

UNFAIR DISMISSAL CLAIMS

Unfair dismissal claims must be made within 21 days from the date of dismissal.

Do not delay. Call SWSLC for legal advice

Please note this article concerns itself with the national unfair dismissal laws as regulated by the Commonwealth Fair Work Act. In New South Wales all employees except State public sector and local government employees are covered by the national unfair dismissal laws. Unfairly dismissed employees may have other or additional rights

What is an unfair dismissal?

The Fair Work Act defines a dismissal as unfair if:

- the dismissal was harsh, unjust or unreasonable;
- was not consistent with the Small Business Fair Dismissal Code (in the case of employees of a small business); and
- the dismissal was not a case of genuine redundancy

This article does not address the situation of a non-genuine redundancy. If you believe your redundancy is not genuine, please call our office for legal advice.

What is harsh, unjust or unreasonable?

When determining whether a dismissal was harsh, unjust or unreasonable, the Fair Work Commission will consider a number of matters, including:

- Whether there was a valid reason for the termination related to the employee's capacity or conduct.
For a reason to be valid:
 - it must be sound or well-founded - not made up, spiteful or prejudiced.
 - it must be connected with the employee's capacity or conduct
 - It is important to note that even if there is a valid reason, a dismissal may still be harsh and therefore unfair.
- Whether the employee was notified of the reason for the termination. 'The reason' is in relation to the 'valid reason' for dismissal (see above).
 - The notification should occur before any decision is taken to terminate the employment, otherwise the employee will not have had a reasonable opportunity to respond.
- Whether the employee was given an opportunity to respond to any reason related to capacity or conduct.
 - Sometimes an employer may have already made up its mind to terminate regardless of the employee's response, and is simply going through the motions by allowing the employee to talk. An employer must give proper consideration to the employee's response before making a decision to terminate.
- Any unreasonable refusal by the employer to allow the employee to have a support person to assist at any discussion relating to dismissal.

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This information applies only in New South Wales.

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- It is important for an employee to have the capacity to respond to allegations, and this may require the presence of a support person.
- This will be relevant where an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses.
- If the dismissal related to unsatisfactory performance, whether the employee had been warned about this and given the opportunity to correct the performance. See below for more details on warnings.
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal.
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal, and
- Any other matters the Fair Work Commission considers relevant. By way of example, this may include:
 - the length of service of the employee
 - the employee's work record,
 - the employee's age,
 - the conduct that led to the termination and
 - whether the employer followed their own disciplinary process.

Harsh

A dismissal may be harsh on the employee because:

- Of its consequences for the personal and economic situation of the employee.
 - For example, the employee may be unskilled and elderly, which may result in prolonged unemployment or under employment.
- The dismissal is disproportionate to the gravity of the alleged misconduct.
 - The punishment must fit the crime.

Unjust

A dismissal may be unjust if the employee is not guilty of the alleged misconduct.

Unreasonable

A dismissal may be unreasonable if the evidence or material before the employer did not support the conclusion reached by the employer that led to the dismissal.

What may be harsh, unjust or unreasonable for one employee may not be for another. Each situation must be considered on a case by case basis taking into account the above factors and all of the circumstances, including the characteristics of the employee.

Must an employer give three written warnings before terminating?

Not really. There is no specific number of warnings that need to be issued by an employer concerning an employee's performance or conduct. Whether the number and manner of warnings were sufficient must be considered on a case by case basis having regard to the nature and seriousness of the problem. Importantly, warnings must:

- identify the relevant aspect of the employee's performance which is of concern to the employer; and
- make it clear that the employee's employment is at risk unless performance improves.

What is Procedural Fairness?

Procedural fairness is about the process used by a decision-maker to make a decision, rather than the actual decision itself. In this case the process used by the employer to decide to dismiss an employee.

Procedural fairness requires:

- The employee being made aware of the allegations concerning his/her conduct or performance
- The employee having an opportunity to respond to or defend the allegations
- Sufficient and appropriate evidence to support the decision
- A lack of bias by the decision maker

This includes the decision maker having an open mind. That is, properly receiving and considering all the evidence, including the employee's response before making the decision.

