



# **Unfair dismissal and Fair Work Australia**

## **Information Kit**

**Advice Line 1300 130 956 or 9227 0111**

**RRR Advice Line 1300 520 054 or 9227 0185**

## Unfair dismissal and FWA

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\*Information includes any and all data, documents, pages and images”.

This information kits is current as at January 2010

## How to use this guide

This guide is to assist you in considering or commencing proceedings with Fair Work Australia (FWA) in relation to unfair dismissal from your employment.

## Who can apply?

- If you have been terminated from your employment, and you believe that your termination was harsh, unjust or unreasonable, you can make a claim for unfair dismissal, subject to the eligibility criteria on page 5.
- Unfair dismissal is different to unlawful termination, which deals primarily with termination of employment situations involving discrimination. You may be eligible to claim for both. For more information, see the ELC Fact Sheet and/or Information Kit “Unlawful Termination”.

## Unfair Dismissal

### What is unfair dismissal?

You can allege unfair dismissal if you believe that the termination of your employment was harsh, unjust or unreasonable:

- harsh because of its impact on you as an employee or because it is disproportionate to your possible misconduct or poor performance;
- unjust because you were not guilty of the alleged misconduct or poor performance; or
- unreasonable because there was no evidence to support a termination.

### Proving unfair dismissal

To prove unfair dismissal you must show that:

- you are an employee;
- you have been dismissed; and
- the dismissal was harsh, unjust or unreasonable.

To prove that a dismissal has occurred you must demonstrate that:

- your employment was terminated at the initiative of your employer; or
- you were constructively dismissed, which means that you had no other choice except to resign as a result of your employer’s conduct. For more information see ELC Fact Sheet “Constructive Dismissal”.

To prove that a dismissal was harsh, unjust or unreasonable, you must show that the employer did not:

- have a valid reason relating to your conduct or capacity to do the job; or
- follow a fair procedure in terminating your employment, where:
  - you were not notified of a reason for termination or you were not given an opportunity to respond; or
  - you had not previously been warned about your unsatisfactory performance.

A dismissal will not be unfair if it is the result of a genuine redundancy. Your dismissal will not be considered a “genuine redundancy” if:

- it was reasonable for you to have been redeployed in your employer's business or the business of an associated entity of your employer; or
- your employer did not comply with obligations in the award or enterprise agreement that applied to you to consult with you about the redundancy.

### **Small Businesses**

Your eligibility to make an unfair dismissal claim and the claim itself will be assessed differently if your employer is a small business.

#### **Is your employer a “small business”?**

Your employer will be a “small business” if the combined workload of all the employees is equivalent to less than 15 full time employees. A full time workload is determined to be 38 hours. So, for example, two part time workers who worked 19 hours a week each would together be equivalent to one full time worker. Casual workers can only be included in the count if they have worked on a “regular and systematic” basis. You and any other workers being dismissed at the same time are included in the count.

#### **Demonstrating “unfair dismissal” as a small business employee**

If your employer is a small business then they will only need to demonstrate that they complied with the Small Business Fair Dismissal Code for FWA to find that the dismissal was not unfair, and for your claim to be dismissed. If FWA finds that your employer did not comply with the Code, FWA will then go on to consider whether or not the dismissal was harsh, unjust or unreasonable in accordance with the process outlined above. So if your employer is a small business you need to demonstrate that:

- your employer did not comply with the Small Business Fair Dismissal Code; and
- the dismissal was harsh, unjust or unreasonable.

The Code is attached at the bottom of this document. In brief it states that:

- no warning need be given for instances of summary dismissal; and
- in all other instances a valid reason related to capacity or conduct must be given and the employee then given a reasonable amount of time to respond to the warning.

## **Making a claim with FWA**

### **Are you eligible to make a claim?**

To make a claim for unfair dismissal with FWA you must:

- be an employee (and not, for example, a contractor);
- be employed by a constitutional corporation (e.g. a company with Pty Ltd or Inc);
- either be covered by a modern award employee or enterprise agreement, or be earning less than the high income threshold (\$108,300);
- have completed your “minimum employment period”, which is 12 months of employment if you were employed by a small business or 6 months for a large employer;
- not be employed subject to a training agreement with limited duration;
- not be a casual employee employed on an irregular basis; and
- not be dismissed at the conclusion of a specified task or period of time, or on a seasonal basis, for which you were hired.

