

# Unfair Dismissal—Guide 1

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## Overview of the unfair dismissal laws

### What is unfair dismissal?

An unfair dismissal occurs where an employee makes an unfair dismissal application and the Fair Work Commission finds that:

- the employee was dismissed, and
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy, and
- where the employee was employed by a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.

A **small business** is a business that employs fewer than 15 employees.

### Who can make an unfair dismissal application?

To make an unfair dismissal application an employee must be covered by the national unfair dismissal laws and eligible to make an application.

The application must be lodged **within 21 days** after the dismissal takes effect.

### Who is covered by the unfair dismissal laws?

Only employees covered by the national workplace relations system are covered by the unfair dismissal laws. (Other employees may have access to unfair dismissal under State laws). The national workplace relations system covers:

- in Victoria, the Northern Territory and the Australian Capital Territory—all employees (except for law enforcement officers and executives in the public sector in Victoria, and members of the Police Force in the Northern Territory)
- in New South Wales, Queensland and South Australia—employees of private enterprise
- in Tasmania—employees of private enterprise and local government
- in Western Australia—employees of constitutional corporations (including Pty Ltd companies), this may include some local governments
- employees of the Commonwealth or a Commonwealth authority
- waterside employees, maritime employees and flight crew officers in interstate or overseas trade or commerce.

## Who is not covered by the unfair dismissal laws?

The national workplace relations system does not cover:

- in New South Wales, Queensland and South Australia—employees of local and state governments
- in Tasmania—employees of state government
- in Western Australia—employees of state government and non-constitutional corporations (including sole traders, partnerships and Trusts)
- independent contractors
- employees who resign and were not forced to do so by the conduct of their employer
- employees employed under a contract of employment for a specified period of time, a specified task, or the duration of a specified season who are dismissed at the end of the period, task or season
- trainees whose employment was for a specified period of time and who are dismissed at the end of the training arrangement
- employees who have been demoted but have had no significant reduction in their remuneration or duties and who remain employed by the employer who demoted them.

**Note:** For detailed information on exclusions please see the *Unfair Dismissals Benchbook* ([benchbooks.fwc.gov.au/unfair/protected-from-unfair-dismissal/people-excluded-from-national-unfair-dismissal-laws/](http://benchbooks.fwc.gov.au/unfair/protected-from-unfair-dismissal/people-excluded-from-national-unfair-dismissal-laws/)).

## Who is eligible to make an unfair dismissal application?

An employee is eligible to make an application for unfair dismissal if they have completed the minimum employment period of:

- one year—where the employer employs fewer than 15 employees (a small business employer)
- six months—where the employer employs 15 or more employees.

In addition, if the employee earns more than the high income threshold, at least one of the following must apply:

- an award covers the employee, or
- an enterprise agreement applies to the employee .

**Note:** The high income threshold is adjusted annually on 1 July and does not include superannuation guarantee contributions. Please refer to the *Eligibility & remedies* page ([www.fwc.gov.au/termination-of-employment/unfair-dismissal/remedies](http://www.fwc.gov.au/termination-of-employment/unfair-dismissal/remedies)) of our website for the current amount.

## What is harsh, unjust or unreasonable?

In considering whether a dismissal was harsh, unjust or unreasonable, the Fair Work Commission must take into account:

- whether or not there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees)

- whether or not the employee was notified of that reason
- whether or not the employee was given an opportunity to respond to any reason related to their capacity or conduct
- any unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to dismissal
- if the dismissal related to unsatisfactory performance by the employee, whether or not the employee had been warned about that unsatisfactory performance before the dismissal
- 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 that the Fair Work Commission considers relevant.

### **What is a genuine redundancy?**

An employee's dismissal was a genuine redundancy if:

- the employee's employer no longer required the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise, and
- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

An employee's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within:

- the employer's business, or
- the business of an associated entity of the employer.

### **What is the Small Business Fair Dismissal Code?**

The Small Business Fair Dismissal Code (declared by legislation) is for small business employers to follow when dismissing an employee in order to make the dismissal fair. It provides that:

#### **Summary dismissal**

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's misconduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

#### **Other dismissal**

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she is at risk of being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

### **Procedural matters**

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist; however, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

To download a copy of the Small Business Fair Dismissal Code and a related checklist, go to [www.fairwork.gov.au/termination/small-business-fair-dismissal-code](http://www.fairwork.gov.au/termination/small-business-fair-dismissal-code).

### **Legal advice**

The Commission cannot provide legal advice.

As part of the unfair dismissal application process, parties may choose to obtain their own independent legal advice.

There are community legal centres in each state and territory. The National Association of Community Legal Centres Inc (NACLC) legal help page ([www.nacalc.org.au/need\\_legal\\_help.php](http://www.nacalc.org.au/need_legal_help.php)) can assist with finding the nearest community legal centre. Please note that the NACLC does not itself offer legal advice.

### **Further information**

For eligibility information, refer to the Unfair dismissal—Am I eligible to apply? page on the Commission's website ([www.fwc.gov.au/termination-of-employment/unfair-dismissal/eligibility](http://www.fwc.gov.au/termination-of-employment/unfair-dismissal/eligibility)).

You can also refer to the full set of unfair dismissal guides available on the Dismissal, termination and redundancy page ([www.fwc.gov.au/termination-of-employment/unfair-dismissal](http://www.fwc.gov.au/termination-of-employment/unfair-dismissal)) of our website.

1. Overview of the unfair dismissal laws
2. Flowchart on the process
3. Making an application
4. Responding to an application
5. Objecting to an application
6. Preparing for conciliation
7. Preparing for a conference or hearing
8. Frequently asked questions
9. Glossary of common terms

The Unfair Dismissals Benchbook can also assist parties lodging or responding to unfair dismissal applications ([benchbooks.fwc.gov.au/unfair](http://benchbooks.fwc.gov.au/unfair)).

If you require further information or help, please refer to the Inquiries page on the Commission's website ([www.fwc.gov.au/about-us/contact-us/enquiries](http://www.fwc.gov.au/about-us/contact-us/enquiries)).

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This guide is not intended to be comprehensive, but is designed to help employers and employees gain an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.