

Have you ever been unfairly dismissed?

In the current state of the economy, and employees being dismissed and made redundant left right and centre, it is prudent to be aware of your rights as an employee. By that same token, it is worthwhile that employers take the time to understand their obligations when making the decision to dismiss an employee.

If a situation arises where a dismissal has occurred, consider whether the dismissal was fair. Below is a summary of the law governing unfair dismissals, consideration of whether these laws apply, and the remedies available where a dismissal has been deemed unfair.

What is unfair dismissal?

Unfair dismissal occurs where an employee makes an unfair dismissal remedy application and the Fair Work Commission finds that:

- The employee was dismissed; and
- The dismissal was **harsh, unjust or unreasonable**; and
- The dismissal was not a case of **genuine redundancy**; and
- The dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business

To make an application, the applicant must be covered by the national unfair dismissal law, and have completed the minimum employment period of 6 months where the employer employs 15 or more employees, or 1 year otherwise.

Who is covered?

Only those employees who are covered by the national workplace relations are covered by the unfair dismissal laws. These groups include all employees in Victoria, and those employed by the Commonwealth, or a Commonwealth authority.

There are certain groups who are not covered by the unfair dismissal laws. These include:

- **Contractors**
- Employees who **resign** and were not forced to do so by the conduct of their employer
- Those employed under a contract of employment for a **specified period of time**, a specified task, or 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 remained employed by the employer who demoted them

“Harsh, unjust or unreasonable”

In considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account the following factors:

- Any **valid reason(s)** for the dismissal related to the person’s capacity or conduct
- Whether the person was **notified** of that reason

- Whether the person was given an **opportunity to respond**
- Any **unreasonable refusal** by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal
- If the dismissal related to **unsatisfactory performance** by the person, whether the person had been warned about that unsatisfactory performance before the dismissal
- Degree to which size of **employer's enterprise** would be likely to **impact** on the procedures followed in effecting the dismissal; and
- Degree to which absence of **human resource management specialists** or expertise in the enterprise would impact on the procedures followed in effecting the dismissal; and
- Any other matters the Commission considers relevant

“Genuine redundancy”

A person's dismissal was a case of genuine redundancy if:

- The person's employer no longer required the person's job to be performed because of changes in the operational requirements of the employer's enterprise; and
- The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy

It is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be deployed within the employer's enterprise, or the enterprise of an associated entity of the employer

Constructive dismissal

Constructive dismissal is in effect forced resignation. It tends to be poorly understood because it can manifest itself in a myriad of situations, depending on the nature of the employment relationship. Generally speaking, constructive dismissal occurs when an employee resigns as a result of the employer creating a hostile work environment. As the resignation was not truly voluntary, it is in effect a termination.

Some examples of employees being constructively dismissed include:

- An employer expressly suggesting that an employee resign to assist with preserving the employee's future ability to obtain work
- An employer actively making it difficult for the employee to fulfil their role
- An employer continuously failing to provide a serious degree, a safe and/or healthy working environment
- An employer imposing unauthorised and detrimental variations to an employee's contract (e.g. pay-cut, demotion, change of working hours)

The employee must provide the employer's actions were the principal contributing factor leading to their resignation. As such, the resignation must occur immediately or shortly after the employer's alleged conduct.

Constructive dismissal often forms the basis of dismissal-related claims, such as unfair dismissal.

Remedies for unfair dismissal

If the Commission is satisfied an employee was unfairly dismissed, it may order:

- The employee's **reinstatement** together with continuity of service and lost remuneration; or
- Payment of **compensation** to the employee if satisfied that reinstatement is inappropriate

Concluding remarks

If you encounter a situation where a person is dismissed, consider whether these regulations have been complied with. Chances are they have been, but it doesn't hurt to consider them!

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(The law as it stands in August 2015)

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