



This information only applies if you have been dismissed on or after 1st July 2009

If you have been dismissed from your job and you believe it was unfair, you may have grounds to make an unfair dismissal claim at Fair Work Australia (FWA). If eligible, you have **14 days** from the date your dismissal took effect to file your claim.

Contents

- What is Unfair Dismissal?
- Can you make a claim?
- Time limit - 14 days
- What remedy do you want?
- Application form
- Filing your claim
- Fees
- What happens next?
- Costs
- Where to get help
- Eligibility Chart

This infosheet is designed to help Victorian employees take the most appropriate action under the unfair dismissal provisions of the *Fair Work Act 2009*. It is not intended to cover all your potential rights and entitlements and you should obtain legal advice before acting on any of the following information.

If you are employed in a state or territory other than Victoria, you also need to obtain specialist advice about your case.

What is Unfair Dismissal? (see *Eligibility Chart - page 9*)

An unfair dismissal claim is a claim that your dismissal from employment was:

- **harsh, unjust or unreasonable;** and
- **not** consistent with the **Small Business Fair Dismissal Code** (if applicable); and
- **not** a case of **genuine redundancy.**

You have been **dismissed** if:

- your employment has been terminated at the initiative of your employer; or
- you resigned from your employment because you were forced to do so because of conduct, or a course of conduct engaged in by your employer (constructive dismissal); or
- you were employed under a contract of employment for a specified period or time, task or season and you were terminated **prior** to the end of the contract.

You have **not** been dismissed if:

- you were employed under a contract of employment for a specific period of time, task or season and your employment has terminated at the end of the period, season or completion of the task; or
- you were an employee to which a training arrangement applied and your employment was for a specified period of time because of a training agreement and your employment was terminated at the end of the training arrangement; or
- you were demoted in employment but the demotion does not involve a significant reduction in remuneration or duties and you are still employed by the employer who demoted you.

Constructive Dismissal

If you think you have no option but to resign from your employment because of your employer's conduct, you should obtain legal advice before doing so because this is a very technical area of law and FWA may not agree that you were forced to resign - see *JobWatch's Constructive Dismissal infosheet* for further information.

You may also have a claim for pay instead of **notice of termination** of your employment - see *JobWatch's Notice of Termination infosheet* for further information.

Job Watch Inc is...

an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to Victorian workers

HOURS:

Mon - Friday
9.00am-5.00pm
 (closed Tuesday
 12.00noon - 2.00pm)

Metro
9662 1933
 Rural
1800 331 617
www.jobwatch.org.au

Harsh, unjust or unreasonable?

In examining whether a dismissal is harsh, unjust or unreasonable, FWA must take into account the following:

- whether there was a valid reason for the dismissal relating to your capacity or conduct (including any effect on the safety and welfare of other employees);
- whether you were notified of that reason;
- whether you were given an opportunity to respond to any reason related to your capacity or conduct;
- any unreasonable refusal by your employer to allow you to have a support person present to assist at any discussions relating to dismissal;
- if the dismissal is related to unsatisfactory performance – whether you had been warned about that unsatisfactory performance before the dismissal;
- the degree to which the size of your employer's business would be likely to impact on the procedures followed in effecting the dismissal;
- the degree to which the absence of dedicated human resource management specialists or expertise in the business would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters FWA considers relevant.

Is your employer a small business employer?

From 1 July 2009 until 31 December 2010, a **small business employer** is an employer who employs fewer than 15 full-time equivalent employees at the time of the dismissal or at the time you were given notice of the dismissal (whichever

happens first) including employees employed by **associated entities** of your employer (see **associated entities page 4**).

After 1 January 2011, a **small business employer** will be an employer who employs

fewer than 15 employees, as calculated by a simple headcount, at the time of dismissal or at the time you were given notice of the dismissal (whichever happens first) including employees employed by **associated entities** of your employer (see **page 4**).

Small Business Fair Dismissal Code

If you were employed by a **small business employer**, your dismissal will not be unfair if it was factually consistent with the **Small Business Fair Dismissal Code**.

If immediately before the time of the dismissal or at the time you were given notice of the dismissal (whichever happened first), the employer was a **small business employer** and the employer complied with

the **Small Business Fair Dismissal Code** in relation to the dismissal, your dismissal will be considered to be fair.