Casual employees can make an unfair dismissal claim to FWA, but only if they were engaged on a regular and systematic basis and had a reasonable expectation that their employment would continue.

In addition, you cannot claim unfair dismissal if you were originally hired for a specified task or period of time, or on a seasonal basis, and have continued to work past the conclusion of that task, time period, or seasonal basis. In this case, a claim for unfair dismissal is only possible if you have been rehired under a new agreement.

### **How do you lodge a claim?**

When lodging an unfair dismissal application you must:

- identify the employer – the legal entity who employed you; and
- state why you believe the dismissal was unfair and what you are seeking.

### **What remedies can you seek?**

There are various remedies available for a successful claim for unfair dismissal. These include penalties, reinstatement, compensation in lieu of reinstatement or any other order that the Court deems appropriate. However, payment in lieu of reinstatement is capped at 6 months’ wages.

If you reach an agreement in conciliation, you and your employer will agree on the appropriate remedy which might include compensation, an apology, a reference or a combination of these.

**What are the time limits?**

You must lodge your claim within 14 days of the dismissal coming into effect. A late application may be accepted in some exceptional circumstances. Any late application must include reasons as to why your application is delayed and why it would be unfair for FWA not to accept the application.

**What form should you use?**

The correct form to use is Form F2 – Application for Unfair Dismissal Remedy, which is available on the FWA website. This application must be submitted to FWA within the 14 day time limit. A copy of this form can be found at the bottom of this document.

**What costs are involved?**

The fee for lodging an unfair dismissal application with FWA is \$59.50. FWA can waive the application fee if it is satisfied that a person making an application will suffer serious financial hardship if the person is required to pay the fee.

In general, parties bear their own legal costs. FWA can order one party to bear some or all of the costs of the other party. However, this is uncommon and is generally limited to situations where a claim is found to be frivolous, vexatious or lacking in merit.

**How do you submit the application?**

Applications can be submitted to FWA in your capital city in a number of ways, including in person, by telephone, by facsimile, by post or online through electronic filing on the FWA website.

To deliver an application in person, go to the FWA office in your capital city between the hours of 9.00am – 5.00pm. In Perth, the address is 111 St George’s Terrace, Perth, 6000. This address can also be used for postal applications.

To submit an application by telephone, call FWA on 1300 799 675. A telephone application must be followed up by a written application, lodged by one of the methods specified above, but is useful if you are running out of time to lodge your application. Payment of the lodgement fee must be made at the time of making the telephone application.

Submitting an application online can be done by following the FWA e-Filing procedure, which is conducted through the FWA website: [www.fwa.gov.au](http://www.fwa.gov.au).

To submit an application by facsimile, simply send your application through to the nominated fax number in your capital city. In Perth, this number is (08) 9464 5171.

**What happens to your application?**

Once your application has been lodged with FWA, your employer should receive written notification of the application, information about the process Fair Work Australia will follow and an employer response form. You and your employer should also receive details of the time and date for the conciliation of the application.

### **Confidentiality**

Your file will remain confidential, as will the details of any conferences held. Hearing and decisions, however, are generally public.

### **How does FWA settle the matter?**

After the relevant documents have been lodged, FWA can make initial inquiries and discuss the issues with the employer and the employee, including in informal conferences at mutually agreed locations, with a view to reaching a mediated resolution. This can be done over the phone in some cases. Where there are disputed facts involved, FWA can decide the outcome in either a private informal conference or through a formal hearing. FWA is likely to attempt to resolve most matters through an informal conference.

### **Do you need representation?**

- Both conciliation conferences and formal hearings may be conducted with or without representation.
- You do not need a representative for a conciliation conference. You are allowed to take a support person with you to a conciliation conference, however this person is not authorised to act as your agent.
- You can also represent yourself adequately at a formal hearing, although some people prefer to be represented.
- Representatives are typically union representatives or lawyers. Union representatives do not require leave to appear before FWA whereas lawyers do.
- FWA may grant permission for a person to be represented by a lawyer or paid agent where:
  - it would enable the matter to be dealt with more efficiently; or
  - it would be unfair not to allow representation as the person is unable to represent himself or herself effectively; or
  - it would be unfair not to allow representation taking into account the fairness between the parties involved.

