

Factsheet Seven

TERMINATION OF EMPLOYMENT

There are many different ways that your employment may end and each way has different legal requirements and implications.

Resigning

Your contract, Modern Award or agreement may state how much notice you should give when resigning. If it is not written down then, as a general rule, the notice period should be at least equal to the pay period. For example, an employee who is paid fortnightly should provide at least two weeks notice. However, the *Fair Work Act 2009* does not actually specify any notice period required to be given by an employee when they resign. If you are a casual employee, you are not obliged to give any notice.

Sometimes people feel forced to resign. This may be for various reasons, such as an unsafe workplace, or being subjected to ongoing workplace bullying or discrimination. These cases may be considered 'constructive dismissal' – see below for more details.

Constructive dismissals

Constructive dismissal means that even though your employer did not say you were sacked, the employer's behavior left you with no reasonable choice but to resign. This is relevant if you are making a claim for unfair dismissal or unlawful termination where you must be able to show that your employment was terminated 'at the initiative of the employer', not because you decided to voluntarily resign. In some cases an employer may not say 'you're sacked', but still force you to leave because of the things they say, do or fail to do. Or they may direct you to resign or otherwise you will be sacked. This is a difficult and complex area and it is important that you get further advice about the prospects of success for a constructive dismissal claim **before** you resign.

Instant or summary dismissals

If you are dismissed for serious misconduct you are not entitled to any notice, or pay in lieu of notice. The *Fair Work Act 2009* defines serious misconduct as including theft, fraud, committing an assault, being intoxicated at work, behaving in a way that causes serious and imminent risk to the health and safety of a person or to the reputation or viability of the business, or refusing to carry out a lawful and reasonable instruction. Your workplace agreement or policies may also include definitions of serious misconduct. If you are dismissed for serious misconduct you may lose your entitlement to pro-rata long service leave.

Finalisation of a fixed term contract

A fixed term contract is a contract of employment that is 'fixed' for a certain period or for a particular task or project. The contract should state the termination date or circumstances in which the contract is fulfilled.

When you are demoted

If you are demoted and the new position involves a significant reduction in either remuneration or duties, then it may be considered that you have been dismissed. However, there are situations where a demotion may not be classified as a dismissal, so seek advice if this happens to you.

Redundancy

If you lose your job because the job disappears permanently, according to the law you are considered to be redundant. This may happen due to changing operational requirements, the introduction of new technology, economic downturns, company mergers, take-overs or restructuring. Before making you redundant, the employer should follow any consultation requirements in your Modern Award or agreement. If it is reasonable, your employer should redeploy you to another position with the employer or a related company. If the redundancy is not a genuine redundancy, you may be able to claim unfair dismissal (see below).

In addition to the employer providing the relevant notice or pay in lieu of notice (see below), you may also be entitled to severance pay. This is to compensate you for the loss of benefits (such as accrued long service leave) and for the inconvenience and hardship caused by the loss of employment. You should check your Modern Award or agreement for a clause on redundancy payments, including restrictions on when those payments apply. For those not

covered by any such clause, there is an entitlement to redundancy pay under the National Employment Standards (NES). This entitlement will apply to all employees who have been employed for at least one year, unless their employer has 15 or less employees. However, you should note that:

- Unless you had an entitlement to redundancy pay under a Modern Award, agreement or contract of employment as at 31 December 2009, only your service with your employer from 1 January 2010 is counted towards your NES redundancy entitlement;
- If your employer has 15 or less employees you do not have an entitlement to redundancy pay under the NES;
- You may not be entitled to redundancy pay if you are moving from one employer to another in a transfer of business situation (for example, your employer's business has been bought by another business and you are going to work for the purchasing business); and
- Generally, casuals, employees on fixed term contracts and employees on training contracts are not entitled to redundancy pay.

The entitlements under the NES are as follows:

Employee's period of continuous service with the employer on termination		Redundancy entitlement
At least	but less than	
1 year	2 years	4 weeks
2 years	3 years	6 weeks
3 years	4 years	7 weeks
4 years	5 years	8 weeks
5 years	6 years	10 weeks
6 years	7 years	11 weeks
7 years	8 years	13 weeks
8 years	9 years	14 weeks
9 years	10 years	16 weeks
10 years	-	12 weeks

If you believe that the redundancy is not genuine, for example if the position still exists, or if you were not redeployed and reasonably could have been, or if the consultation requirements in your Modern Award or agreement have not been followed, you may be able to make a claim for unfair dismissal (see below).

