

Unfair Dismissal

What is Unfair Dismissal?

Dismissal relates to a situation where your employment has been terminated by your employer, or you have been forced into resigning. It is not considered a dismissal when:

- You voluntarily resign;
- Your employer refuses to renew your fixed-term contract that has come to an end;
- You are a volunteer; or
- You are an independent contractor.

You may be able to claim a remedy for unfair dismissal if you have been dismissed from your work for reasons that are 'harsh, unjust or unreasonable.' This may include circumstances where you have been made redundant, but it is not a 'genuine' redundancy.

It may also apply to circumstances where you have been forced into resigning as a result of your employer's conduct. This is called constructive dismissal. You should get advice from an employment specialist *before* communicating your resignation if you believe this applies to your situation.

Circumstances that give rise to an unfair dismissal claim may include the following:

- You were not provided with reasons for your dismissal that relate to your capacity or conduct, and/or you were not provided with an opportunity to respond to the concerns;
- Reasons were given relating to your capacity or conduct, but were not supported by evidence, or the conduct was not sufficiently serious; and/or
- You were unreasonably denied the opportunity to have a support person with you during discussions about your termination.

Who can make a claim for Unfair Dismissal?

You must be a 'National System' employee to be eligible to make a claim for unfair dismissal under the *Fair Work Act 2009*. In Tasmania, you are likely to be a National System employee unless you are employed by the State Government. If you are employed by the State Government, your employment is governed by the *Industrial Relations Act 1984* (TAS).

To be eligible to make a claim for unfair dismissal, you must have been employed in your role for at least six months full-time, or part-time equivalent. If you are a casual worker you may be able to make a claim if you have been employed on a regular basis for the equivalent of six-months full time, and have a reasonable expectation of regular ongoing work.

If you work for a small business employer (a business with up to 15 employees) you must have been employed for 12 months full-time, or part-time equivalent to make a claim for unfair dismissal.

There is a **TIME LIMIT OF 21 DAYS** from the date the dismissal took effect in which you can make an application for unfair dismissal. Therefore, you should seek legal advice as soon as possible.

Was the dismissal a case of genuine redundancy?

If you have been dismissed as a result of a genuine redundancy, you will not be eligible to make an unfair dismissal claim.

A redundancy will be genuine if the employer no longer requires for your position to be carried out. This may be because the business or organisation has stopped operating, has undergone a necessary restructure, has relocated or significantly changed its processes. In the case of a redundancy, your employer is required to talk to you and consider

alternative roles for you in the business or organisation.

If your position has been made redundant and you are not sure if it is a case of genuine redundancy you should get legal advice.

Dismissed from a small business?

If you are employed by a small business employer (15 employees or less) you may be dismissed without notice or warning if your employer believes on reasonable grounds that you have engaged in serious misconduct, including fraud and/or theft, committed violence, or caused a serious occupational health and safety risk. This is called a 'summary' dismissal.

You may also be dismissed by a small business employer without it being considered 'unfair' if your employer gives you a valid reason in writing based on your performance or conduct, and you are provided an opportunity to address the issue, but the issue is ongoing.

How do I make a claim for Unfair Dismissal?

Applications for unfair dismissal are made to the Fair Work Commission. You can access the application form on the Fair Work Commission website at: <https://www.fwc.gov.au/>.

The form can be submitted via the website or email, or can be lodged by mail, phone, fax, or in person at the Fair Work Commission office. There is a fee associated with lodging the application, but the fee may be waived if you are experiencing financial hardship.

Once you have lodged a claim for unfair dismissal your employer will be notified and given an opportunity to respond.

Generally, the dispute will be referred to a Conciliation Conference in an effort to resolve the matter. The Conciliator is an independent third party who can help you and your employer have a discussion and try to reach an agreement. The Conciliation Conference is confidential.

If you cannot reach an agreement, your matter may continue to a hearing in the Fair Work Tribunal, where the Commissioner will make a decision. The solutions available include being given your job back (where appropriate), or an award of compensation for expenses, lost wages and/or emotional distress.

General Protections – Unfair Dismissal

If you have been dismissed but you are not eligible to make an unfair dismissal claim, you may be eligible to make a claim under the General Protections in the Fair Work Act, for unlawful dismissal.

You may have been unlawfully dismissed if you were dismissed in response to exercising a workplace right, or for a discriminatory reason – even if you have been employed for less than six months.

As with unfair dismissal, there is a TIME LIMIT OF 21 DAYS from the date the dismissal took effect to make a claim for unlawful dismissal, so you should seek legal advice as soon as possible.

You cannot make both an unfair dismissal claim and an unlawful dismissal claim, so it is important that you get legal advice to make sure you are putting in the appropriate application.

How do I find out more?

For more information contact:

- **Fair Work Commission** – 1300 799 675 or www.fwc.gov.au.
- **Fair Work Ombudsman** – 13 13 94
- **Women's Legal Service Tasmania** – 1800 682 468

'Unfair Dismissal' is intended to give general information. While we have made every effort to ensure the contents of this document are accurate at the time of publication the law and services do change. Legal and service exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice. Women's Legal Service (Tasmania) does not accept

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