### **What if you have difficulty reading and speaking English?**

You can ask a friend or community organisation to assist you. You can also request an interpreter. If you require assistance, you can contact the Translating and Interpreting Services through the Department of Immigration and Citizenship.

### **What is conciliation?**

Conciliation is an informal, private and generally confidential process where a FWA conciliator assists employees and employers to resolve an unfair dismissal application by agreement. Both parties will be allowed to put forward their case, and also respond to any allegations made against them.

The conciliator is independent and does not take sides, but works to bring the parties to an agreed resolution. The conciliator can make a decision that is binding on both the employee and employer. This is different to the previous procedure in the AIRC, where a binding decision could only be made by a Commissioner after a matter could not be resolved through conciliation and had progressed to a formal hearing.

Generally, the steps of a conciliation conference will be as follows:

- the conciliator explains their role and the manner in which the conciliation is to be run;
- each side briefly outlines their story including what happened, any relevant facts and what they want;
- the conciliator may allow or ask questions;
- the circumstances, and any issues arising, are discussed. The conciliator may talk separately to the parties; and
- the conciliator assists the parties to reach agreement by identifying common ground, suggesting possible options and sometimes by making recommendations and assisting the parties in drafting an agreement in writing.

If you are unhappy with the decision, you may be able to appeal and elect to go to a formal hearing to have the matter determined.

### **When will conciliation be used?**

After your application has been lodged FWA will seek to conciliate the claim as the first option. The purpose of a conciliation conference is to bring the employee and employer together in an informal, private meeting to reach an agreement without the need for a formal hearing. FWA will use a conciliation conference in place of a hearing wherever possible.

### **When and where will the conciliation be held?**

The conference will take place at a location mutually agreed upon by you, your employer and FWA. This is most likely to be at the FWA offices, which in Perth is located at 111 St George's Terrace, Perth. It may also be by telephone conference.

### **Who is required to attend the conciliation?**

Both the employee and the employer are required to attend the conference. In addition:

- the employer may send an appropriate person from senior management who has authority to agree to a settlement;
- you may have a person attend the conference in support (not as your agent) if the FWA Conciliator allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

### **How do you prepare for the conciliation?**

It will help you to be well prepared for the conference. You should:

- know your case – review what happened and prepare a summary;
- locate all relevant documents (e.g. medical certificates or employment contracts);
- seek advice from a legal practitioner, union or employee organisation;
- consider bringing along a support person; and
- conduct yourself in a polite, courteous manner.

### **What should you say at the conciliation?**

At the conference, you should be prepared to answer the following questions:

- What happened (i.e. what are the relevant facts)?
- Why do you think that the termination was unfair?
- How was the termination carried out? Were you given warnings?
- What are you seeking (i.e. reinstatement, compensation)?

### **What happens if the parties agree to a resolution?**

FWA may make a binding order that gives effect to the agreement made between you and your employer.

### **What happens if the parties do not agree to a resolution?**

If the matter cannot be resolved during the informal conference, FWA may make an order for the matter to be heard at a formal hearing, if it considers that this is the most efficient and effective way to resolve the matter.

### **What happens in a formal hearing?**

FWA will only deal with the matter in a formal public hearing if, after considering the views of the parties, it believes that it would be the most effective and efficient way to resolve the matter. During the hearing, the FWA Commissioner can ask questions directly to the employer and employee. After hearing from both parties, as with the informal conference, the FWA Commissioner can then make a decision that is binding on the employer and employee.

### **Application form**

[Form F2](#)

### **More Information**

#### **The Employment Law Centre of WA (Inc)**

Advice Line 1300 130 956 or 08 9227 0111  
RRR Advice Line 1300 520 054 or 9227 0185 (9.30am-1.00pm only)  
Web [www.elcwa.org.au](http://www.elcwa.org.au)  
Hours 9.30am-3.30pm Mon, Tues, Thurs and Fri (as well as 5pm – 7.30pm on Tues evenings).

#### **Fair Work Australia**

Address 111 St George's Terrace, Perth 6000  
Tel 1300 799 675  
Fax 9464 5171  
Web [www.fwa.gov.au](http://www.fwa.gov.au)  
Email [perth@fwa.gov.au](mailto:perth@fwa.gov.au)

## **FWA's summary of the Small Business Fair Dismissal Code**

### 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 conduct 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 risks 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 Fair Work Australia, 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.