A fair dismissal can include a dismissal without notice or warning in cases of serious misconduct (for example, theft, fraud or violence) or dismissal for underperformance, provided that you were given a valid reason as to your capacity or conduct

as well as a reasonable opportunity to rectify the problem.

For a copy of the Small Business Fair Dismissal Code Checklist, contact FWA. See 'Where to Get Help' page 8.

Genuine redundancy

A genuine redundancy occurs when your employer no longer requires the job that you have been doing to be performed by anyone because of changes in the operational requirements of its business and your

employer has complied with any obligation to consult about redundancy contained in a modern award or enterprise agreement that applied to the employment.

It is **not** a genuine redundancy if it would

have been reasonable in all the circumstances for you to be redeployed within your employer's business or a business of an **associated entity** of your employer. See page 4 for explanation of an **associated entity**.

Can you make a claim?

A person who is **protected from unfair dismissal** is entitled to make a claim.

A person is protected from unfair dismissal if the person is an employee who has completed a period of employment with their employer of at least the **minimum employment**

period and one or more of the following also apply:

- a modern award covers the person;
- an enterprise agreement applies to the person in relation to the employment; or
- the sum of the person's annual rate of earnings and other

such earnings, worked out in relation to the employee in accordance with the regulations, is less than the current high income threshold, being **\$113,800..**

A person who is **protected from unfair dismissal** is entitled to make a claim.

Minimum employment period

The minimum employment period differs between **small business employers** and other employers.

If your employer is **not a small business**

employer, the minimum employment period is **6 months**, ending at the time when the employee was given notice of the dismissal or immediately before the dismissal (whichever occurs first).

If your employer is a **small business employer**, the minimum employment period is **one year** ending at that time.

Minimum employment period is 6 months or 12 months if your employer is a small business employer

Period of employment

A period of employment with an employer is the period of continuous service which you have completed with the employer, as an employee.

For example, if you took 2 months of unpaid or unauthorised leave during your first year of employment with a small business employer then, after 12 months, you will only have 10 months of continuous service with your employer.

A period of employment as a **casual** employee **does not count** unless the employment was on a regular and systematic basis and there was a reasonable expectation of this continuing.

A period of service with an old employer will not count towards service with a new employer if you transfer from one employer to another (for example, due to a sale of business), if the new employer informed you in

writing before you started with the new employer that the period of service with the old employer would not be recognised.

However, this does not apply where your old and new employers are **associated entities** (see next page).

Associated Entities

An **associated entity** is defined by s50AAA of the *Corporations Act 2001* and includes where your employer controls or is controlled by another company or individual.

This is a very technical area of the law and each particular circumstance will be different but usually, where one or more of the directors of your employer are also

directors of other companies, then those other companies will be **associated entities** of your employer.

The 14 day time limit is a strict time limit. If you think you may have a claim, you should get advice as quickly as possible or file your claim and then get the relevant advice.

Time limit - 14 days

A claim for unfair dismissal must be filed at FWA within **14 days** from when your dismissal took effect.

FWA may only grant an extension of time to file your unfair dismissal claim if there are exceptional circumstances. If you are already out of time, you could consider filing your claim as soon as possible and then obtaining advice

about the likelihood of being granted an extension of time before your matter proceeds further.

In considering whether to grant an extension of time, FWA will consider the following:

- the reason for the delay;
- whether the person first became aware of the dismissal after it had taken effect;

- any action taken by the person to dispute the dismissal;
- prejudice to the employer (including prejudice caused by the delay);
- the merits of the application; and
- fairness as between the person and other persons in a similar position.

What remedy do you want?

Once you have established that you are eligible to make an unfair dismissal claim, you should think about what you are seeking to resolve your claim. You can seek **reinstatement** to your position and/or **compensation**.

If FWA orders **reinstatement**, you will be reappointed to the position you were in prior to your dismissal or to another position on terms and conditions that are no less favourable than previously. FWA may also order your employer to pay you remuneration that you lost because of the dismissal.

If FWA orders **compensation**, you will be compensated in lieu of reinstatement.

Compensation will not be awarded for any shock, distress or humiliation associated with your dismissal and any misconduct by you that contributed to your dismissal will reduce the amount of compensation that may be ordered by FWA .

