

UNFAIR DISMISSAL AND GENERAL PROTECTIONS

Unfair Dismissal

You may be able to apply to the Fair Work Commission if you have been unfairly dismissed from your employment.

What is unfair dismissal?

An unfair dismissal is where the Fair Work Commission finds that:

- a [dismissal](#) has taken place; and
- the dismissal was harsh, unjust or unreasonable; and
- the dismissal was not a genuine redundancy; and
- if you worked for a small business (one with fewer than 15 employees), your employer did not follow the Small Business Fair Dismissal Code.

Am I covered by unfair dismissal laws?

To be covered by unfair dismissal laws, you must have worked for the same employer for:

- at least 6 months if your employer has 15 or more employees; or
- at least one year if you worked for a small business (one with less than 15 employees).

If you were a casual employee, you will need to show that you worked on a regular and systemic basis over this period, and reasonably believed that you would continue to work in this way.

To be covered, you also need to show:

- you were covered by a Modern Award; or
- you were covered by an Enterprise Agreement; or you were earning less than the [high income threshold](#) of \$158,500 per year; or for a dismissal which took effect prior to or on 30 June 2021, \$153,600 per year.

Contractors are not covered by unfair dismissal laws. If you are unsure whether you are a contractor or an employee, you should contact the Fair Work Commission who may be able to assist you to work this out.

What is harsh, unjust or unreasonable?

The Fair Work Commission decides whether a dismissal was harsh, unjust or unreasonable. In making this decision, the Fair Work Commission considers certain factors, such as:

- whether there was a valid reason for the dismissal;
- whether your employer notified you of that reason; and
- whether you were given an opportunity to respond to that reason.

Other factors can be found in the Fair Work Act 2009 (Cth) s 387.

What is a genuine redundancy?

A genuine redundancy is one where:

- your job is no longer required due to changes in operational requirements; and
- when dismissing you, your employer followed the consultation obligations set out in a Modern Award, Enterprise Agreement or other registered agreement.

What do I do if I have been unfairly dismissed?

If you think you have been unfairly dismissed, you can make an application to the Fair Work Commission within 21 days of the dismissal taking effect. In exceptional circumstances, the Fair Work Commission may consider applications made after this time.

What happens at the Fair Work Commission?

Once the Fair Work Commission receives your application, a copy will be sent to your employer. You and your employer will be invited to attend conciliation, which usually takes place over the telephone.

If you do not reach an agreement during conciliation, the matter will go to a hearing or conference where the Fair Work Commission decides whether the dismissal was unfair. The [Fair Work Commission website](#) contains further information about this process.

If the Fair Work Commission finds that you have been unfairly dismissed, it can order your employer to give you your job back or pay you compensation.

General Protections

Under Australian employment law, employees have general workplace protections.

Am I covered by general protections laws?

The [general protections laws](#) cover all employees in the Northern Territory, including casual and prospective employees, as well as independent contractors.

What do I need to show to make a complaint?

You need to prove that:

- an adverse action has been taken or the threat of an adverse action has been made towards you; and
- the adverse action breaches one of the general protections.

What is an adverse action?

An adverse action is a specific act or failure to act that takes place in certain employment situations. You have had an adverse action taken against you if your employer threatens to, or actually does one of the following:

- dismisses you;
- injures you;
- changes your job description to your disadvantage; or
- discriminates against you.

You have had an adverse action taken against you if a potential employer:

- fails to hire you; or
- offers, or threatens to offer unfair terms and conditions which are different to other employees' conditions.

What are the general protections?

The general protections include:

- protection of workplace rights;
- protection of freedom of association;
- protection from workplace discrimination;
- protection regarding temporary absences; and
- protection from sham arrangements.

Workplace rights

Workplace rights include:

- an entitlement to a benefit, role or responsibility under a workplace law, workplace instrument (for example, an Enterprise Agreement or Award) or order (for example, an order made by the Fair Work Commission);
 - being able to start or take part in proceedings or processes under a workplace law or workplace instrument; and
 - a right to make a complaint or inquiry in relation to your employment.
- A person cannot take adverse action against a worker because they:
- have a workplace right;
 - have, or have not exercised a workplace right; or
 - propose to, or propose not to exercise a workplace right.

Freedom of association

Freedom of association is about you choosing to take part in or not take part in industrial activities. An industrial activity includes becoming or not becoming a member of an industrial association (e.g. a Union), paying a fee to an industrial association, establishing an industrial association, or seeking to be represented by an industrial association. A person must not take adverse action against you because you:

- are, or are not a member of an industrial association; or
- participate, or do not participate in an industrial activity.

Workplace discrimination

An employer must not take adverse action against an employee or a potential employee, due to their:

- race;
- colour;
- sex;
- sexual orientation;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibility;
- pregnancy;
- religion;
- political opinion;
- national extraction; or
- social origin.

There are some situations where discrimination will not be unlawful, for example some actions taken by religious institutions.

Temporary absence

You cannot be dismissed if you are an employee and you are temporarily absent from your workplace because of a prescribed illness or injury. However, you will not be protected where:

- you were absent from the workplace for more than 3 months; or
- you were absent for a total of more than 3 months over a 12 month period; and you were not on paid personal/carer's leave for the whole time you were absent.

Sham arrangement

Your employer must not tell you that you are being employed as a contractor when you are really an employee. An employer must not dismiss or threaten to dismiss you as an employee in order to employ you as an independent contractor to perform the same or very similar work.

What can I do if my employer has breached one of the general protections?

If the adverse action taken against you because of your employer's breach of a general protection involves dismissal, you need to apply to the Fair Work Commission within 21 days of the dismissal taking effect. In exceptional circumstances the Fair Work Commission may consider applications made after this time.

If the matter is not resolved at the Fair Work Commission, you can take the matter to the Federal Court or the Federal Circuit Court within 14 days of the Fair Work Commission providing a certificate saying that the matter has not been resolved.

If the adverse action taken against you because of your employer's breach of a general protection does not involve dismissal, you can apply to the Fair Work Commission within 6 years of the breach.

Useful contacts

Darwin Community Legal Service

Freecall: 1800 812 953

Phone: (08) 8982 1111

Fair Work Ombudsman

Phone: 13 13 94

Website: www.fairwork.gov.au

Fair Work Commission

Phone: 1300 799 675

Website: www.fwc.gov.au

Union Helpline

Phone: 1300 486 466

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