

# Unfair dismissal laws and practice

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Most, but not all Australian employers are covered by the unfair dismissal laws under Pt 3-2 of the Fair Work Act 2009 (Cth) (the Act). Those employers who are not covered by these laws and do not meet the definition of national system employer under the Act are usually State employers and are covered by a State scheme.

## When is a person protected from unfair dismissal?

Even so, not all employees of national system employers are protected from “unfair dismissal”. The following persons are protected:

- An employee who has completed a continuous period of service of six months or, in the case of an employee of a small business employer (employing fewer than 15 employees at the time of dismissal) a continuous period of service of 12 months; and
- An employee where either or both of the following apply:
  - a Modern Award or an Enterprise Agreement is applicable to the employment of the employee; or
  - an employee’s annual rate of earnings, excluding superannuation under the Superannuation Guarantee Legislation, is less than or equal to the high income threshold (this is currently \$129,300 per annum but increases on 1 July each year, calculated in accordance with the Consumer Price Index).<sup>1</sup>

Note that periods of unpaid leave do not count towards the calculation of continuous service.

The unfair dismissal laws do not apply to casual employees unless they have been engaged for more than six months and have a reasonable expectation of continuing employment.

## What is a dismissal?

To constitute a dismissal under the Act, the employment has to be terminated at the initiative of the employer. This means a resignation is not a termination unless it is a constructive dismissal. A constructive dismissal may arise when the employee had no choice but to resign because of the employer’s course of conduct.

Where the employment is of a fixed term nature and expires, the conclusion of the employment will not be construed as a termination at the initiative of the employer.

An unfair dismissal claim will also not arise if an employee is under a training arrangement and the employment is terminated at the end of the arrangement.

## Redundancy

It is not an unfair dismissal if the dismissal is a case of genuine redundancy. Genuine redundancy is where:

- the employer no longer requires the person’s job to be performed because of operational requirements;
- the employer has complied with any obligation under an award or enterprise agreement to consult with the employee; and
- the employee could not reasonably be redeployed into the employer’s business or an associated entity (this is referable to s 50AAA of the Corporation Act 2001 (Cth)) of the employer.<sup>2</sup>

Redeployment is an important consideration because the Fair Work Commission, which arbitrates unfair dismissal cases, has determined that offers of redeployment should include offers to a lower position or an interstate position. If an employer has not at least made such offers where suitable positions exist, then it may not be a case of genuine redundancy thus giving rise to it potentially being an unfair dismissal.

## What then is an unfair dismissal?

A dismissal is unfair if it is harsh, unjust or unreasonable. The Act sets out the criteria the Commission must take into account in determining whether a dismissal is harsh, unjust or unreasonable. They are:

- 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);
- whether the person was notified of that reason;
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;

- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;
- if the dismissal related to unsatisfactory performance by the person — whether the person 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 Commission considers relevant.<sup>3</sup>

It is usually easier to determine whether a dismissal is unfair where the basis of the dismissal relates to misconduct, especially serious misconduct, if there is reasonable evidence that the alleged conduct did occur. However, even if there appears to be a valid reason for the termination of the employment by the employer, it is still open for the Commission to determine if it was nevertheless harsh to actually dismiss the employee. The Commission will consider:

- the circumstances of both the employer and the employee;
- whether prior warnings have been given;
- the seriousness of the action;
- whether the conduct is a breach of a specified policy or procedure; and
- whether that policy or procedure has been clearly conveyed to the employee.

Generally, the Commission will not excuse theft, violence, sexual harassment, bullying or conduct that creates risks to health and safety, especially in violation of an established and understood policy. However, different outcomes on what appears to be common facts may arise as a result of the circumstances of each case.

The more difficult cases arise where dismissal occurs as a result of alleged unsatisfactory performance. Despite the Act talking about whether an employee had been warned about unsatisfactory performance before the dismissal, the Commission usually expects a higher standard than simply giving an employee one opportunity to improve before dismissal. Whether the unsatisfactory performance warranted dismissal is a subjective and much more difficult issue. An employer must usually demonstrate a solid disciplinary process of warnings, opportunities to improve, offers of training

and support and clear evidence of a reasonable standard that had been set but not met by the employee. Should the employer fail to do so, it is likely that the Commission will find the performance based dismissal unfair.

## What remedies can the Commission order?

If the Commission is satisfied that a person has been unfairly dismissed, the primary remedy is reinstatement and if necessary, back pay.<sup>4</sup> If reinstatement is found to be inappropriate, the Commission might make an order for compensation for up to 6 months remuneration. The amount ordered by the Commission to be paid to an employee who was unfairly dismissed is capped at half the amount of the high income threshold immediately before the dismissal.<sup>5</sup> For instance, if an employee earns \$300,000 but is covered by a modern award or an enterprise agreement and therefore covered by the unfair dismissal laws, such an employee cannot get maximum compensation of more than \$64,650 (which increases on 1 July each year).

The Commission cannot make an order for pain and suffering.<sup>6</sup>

## Time limits for bringing an application

An employee has 21 days after the dismissal takes effect to bring a claim or within such further period as the Commission allows. However, the Commission is strict about granting any extensions and will only do so in exceptional circumstances.<sup>8</sup>

It is also noteworthy that while unfair dismissal claims are heard in a primarily cost free jurisdiction, costs can be ordered if a claim has been pursued or defended vexatiously or without reasonable cause.

## Statistics

There are 14,000–15,000 unfair dismissal claims brought each year under the Act. A high proportion of these are settled prior to an arbitrated hearing. Of the matters that are arbitrated, three-quarters of them are dismissed for want of jurisdiction. Only 15% of cases that are not dismissed result in an order of reinstatement.

## Legal Representation

Lawyers can only appear with leave of the Commission where the case is complex or where it would be unfair not to allow legal representation. Careful demonstration of one of these requirements must be made to obtain leave.

## Practical considerations

Dismissals on the basis of conduct or performance require a clear process that includes:

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- good defensible evidence (and good witnesses) to justify performance related dismissal or conduct-based dismissal;
- a well established and tolerant process in the case of performance related dismissal; and
- promulgated policies clearly stating what conduct is not tolerated, in the case of conduct-dismissal.

A subjective assessment must be made as to whether, in all the circumstances, even if there is a valid reason to dismiss, it is not “harsh” to do so having regard to the employee’s situation. This is not an easy task.

A redundancy dismissal is usually a lot easier to defend.

Of late, the concern of employers is no longer combating unfair dismissal claims but rather termination claims brought under the general protection provisions of the Act. In general protection claims, the onus of proof lies heavily on the employer, penalties can be

awarded and compensation is unlimited.<sup>9</sup> Such laws make the unfair dismissal jurisdiction seem more tolerable for most employers.



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## Footnotes

1. See Fair Work Act 2009 s 382.
2. Above, n 1, at s 389.
3. Above, n 1, at s 387.
4. Above, n 1, at ss 390–91.
5. Above, n 1, at s 392(5)–(6).
6. Above, n 1, at s 392(4).
8. Above, n 1, at s 394(2).
9. Above, n 1, at Pt 3-1.