

# UNFAIR DISMISSAL:



*Please note that this is general information & may not be relevant to your particular matter. This should not be taken as legal advice.*

**Important: You have 21 days from the date the dismissal takes effect to make an unfair dismissal application. This is a strict time frame.**

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## PROTECTION FROM UNFAIR DISMISSAL

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You are protected from unfair dismissal if at the time of your dismissal:

- 1.** You have been employed by the employer for at least the minimum employment period; AND
- 2.** Your employment is either:
  - covered by a modern award; or
  - an enterprise agreement applies to you, or
  - your annual rate of earnings is less than the high-income threshold (currently \$162,000 per year for period 1 July 2022 to 30 June 2023, adjusted annually).

### Minimum Employment Period

If you have not been employed for at least the minimum employment period, **you will not be eligible** to make an unfair dismissal application.

- If your employer is a small business employer (less than 15 employees), then your minimum employment period is 12 months continuous service.
- If your employer is not a small business (15 employees or more) then your minimum employment period is 6 months continuous service.

NOTE: Some periods of service as a casual employee may count towards your minimum employment period.

If you are still confused as to whether you are eligible to lodge an unfair dismissal, please take the [Fair Work Ombudsman Quiz](#).

# Have you been unfairly dismissed?

You have been unfairly dismissed if:

1. You were dismissed; and
2. The dismissal was **harsh, unjust, or unreasonable**; and
3. The dismissal was not a case of genuine redundancy; and
4. If you were employed by a small business (fewer than 15 employees), that the dismissal was not consistent with the Small Business Fair Dismissal Code.

## Dismissed

You **were** dismissed if:

- the employer terminated your employment at its initiative; or
- you were forced to resign due to the conduct of your employer (this is known as constructive dismissal).



You **were not** dismissed if:

- you were employed for a specific period of time, or for a specific task or for a specific season and your employment was terminated at the end of that time period or season or at completion of the task; or
- you were employed under a training arrangement (e.g. apprenticeship or traineeship) and your employment is terminated at the end of the training arrangement; or
- you were demoted BUT you remain employed by the employer AND the demotion does not result in a significant reduction in your remuneration or duties.

## Harsh, Unjust or Unreasonable

A dismissal may be unfair if it is harsh, unjust, or unreasonable or any combination of these factors.

For example, a dismissal might be:

**Unjust** if the reason for dismissal is untrue or the alleged conduct did not occur.

**Unreasonable** if the evidence does not support or prove the reason for dismissal.

**Harsh** if it was an excessive response to the reason for dismissal (“the punishment does not fit the crime”) or because of the economic and personal consequences of being dismissed has on you.

The Fair Work Commission (FWC) must consider specific criteria for the harshness of the dismissal:

1. Whether there was a valid reason for the dismissal related to your capacity (your ability to do the job) or conduct (including its effect on the safety and welfare of other employees).
2. Whether you were notified of that reason.
3. Whether you were given an opportunity to respond to the reason(s).
4. Whether you were allowed a support person present in any discussions relating to the dismissal.
5. If the dismissal related to unsatisfactory performance, whether you had been warned about the performance before the dismissal.
6. The size of the employer and the impact this has on the appropriateness of procedures for dismissal.
7. Whether the business has a dedicated human resource specialist or expertise.
8. Any other matters the FWC considers relevant.

**NOTE:** Facts that existed at the time of the dismissal, even if the employer was unaware of those facts and did not rely on them at the time of dismissal, can be considered by the Commission when deciding if the dismissal was harsh, unjust, or unreasonable.

### **Inconsistent with the Small Business Fair Dismissal Code**

If you are employed by a small business (fewer than 15 employees) at the time of your dismissal, then the Small Business Fair Dismissal Code (the Code) applies to your dismissal. If the small business employer complies with the Code, you have not been unfairly dismissed.

The Code can be found here: Usually, your employer will read out the allegations and provide any additional evidence to you. They will then ask that you provide a response to the allegations. It is important that you hear all the allegations before you respond.