Even though an employer may have a valid reason to terminate, a lack of procedural fairness in the termination process may make the dismissal unfair.

Minimum employment periods before a claim can be made for unfair dismissal

Employees can bring a claim for unfair dismissal to the Fair Work Commission only after completing a minimum period of continuous service with the employer.

For employees employed by employers with less than 15 employees (a small business) the minimum period is 12 months. For employees employed by employers with 15 or more employees the minimum period is 6 months.

To calculate the number of employees employed, all full-time, part-time and regular and systematic casual employees at the time of termination are included. The dismissed employee/s are also included.

Can Casual employees claim for unfair dismissal?

Yes, casual employees can claim for unfair dismissal if:

- a) They worked on a regular and systematic basis; and
- b) During the period of casual employment, the employee had a reasonable expectation of ongoing employment on a regular and systematic basis; and
- c) They satisfy the minimum employment period

For example, a casual employee who works regular set days and shifts from week to week may fall within this definition.

An employee can satisfy the minimum employment period with a combination of continuous permanent employment status and regular and systematic casual employment status.

Lodging a claim for unfair dismissal

To lodge a claim for unfair dismissal, complete a [Form F2](#) – Application for Unfair Dismissal Remedy and lodge with the FWC. This can be submitted in person, by phone, fax, post, email or online through the [electronic filing on the FWC website](#).

In this application you must identify the employer and state why you believe the dismissal was unfair.

You must also pay the application fee, which is currently \$70.60. An employee can submit [Form F80](#) to apply to have the fee waived in cases of financial hardship.

Remedies

If the Fair Work Commission finds that that an employee was unfairly dismissed, it can award:

a. Reinstatement

This involves the employee being reappointed to the position in which he/she was employed immediately before the dismissal or to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Together with reinstatement, the Fair Work Commission can make an order to restore lost pay. Usually this is back pay for the loss of income between the dismissal and the reinstatement order.

b. Compensation

If the Fair Work Commission considers that reinstatement is inappropriate it can order the employer to pay compensation to an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal.

How much compensation?

There is a cap set on the compensation that can be awarded. The maximum compensation cannot exceed the lesser of:

- 26 weeks of the employee's remuneration; and
- Half the amount of the high income threshold immediately before the dismissal.

When deciding how much compensation to award, the Fair Work Commission will consider all the circumstances of the case, including:

- the length of the employee's service with the employer
- the pay the employee would have received if the employee was not dismissed
- the efforts of the employee to find other work
- the amount of income the employee earned from other employment between the dismissal date and the Fair Work Commission order for compensation

There is no compensation for shock, distress or pain and suffering caused by the dismissal.

21 Day time limit to lodge an Unfair Dismissal Claim!

An application for an Unfair Dismissal must be lodged with the Fair Work Commission within 21 days after the dismissal takes effect. A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed. A dismissal can be communicated verbally or in writing. These time limits are strictly enforced so an employee must act very quickly.

How long does the Unfair Dismissal process take?

The unfair dismissal process has two main stages:

1. Conciliation
2. Arbitration

Usually the Fair Work Commission conducts Conciliations by phone. These typically take place within 2 to 3 months of the application being lodged.

Conciliation is an informal and confidential process. It involves a conciliator from the Fair Work Commission conducting a conciliation conference between the employee and employer with a view to settling the claim. The majority of matters do settle at this stage.

If the matter does not settle at Conciliation the claim proceeds to an Arbitration hearing at the Fair Work Commission. It can take up to several months to be allocated a hearing date.

Arbitration hearings are conducted with as little formality as possible and it is quite common for employees to represent themselves.

Employees will need the permission of the Fair Work Commission to be represented by a lawyer.

More information

For more information and legal advice contact South West Sydney Legal Centre. For information and examples of completed application forms you can also go to the Law Access website and choose the *Employment Rights* tab.

South West Sydney Legal Centre can assist you with any questions or concerns.

Free Phone Advice 9601 7777

Tuesdays: 12.30pm to 2.00pm

Tuesdays: 4.00pm to 6.00pm

Thursdays: 12.30pm to 2.00pm

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