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RIGHTS



UNFAIR DISMISSAL

When can your employer terminate your employment?

If you're a permanent employee (or a long term casual employee) your employer can only lawfully terminate your employment for a valid reason, which means one based on:

- your capacity to work or your performance
- your conduct, including its effect on the safety and welfare of other employees, or
- their need to have the work you're doing performed (ie redundancy).

Before it can dismiss you for one of the first two reasons, your employer will usually first need to give you both a warning (preferably written) and a reasonable opportunity to correct your behaviour or lift your performance. It must also let you bring a support person into any meeting to discuss your performance or conduct, as well as giving you the chance to present your side of the argument.

If they don't you may be entitled to bring an unfair dismissal claim.

What are you entitled to when you're dismissed?

Usually all employees are entitled to receive the minimum period of notice of termination or a payment in lieu of notice. These are set out in the 10 National Employment Standards, which you can view on the Fair Work Ombudsman's website. www.fairwork.gov.au

You could also be entitled to further notice of termination under a modern award, an enterprise agreement or your contract of employment. Your notice period is supposed to give you the opportunity to find new employment with minimal disruption to your career and earning capacity. An employer doesn't need to provide you with any notice of termination if you abandon your employment or you're guilty of serious misconduct.

On termination, you're also entitled to:

- any outstanding salary, including penalty rates and allowances
- any accrued annual leave and annual leave loading entitlements
- any accrued or pro-rata long-service leave (if you have been employed long enough), and
- redundancy pay, if your role was made redundant and you're entitled under the 10 National Employment Standards, your contract, an enterprise agreement or a modern award.

If your employer dismisses you without giving you everything you're entitled to, you should contact your solicitor or the Fair Work Ombudsman.

When can you bring an unfair dismissal claim?

If your employer doesn't follow the correct procedure for dismissing you, fails to pay you what you're entitled to, or otherwise denies you your rights, and you are employed in the private sector or by the Commonwealth or a Commonwealth authority, you may be entitled to bring an unfair dismissal claim in the Fair Work Commission. If you are employed by the State government or one of its authorities, you may still have a claim but not to the Fair Work Commission.

When you do lodge a claim to the Fair Work Commission, it will ask itself whether your dismissal was 'harsh, unjust or unreasonable'. Generally:

- A dismissal is harsh if it was a disproportionate response to your conduct or because of the economic or personal consequences it will cause you
- A dismissal can be unjust if you didn't do what the employer alleged you did, and
- A dismissal can be unreasonable if your employer's decision wasn't based on solid ground or following a fair process.

On top of this, the Fair Work Commission will examine whether your employer gave you a 'fair go all round' before dismissing you.



UNFAIR DISMISSAL

Your claim is not likely to succeed if your employer can show that your termination was a 'genuine redundancy' (including that they properly consulted with you and looked for redeployment opportunities for you), or if they are a small business, they complied with the Small Business Fair Dismissal Code. A solicitor can advise you on whether your claim is likely to succeed.

When can't you bring an unfair dismissal claim?

Sometimes you can't bring an unfair dismissal claim, even if your dismissal was harsh, unfair or unreasonable. For instance, you won't be able to bring an unfair dismissal claim if:

- You resigned and were not forced to do so by the conduct of your employer
- You're still in the first six months of your employment or 12 months (if you're employed by a small business)
- You're employed under a fixed-term contract or for a specified task or season, and it reaches its natural conclusion
- You earn more than the upper salary limit (currently \$129,300 a year) and are not covered by a modern award or enterprise agreement
- You're an independent contractor, or
- You bring the claim outside of the 21-day time limit (although in exceptional circumstances, the Fair Work Commission may let you bring a claim outside of these limits).

You must bring an unfair dismissal claim within 21 days of your employment ending. If you don't you'll need to apply for special leave and the Fair Work Commission will have to rule on whether your claim should be heard.

How do you bring an unfair dismissal claim?

You can lodge an unfair dismissal claim by email or post or online through the Fair Work Commission's website. First download the correct forms and pay a \$65.50 application fee. (Although the Fair Work Commission will sometimes waive this if it will cause you serious financial hardship.)

What happens when you lodge a claim?

Once you lodge your claim, the Fair Work Commission sends a copy to your employer and your employer must respond in writing. Usually you and your employer are then invited to attend a telephone-based conciliation conference with a

Fair Work Commissioner, to see if you can reach an agreement to settle your claim. If your claim does not settle, it may progress to a conference or hearing before the Fair Work Commission.

Are there any situations where an employer can't dismiss you?

There are some unlawful reasons for which an employer can't terminate your employment. These are separate to unfair dismissal even though you'll also need to bring any claim in the Fair Work Commission. Unlawful reasons for dismissal include dismissing you because:

- Of your race, colour, sex, sexual orientation, age, religious beliefs, mental or physical disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (Although it makes an exception if it's an inherent requirement of the job)
- You've been away temporarily from work through illness or injury
- You are or aren't a union member or are running for office as a union representative
- You're on parental leave, paid or unpaid
- You're away because of emergency volunteer work, or
- You've filed a complaint or started proceedings against an employer.

If you think your employer has terminated you for one of these reasons, you should consult with your solicitor before starting proceedings.

How can a solicitor help?

If you've been unfairly dismissed, a solicitor can help in so many ways, including:

- Advising you on whether you should make an unfair dismissal or another employment claim
- Advising you on whether there are other ways to resolve your dispute
- Advising you on whether you've received all your entitlements
- Advising you on whether there are other ways or approaches including contacting the Fair Work Ombudsman, and
- Organising your claim and representing you at the Fair Work Commission.

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