

FACT SHEET 5

UNFAIR DISMISSAL

What is unfair dismissal?

A person has been unfairly dismissed when the Fair Work Commission is satisfied that the dismissal was harsh, unjust or unreasonable and it was not a case of genuine redundancy.

Dismissal can also be at the employee's initiative. This is known as Constructive Dismissal and occurs when an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.

The Fair Work Act restores protection from unfair dismissal for an additional 3 million workers who were excluded under the previous Work Choices legislation.

What constitutes harsh, unjust or unreasonable?

The Fair Work Commission will consider:

- Whether there was a valid reason for the dismissal, related to the person's capacity or conduct.
- Whether the person was notified of that reason

- Whether the person was given any opportunity to respond to that reason
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist in discussions relating to the dismissal
- If the dismissal was related to unsatisfactory performance – whether the person had been warned about the unsatisfactory performance before the dismissal, and
- Any other matters that the Fair Work Commission considers relevant

An employer can no longer avoid an unfair dismissal claim by claiming the dismissal was due to 'operational reasons'. Genuine redundancy occurs when the employer no longer requires the work done by the employee to be performed by anyone. It is not a case of genuine redundancy if the person dismissed could have been employed in another position within the business or associated entity and it would have been reasonable to redeploy them.

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have:

- Completed the minimum employment period (qualifying period), and
- Are covered by a modern award, or
- An enterprise agreement applies to the person

In some situations, high income earning employees will be excluded from unfair dismissal protection. If a person is not covered by a modern award or enterprise agreement, they will only be able to bring an unfair dismissal claim if they earn less than the high income threshold (currently \$129,300, from 1 July 2013, indexed annually).

Regardless of the size of the business, workers can be protected from unfair dismissal provided that they have served a qualifying period.

The qualifying period for a small business is 12 months and for other businesses the qualifying period is 6 months.

A small business is now defined as having fewer than 15 FTE. After January 2011, a small business will be one with fewer than 15 full time, part time or regular and systematic casual employees.

The Fair Work Act provides for a Fair Dismissal Code. If a small business can prove to the FWC that it has complied with the code, the FWC cannot find the dismissal was unfair.

Should the Fair Work Commission find a dismissal unfair, it can order reinstatement or compensation (up to 6 months pay).

Making an unfair dismissal claim

Claims must be lodged within 21 days of the dismissal taking effect. The applicant must pay the current application fee (as at 1 July 2013 the fee is \$65.50). The Fair Work Commission will then decide whether it has jurisdiction to hear the claim and if it does, it will hold a private conference. If the matter remains unsettled, the FWC may hold a formal hearing. Lawyers will only be allowed with the FWC's permission, however this rule does not apply to union lawyers.

Appeals can only be made to the Full Bench if it is in the public interest to do so or where there has been a significant error of fact.

The Minister can apply to the Fair Work Commission for a review of unfair dismissal decisions (other than those made by the Full Bench) if the Minister believes the decision is contrary to public interest.