# Genuine Redundancy

You will not be eligible to lodge an unfair dismissal case if you were dismissed because of a genuine redundancy. A genuine redundancy happens when:

1. The employer no longer requires the person's job to be performed because of operational requirements; and
2. The employer has complied with any obligation to consult in a modern award or enterprise agreement; and
3. There is no reasonable way to redeploy the employee within the business or an associated entity of the business.

If your redundancy does not fit the above criteria, then you may have a case for unfair dismissal on the basis that the redundancy is not genuine.

## **Redundancy can happen when:**

- New technology is introduced (eg. the job can be done by a machine)
- Redistribution of an employee's duties between several other employees, so that the job no longer exists
- The business downsizes or closes down
- Completion of a project
- Outsourcing of jobs
- The business relocates interstate or overseas
- A merger or takeover of the business happens
- The business becomes insolvent or bankrupt

**Remember:** A person is not made redundant - a POSITION or JOB is made redundant.

## **Consultation obligations**

An employer must consult about redundancy in accordance with the requirements set out in the modern award or enterprise agreement that applies to the employee.

If an employer was required to consult and fails to do so, there is NO genuine redundancy.

Consultation should be meaningful and happen before the decision to terminate has been made.

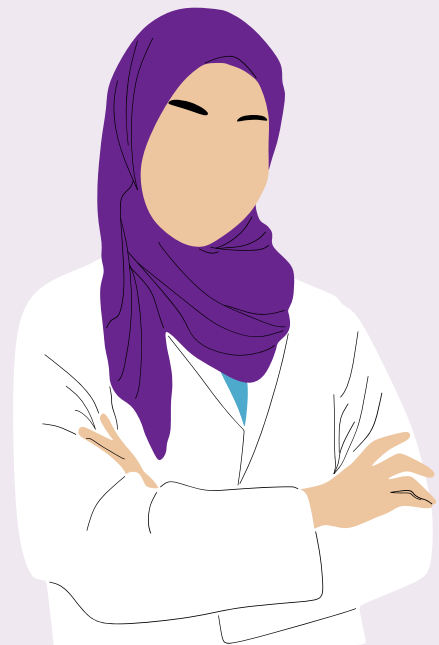
Where there is no modern award or enterprise agreement that applies to an employee, there is no duty to consult about the redundancy before the decision to make an employee redundant is made.

## **Redeployment**

The circumstances that exist at the time of dismissal will be relevant to considering if redeployment to another position within the business or with an associated entity of the business would have been reasonable.

Some relevant considerations in determining if redeployment is reasonable include:

- If there is an available alternative job or position
- What qualifications are required for the job and if the employee possesses those qualifications, skills and/or experience
- The suitability of the job
- The location of the job and the remuneration (is it similar to or better than the current role?)



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# MAKING AN APPLICATION FOR UNFAIR DISMISSAL

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## Things to Know Before Starting Your Application

If you think you have been unfairly dismissed then you can make an application to the Fair Work Commission (FWC) within 21 days from the date of the dismissal.

### Timeframe for lodgement

You have 21 days (calendar days) from the date your dismissal takes effect to make an application. **This is a strict time frame.**

If the final day of the 21-day period is on a weekend or public holiday the timeframe will be extended until the next business day (a day that is not a weekend or public holiday).

### When a dismissal takes effect

There may be times where you are given notice of your dismissal, but your final day of employment is not for some time (e.g. 4 weeks later). In this case, the dismissal will take effect on your last day of employment.

#### **Example scenario:**

*If an employee is given 4 weeks' notice that they will be dismissed:*

- When they work the 4-week notice period – the date that the dismissal takes effect will generally be at the end of that 4 week notice period – their last day of work.*
- When they receive 4 weeks' pay in lieu of notice and are NOT required to work the 4 week notice period – then the date that the dismissal takes effect will generally be the last day worked unless the employer specifies a different date of dismissal.*

### Extension of time lodging the application

There are limited exceptional circumstances when the Commission may exercise its discretion and allow an extension of time for lodging an application. Not knowing the timeframe for lodgement is not considered an exceptional circumstance.

### Application Fee

An unfair dismissal application must be accompanied by payment of the filing fee (or an application to waive the fee due to serious financial hardship). If the filing fee is not paid or a waiver request submitted, the Commission may cancel or discontinue the application.