The maximum compensation that may be ordered is the lower of either half the amount of the high income threshold (\$113,800 for full-time employees) immediately

before the dismissal or the total amount of income you received or were entitled to (whichever is the higher) during the 26 weeks prior to your dismissal.

FWA will consider the option of reinstatement before it considers the option of compensation

Application Form

The application form for unfair dismissal is called a **Form F2 - Application for an unfair dismissal remedy**. It is available from Fair Work Australia.

Fair Work Australia
 Level 4, 11 Exhibition Street
 Melbourne 3000
 (GPO Box 1994)
 Tel: 1300 799 675
 Fax: (03) 9655 0401
 website: www.fwa.gov.au

Filing your claim

If you need assistance completing the application form, you may contact:

- your union (if you are a member);
- a solicitor; or
- FWA. You should be aware that FWA is not able to provide you with legal advice.

Make sure you **file your claim within the 14 day** deadline, even if you have not yet received legal advice.

You must file your claim with FWA. You can do this on-line, by post or fax or by personally delivering it to FWA.

**File your claim
 within the
 14 day deadline**

Fees

A **\$60.60** filing fee is required to be paid with your claim.

This fee may be refunded if you discontinue your application before a conference.

The filing fee may be waived by FWA if you can show that it would cause your "serious hardship". To be eligible, you must file a **fee waiver application form**. This

form is available from FWA or its website.

This form must be filed at the same time as (or soon after) you file your unfair dismissal claim.

What happens next?

Before FWA can consider the merits of your application, it must decide whether you are eligible to make a claim by considering the following matters:

- whether your claim was made within the time limit (**14 days**);
- whether you were protected from unfair dismissal;

- whether your dismissal was factually consistent with the Small Business Fair Dismissal Code; and
- whether your dismissal was a case of genuine redundancy.

If the facts of your case are in dispute, FWA must conduct a conference or a hearing in relation to the matter.

FWA may deal with an unfair dismissal claim however it considers appropriate. Usually, this will be with a conference, and then, if necessary, a hearing.

Conferences

If FWA believes it to be appropriate, it may refer your claim to a private conference. A conference is a conciliation meeting between you and your former employer in the presence of a FWA conciliator or over the telephone.

The purpose of the conference is to bring you and your former employer together to try and resolve the matter without the need for a formal hearing.

You can agree to settle your claim at any time, even before the conference. If your former

employer makes you an offer to settle, it is always advisable to get independent advice so that you are satisfied that the offer is reasonable given the merits of your case.

Do I need a Lawyer?

There is a limited role for lawyers at FWA.

If you are entitled to, or have leave of FWA to be represented by a lawyer, you should consider:

- how much your representative's fees will be;
- when they need to be paid; and

- to what stage are they prepared to take your claim.

Generally, you will have to pay your own legal costs regardless of the result of your case. Some Employment Law firms offer a "no-win-no-fee" arrangement which often means you don't have to pay all of your lawyer's

fee if you are not successful with your claim.

Law firms participating in the Legal Referral Service run by the Law Institute of Victoria will provide you with an initial consultation of up to 30 minutes free of charge.

Representing yourself?

It is important to be prepared for the conference. The FWA conciliator will ask you to outline your claim briefly and state what remedy you are seeking. Write down a brief chronology of the relevant events and

summarise the key details of your employment. It is important to explain why you think the dismissal was unfair, taking into account the grounds of your claim.

Your former employer will

also be given an opportunity to put forward their side of the case.

Discussion will then normally occur with a view to reaching a settlement if possible.

If a settlement is reached

If you have settled your claim, you may be asked to sign a document called a "Release Agreement", "Settlement Agreement", "Deed of Release", "Terms of Settlement" or something similar.

These are legal documents that usually

state that:

- you and your former employer have agreed to settle your claim; and
- in return for reinstatement and/or compensation, you **will not** take **any further**

action against your employer in the future over any and all matters arising out of the employment.

Releases often have complicated legal language in them and can be difficult to understand. If you have any doubts

about signing one of these documents or if you think you may have other claims against your employer, you should obtain legal advice before you sign.

You should file a "*Notice of Discontinuance*" form with FWA once:

- you have settled for an amount of compensation and/or reinstatement; **and**
- you have received the settlement monies; **and**
- the funds have been cleared.

