

UNFAIR DISMISSAL

Under the Fair Work Act, an employee is considered to be unfairly dismissed if the Fair Work Commission is satisfied that the dismissal was:

- > Harsh, unjust or unreasonable;
- > Not consistent with the Small Business Fair Dismissal Code; and
- > Not a case of genuine redundancy.

Who can bring a claim? See Fair Work Act s. 382

An employee can bring a claim if:

1. they have completed the minimum period of employment; and
2. they are covered by an award or enterprise agreement.

The minimum period of employment is 6 months (or 12 months where the employer is a **small business** with fewer than 15 employees).

Full-time, part-time and 'regular and systematic' casual employees can make a claim for unfair dismissal.

An employee cannot bring a claim if:

- they are an irregular casual; or
- they are not covered by an award or enterprise agreement and earn more than the high income threshold (currently \$153,600 per annum, adjusted annually on 1 July 2020). For employees other than full time employees (e.g. part time and casual employees) the annual earnings is treated on a proportionate basis

An application must be lodged **within 21 days** of the dismissal.

Criteria for considering harshness See Fair Work Act s387

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) 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

(h) any other matters that the FWC considers relevant.

Small Business Fair Dismissal Code

An employer always needs a valid reason to terminate an employee; however the Small Business Fair Dismissal Code provides less stringent obligations on small business to afford an employee procedural fairness.

Importantly, a small business must only warn an employee “verbally or in writing” about his or her poor performance or conduct before considering termination. This is in contrast to findings from the Commission against larger businesses that an absence of written warnings is a denial of procedural fairness.

A small business has fewer than 15 employees (excluding irregular casuals).

What is genuine redundancy?

An employee cannot claim unfair dismissal if the dismissal was a case of genuine redundancy.

A dismissal is a case of genuine redundancy when:

- > The employer no longer requires the employee’s job to be performed by anyone because of changes in the operational requirements of the business; and
- > The employee was consulted about the proposed change as required by the modern award or enterprise agreement.

A further requirement is that there must have been no reasonable opportunity for the employee to have been redeployed within the business.

What remedies can the Commission order?

If the Commission is satisfied that a dismissal is unfair, there are two remedies it may grant an employee:

- > An order to re-instate the employee or, where that would be ‘inappropriate’,
- > An order to pay compensation

The amount of compensation is capped at 6 months’ pay (to a maximum of \$76,800) being half the high income threshold).

Frequently Asked Questions

Must an employee be given three warnings before being dismissed?

Employees should be given fair warning to improve their performance before being dismissed, but a ‘three-strikes policy’ is not a legal requirement. The number of warnings an employee is given will depend on the seriousness of the conduct or performance in question.

No warning or notice of termination need be given if the employee has committed “serious misconduct” (for example, theft or fraud). Employers should seek advice before terminating an employee without notice.

Is an employee who earns more than the high income threshold excluded from claiming unfair dismissal?

If an employee earns more than the high income threshold (currently \$153,600 per annum) and they aren't covered by an award or enterprise agreement, they are precluded from claiming unfair dismissal.

However, employers should be aware that an employee may be paid above the high income threshold and still be covered by a modern award. In this case, an employee can make a claim for unfair dismissal.

What is the process of an unfair dismissal claim?

After the Fair Work Commission receives an application for unfair dismissal it will ask both parties (employer and employee) to attend conciliation in order to settle the case. Conciliation is a process of negotiation, generally conducted over the phone, and assisted by a conciliator. If agreement is reached between the parties (an employer may, for example, offer the employee 'go away money') then the employer may be asked to sign a settlement agreement. Most cases are resolved at conciliation.

If the matter is not resolved at conciliation it will go to a hearing. After hearing evidence from both parties, a Commissioner will then make a decision about whether or not the employee was unfairly dismissed.

The Victorian Chamber says:

Termination of employment can be a complex and potentially costly exercise for employers. Termination decisions are frequently linked to the performance and success of your business and can often lead to grievances and disputes in and beyond the workplace. Managing the performance, conduct and termination of your employees effectively in compliance with statutory and regulatory requirements will reduce your business costs and increase the productivity and efficiency of your workforce.

The Victorian Chamber can assist in protecting your business with all aspects of unfair dismissal claims in a timely and professional manner, working collaboratively with your business toward solutions that deliver the best outcomes. We also refer you to the additional Quick Guides on related subjects.

Under the FW Act, employers are required to contend with a range of new employee entitlements and the expanded investigative and enforcement capacities of the Fair Work Ombudsman. Disputes around termination may arise with reference to workplace rights, which will require careful management and investigation.

Representation at FWC conferences and hearings

Unfair dismissal is the most common claim made against employers. The Victorian Chamber's consultants are highly experienced when it comes to dealing with conciliations (conferences) and arbitrations (hearings) facilitated by the FWC. Consultants are able to provide employers with easy to follow guidance and advice, as well as knowledgeable and experienced representation at both conferences and hearings

Coaching your managers to manage outcomes at the FWC

Our experienced consultants can coach your staff before attending a FWC conference or hearing. Training packages can be tailored to your specific requirements.

Training your front line managers

We can re-train your supervisors and front-line managers to ensure your business is compliant with the necessary requirements of procedural fairness under the FW Act. Training can be tailored to your specific requirements, including managing any provisions relating to consultation and dispute resolution that may apply to your workplace.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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