

Unfair dismissal

This information is based on the law as at November 2010. It is intended as a guide only and not to replace the need for legal advice about specific situations.

This Tip Sheet provides some basic information about your rights under the *Fair Work Act* 2009 if you have lost your job or you think you may be about to lose your job. The Act gives you a right to bring a claim against your employer if you believe your employment has been terminated unfairly or unlawfully. (For information on unlawful termination please see our tip sheet called '**General Protections Dismissals**'.)

However, not everyone can make a claim under the Act and there are certain things which you should know before lodging an application. The law in this area can be complicated and this is only a brief guide to some of the common issues. If you are considering making a claim you should seek further advice.

How do I make a claim?

To make a claim for unfair dismissal you must get an application form, complete all relevant sections and lodge it with Fair Work Australia (FWA). You can do all this at the Canberra Registry, 2nd Floor, CML Building, 17-21 University Ave, Canberra, phone 6209 2400 and fax 6248 9774.

What does it cost to make a claim?

There is a filing fee which is currently \$60.60 but will increase annually and it must be paid when you lodge your application. This fee can be waived if it will cause hardship. There is a form you will need to fill in and lodge with FWA if you want to have the fee waived.

If you make a claim and you later discover you had no legal right to do so, your employer may eventually ask that you pay for their legal costs. This is why it is important to check in the early stages whether you are an 'excluded' employee. You are excluded from making an unfair dismissal claim if you fall into any one of the following categories:

- you are a bona fide independent contractor;
- State government employees (although you may be able to bring a case under State Law);
- employees who resign and were not forced to do so by the conduct of their employer;
- those employed under a contract 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;
- employees who have worked for less than one year—where the employer employs less than 15 full-time equivalent employees (a small business employer); or
- employees who have worked for less than six months—where the employer employs 15 or more full-time equivalent employees.

Was the termination of my employment ‘harsh, unjust or unreasonable’?

This term is not defined, but if you believe:

- there was no valid reason for the termination of your employment relating to your performance and conduct;
- you were not told the reason for your termination of employment;
- you were not given a chance to respond to criticisms of your work performance or behaviour;
- your termination related to unsatisfactory performance and you had not been warned about that unsatisfactory performance; or
- you were not given a fair chance to improve the alleged unsatisfactory performance/conduct;
- the dismissal was not a case of genuine redundancy; or
- the dismissal was not consistent with the Small Business Fair Dismissal Code, where you were employed by a small business,

then you may be able to claim that the termination of your employment was unfair.

How much time do I have to bring a claim?

You must lodge your unfair dismissal application with FWA within **14 days** of the day on which the termination took effect.

If more than 14 days have already passed you can still lodge an application, but if the employer objects because it is out of time the Commission will hold a hearing prior to conciliation to decide whether to accept your claim

If you wish to lodge an application you should contact the Centre or Fair Work Australia for more information.

Was I given enough notice of the termination?

The National Employment Standards say that a permanent employee has to be given a minimum amount of notice of termination, or payment in lieu of notice, depending on their length of service with the employer.

<u>Period of Continuous Service</u>	<u>Minimum Period of Notice</u>
Not more than 1 year	1 week
More than 1 year but no more than 3 years	2 weeks
More than 3 years but no more than 5 years	3 weeks
More than 5 years	4 weeks

In addition, if you are over 45 years old and have 2 years continuous service, then you are entitled to an additional 1 weeks’ notice or payment of an equivalent amount.

Am I excluded from making a claim that I did not get enough notice or payment in lieu of notice?

The following types of employees may be excluded from making a claim about failure to receive enough notice:

- casual employees;

- employees engaged for a specific task or time;
- employees dismissed for serious misconduct; and
- certain employees in the meat industry.

What happens once I have lodged my claim?

After you have lodged your claim, it will be referred for conciliation. Both sides are invited to a conciliation appointment at the Canberra Office of Fair Work Australia or a teleconference with Fair Work Australia, where a conciliator will try to encourage you and your employer to agree to a settlement. At this stage, the Commission cannot make any orders, and can only try to assist with a negotiated settlement.

If no agreement is reached at the conciliation stage, FWA may list the matter for a hearing.

Unfortunately, the law can be complicated once you reach this stage, so if you have any difficulties, you should seek advice. If you have more than one basis for your claim, you will need to check carefully before choosing where to take your claim. You usually cannot bring two types of claim.

What can FWA do about my claim?

FWA has power to:

- reinstate you to the same or similar position and order that you be paid any lost remuneration, or
- if reinstatement would be inappropriate, to order that you be paid an amount of money.

The maximum amount of money that the Commission or court can order is presently limited to the total sum of your remuneration received in the 6 months prior to your termination. Many successful applicants receive much less.

Discrimination

If the reasons you were dismissed were discriminatory you should consider making a complaint of discrimination, where you can claim compensation for hurt feelings, suffering, humiliation and distress. You can make that claim in Fair Work Australia or there are alternate tribunals such as the ACT Human Rights Commission and the Australian Human Rights Commission who can also handle such claims. If you are considering making a claim of this type you should seek further advice and also read our tip sheet on discrimination.

Where can I get help and information?

Women's Legal Centre (ACT & Region)	(02) 6257 4499 (local) 1800 634 669 (outside Canberra) www.womenslegalact.org
UnionsACT	(02) 6247 7844 www.unionsact.org.au
ACT WorkSafe	(02) 6205 0200 http://www.ors.act.gov.au/workcover/
Fair Work Ombudsman	13 13 94 www.fwo.gov.au
ACT Human Rights Office	(02) 6207 0576 www.hro.act.gov.au
Australian Human Rights	1300 656 419 www.humanrights.gov.au
Law Society ACT (for referrals to a private solicitor)	(02) 6247 5700 www.actlawsociety.asn.au

About the Women's Legal Centre

The Women's Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00pm.

The numbers for legal advice are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General's Department.