What if a settlement cannot be reached at a conference?

If a settlement is not reached at a conference, your options are to:

- not continue with your application by filing a notice of discontinuance; or
- wait for the relevant documents to be prepared, or directions to be given by FWA regarding a hearing (if any). You may have to elect to proceed to a

hearing within a certain time so be sure to carefully read any documents given to you by FWA.

At this stage, the FWA conciliator may make a recommendation or express an opinion about your claim and/or its resolution. Take note of any recommendations given, as advice from FWA will be important in selecting your next course

of action which may include going to a hearing.

Representing yourself at a hearing is much more difficult than representing yourself at a conference because you need to prove your claim with evidence from witnesses and/or documents. It is recommended that you obtain legal advice before representing yourself at a hearing.

Costs

Generally, each party pays its own legal costs. However in some circumstances, FWA may, on application within 14 days of the matter being discontinued or determined, make an "*order for costs*" against one of the parties. This can only happen if FWA is satisfied that one of the parties:

- made the claim vexatiously or without reasonable cause; or
- it should have been reasonably apparent that a claim had no reasonable prospect of success.

If you are in doubt about the strength of your claim, you should obtain independent legal advice

before or shortly after filing your unfair dismissal claim. As an applicant, you run the risk of incurring a liability for costs from the moment you make your claim.

Separation Certificates

Being dismissed without being given a Separation Certificate is **not**, on its own, a ground for unfair dismissal. However, your former employer has a legal obligation to provide you with a **Separation Certificate** for Centrelink purposes.

If your former employer

does not have a precedent form of a Separation Certificate, you can obtain one from Centrelink or on the internet at www.centrelink.gov.au.

If your former employer refuses to provide you with a Separation Certificate within a few days of your dismissal,

you may report this to Centrelink. Centrelink has the power to contact the employer and request them to provide you with the Certificate.

From 1st January 2010, an employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (exceptions apply)

Where to get help

JobWatch Inc
Metro: (03) 9662 1933
Rural: 1800 331 617

**Fair Work Australia
Helpline** (Unfair
Dismissal)
1300 799 675

Fair Work Infoline
(Office of the Fair Work
Ombudsman)
13 13 94

**ACTU Worker
Information line**
(for referral to a union):
1300 362 223

Law Institute of Victoria
(for referral to a lawyer):
(03) 9607 9550

If you are unsure about any information in this infosheet, it is important to obtain legal advice as soon as possible.