If you cannot afford to pay the fee, you will need to complete Form 80 – Application for Waiver of Filing Fee. That can be found on the FWC website.

# Making Your Application

1. You will need to complete a Form F2 – Application for Unfair Dismissal.
  - This can be found on the FWC website, at this link: <https://www.fwc.gov.au/content/rules-form/unfair-dismissal-application>
  - You can also complete the form using the online lodgement service using this link: <https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodgeapplication/online-lodgment-service>
  - The Form F2 sets out the relevant information required to make an application for unfair dismissal and includes various methods for lodging an unfair dismissal application.
2. Once you have completed the Form F2 you can email the application to the FWC at [brisbane@fwc.gov.au](mailto:brisbane@fwc.gov.au).
  - You should receive a confirmation email from the FWC saying they have received your Application.
3. Typically, a conciliation conference occurs 4-6 weeks after the application has been processed (depending on the capacity of the FWC).
  - The next step is for you to receive a notice of listing from the FWC, advising of a time and date for your conciliation conference.



## FIVE APPLICATION TIPS

- ✓ **At Part 2.1 include what outcome you want.** For example, you might write “compensation” (the maximum is 26 weeks), a statement of service, and for the dismissal to be recorded as a resignation.
- ✓ **At Part 3.1 insert brief reasons why you were dismissed.** If you were given a letter of dismissal, you can refer to it here, and attach it to the application.
- ✓ **At Part 3.2 explain why the dismissal was unfair.** Use the criteria for hardness outlined in Part 1 of this toolkit to help you with what you need to say. If you were made redundant, or your employer was a small business, you need to address that here too.
- ✓ **At Part 3.2 it is best to use dot points or number your paragraphs.** Be concise and try to avoid long, complicated paragraphs, with opinions and emotions.
- ✓ **Make sure you submit your application within 21 days from the date of your dismissal. This is very important.**

## Commission Processes

### What is a Conciliation Conference?

The Fair Work Commission (FWC) will hold a conciliation conference – usually by phone – between you and the employer with the aim of helping you to come to an agreement about the settlement of your unfair dismissal complaint.

Prior to the conciliation conference, you will be provided with a copy of the employer's response to your application (if they provide a response).

On the date of the conciliation conference, a conciliator will call you from the FWC. The conciliator will be an impartial third party. The employer will be on the phone as well.

### What happens during a Conciliation Conference?

- The conciliator will explain the process for how the conciliation will be run.
- You will then get a chance to make a statement. An opening statement is a summary of your unfair dismissal application. You may also choose to respond to the employer's response in your opening statement. The purpose of your opening statement is to put forward your case, in a concise way, at the start of the conciliation conference.
- The employer will then be given an opportunity to make an opening statement. The conciliator may ask some questions of you and your employer.
- The conciliator will then break you into separate sessions. The conciliator will talk to you in a private session, this is an opportunity to disclose to the conciliator any further information that you may not have been comfortable saying in front of the employer and to put forward your first offer for settlement.
- The conciliator will then take the offer back to the employer.
- It is likely to go back and forward between both parties until an agreement is reached.
- If an agreement is reached, the conciliator will help to draft Terms of Settlement for both parties to sign.
- If an agreement is not reached, then the matter may proceed to a hearing, in person, at the FWC.

**Tip:** prepare your opening statement before the conciliation conference so you can read it out, rather than having to think of what to say on the spot.

**Tip:** Prepare what your first offer will be before the conciliation. This can include compensation, statement of service, or resignation.

**Tip:** start higher than what you want to settle for, so you have room to negotiate.

You can find some more information from the Fair Work Commission website about conciliation here: <https://www.fwc.gov.au/conciliation>



# WHERE CAN I GET HELP?

## Working Women Queensland

Working Women Queensland is a free, confidential and supportive service to help disadvantaged women seeking help with work matters.

- Call us on 1800 621 458
- visit our website <https://brq.org.au/working-women-qld/>

## Other Support Services

### Fair Work Ombudsman

- 13 13 94
- <https://www.fairwork.gov.au>

### Queensland Council of Unions

- 07 3010 2555
- <https://www.qldunions.com/>