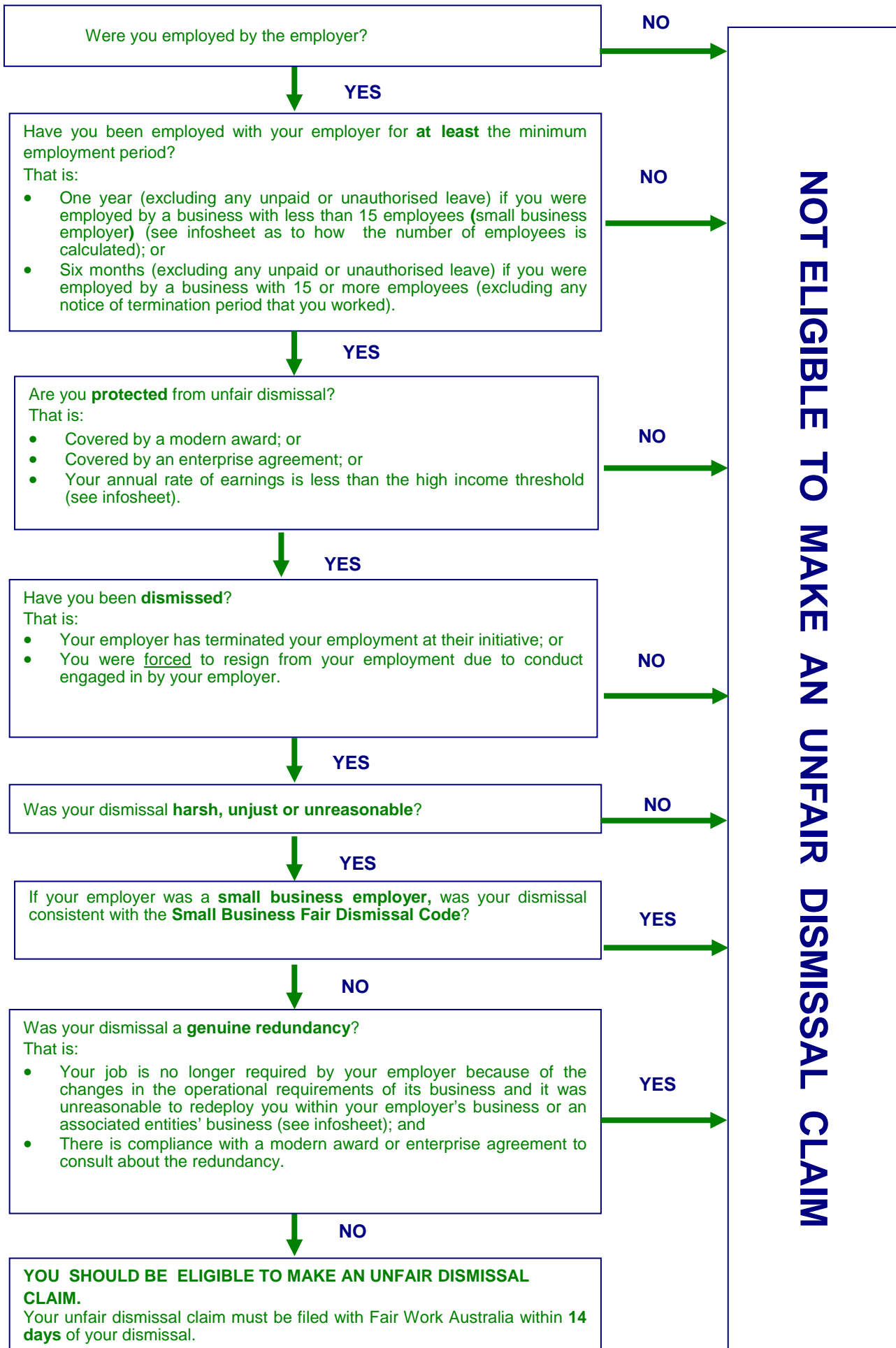
DISCLAIMER

The information in this infosheet is of a general nature only. It is not a substitute for professional legal advice. Readers should not act on the basis of any information contained here without first obtaining legal advice relevant to their particular employment situation.

JobWatch Inc. disclaims any liability in respect of any action taken or not taken in reliance on the contents of this publication. This information is current at the time of printing July 2009.

Eligibility Chart

NOT ELIGIBLE TO MAKE AN UNFAIR DISMISSAL CLAIM



Were you employed by the employer?

NO

YES

Have you been employed with your employer for **at least** the minimum employment period?
That is:

- One year (excluding any unpaid or unauthorised leave) if you were employed by a business with less than 15 employees (small business employer) (see infosheet as to how the number of employees is calculated); or
- Six months (excluding any unpaid or unauthorised leave) if you were employed by a business with 15 or more employees (excluding any notice of termination period that you worked).

NO

YES

Are you **protected** from unfair dismissal?
That is:

- Covered by a modern award; or
- Covered by an enterprise agreement; or
- Your annual rate of earnings is less than the high income threshold (see infosheet).

NO

YES

Have you been **dismissed**?
That is:

- Your employer has terminated your employment at their initiative; or
- You were **forced** to resign from your employment due to conduct engaged in by your employer.

NO

YES

Was your dismissal **harsh, unjust or unreasonable**?

NO

YES

If your employer was a **small business employer**, was your dismissal consistent with the **Small Business Fair Dismissal Code**?

YES

NO

Was your dismissal a **genuine redundancy**?
That is:

- Your job is no longer required by your employer because of the changes in the operational requirements of its business and it was unreasonable to redeploy you within your employer's business or an associated entities' business (see infosheet); and
- There is compliance with a modern award or enterprise agreement to consult about the redundancy.

YES

NO

YOU SHOULD BE ELIGIBLE TO MAKE AN UNFAIR DISMISSAL CLAIM.
Your unfair dismissal claim must be filed with Fair Work Australia within **14 days** of your dismissal.



Metro - 9662 1933
Rural - 1800 331 617

www.jobwatch.org.au