Termination entitlements

If your employment is terminated, your employer must follow due process. You are entitled to:

- a valid reason for the dismissal;
- a fair and transparent process leading up to the dismissal;
- written notice of the date of termination (unless you are a casual);
- wages due at the time of dismissal;
- a separation certificate (if your employer refuses to provide one, contact Centrelink who can obtain one);
- request to have a support person present at discussions regarding the dismissal, which your employer should not unreasonably deny.

Outstanding payments

As well as the entitlements above, if your employment is terminated you are entitled to:

- payment for annual leave not taken, as well as leave loading¹;
- redundancy entitlements, if applicable;
- written notice or payment in lieu of notice (see below); and
- depending on how long you have worked with your employer, and depending on the circumstances of your termination, you may be entitled to payment for long service leave not taken or pro-rata long service leave (unless, in some cases, for example if you were dismissed for serious misconduct).

If you are not paid your correct entitlements and your employer will not agree to pay them, you can make a complaint to the Fair Work Ombudsman.

Notice periods

If you are a permanent employee and you are dismissed (other than for serious misconduct), your employer must give you the period of notice (in writing) required by your Modern Award or agreement, or pay you the equivalent in lieu of notice. Employees are entitled to notice

¹ *Centennial Northern Mining Services Pty Ltd v CFMEU* [2015] FCAFC 100. If an employee receives annual leave loading during employment, they are also entitled to loading on any untaken annual leave on termination of employment, despite a contrary provision in any industrial instrument.

regardless of length of employment. If you are sacked without notice or pay in lieu of notice and it was not a case of serious misconduct, you can make an application to the Fair Work Ombudsman within 6 years. If there is no Modern Award or agreement fixing minimum periods of notice, then the following periods apply under the NES:

Period of continuous service	Notice period
Less than 1 year	1 week
More than 1 year, but less than 3 years	2 weeks
More than 3 years, but less than 5 years	3 weeks
More than 5 years	4 weeks

Employees are entitled to an additional week's notice if they are over 45 years old and have worked for their employer for at least 2 years.

Warnings

The purpose of a warning is to advise you that your work performance or conduct is unsatisfactory, and to put you on notice that the performance or conduct needs to be improved. Warnings may be given verbally or in writing. There is **no** minimum requirement that an employer must provide 3 warnings before a dismissal can occur, however under the *Fair Work Act 2009*, a dismissal may be considered unfair if you were not given a warning and the opportunity to improve your performance.

It is always best to request a copy of the written warning and take it away with you so that you can respond to it (preferably in writing). You do not have to sign a warning. In cases where you are under pressure to sign a warning and you disagree with it, you can write on the document: 'I disagree with the contents of this document', sign it and then write a letter in response to the warning, objecting to the warning and explaining your concerns. Even though you may choose not to sign a warning that has been issued to you, it still has effect as a warning.

If your employer requests that you attend a meeting to discuss your work performance or conduct it is important that you attend the meeting. Under the *Fair Work Act 2009*, if you request to have a support person present and your employer unreasonably refuses your request, this may go towards your claim for unfair dismissal (see below).

Unfair dismissal

Unfair dismissals are those which are 'harsh, unjust, or unreasonable' and include terminations by an employer where there is no valid reason or there has been no procedural fairness. If you believe you have been dismissed in a way which is harsh, unjust or unreasonable, you may be able to make a claim for unfair dismissal to the Fair Work Commission. It may be possible to be reinstated or to receive compensation for the wages and other entitlements lost in the period between the dismissal and re-employment. The law on unfair dismissal is complex and it is wise to seek advice about your situation. If you decide to make a claim, don't delay.

Unfair dismissal applications must be lodged within 21 calendar days after the dismissal takes effect.

Only employees can make a claim for unfair dismissal. This means that if you are engaged as an independent contractor or subcontractor then you cannot make a claim. However, in some circumstances workers who are called contractors are legally recognised to be employees. If you do not know what your employment status is or you are unsure whether you are a genuine independent contractor or not, you should get advice as soon as possible.

Not every employee can make a claim for unfair dismissal. You are excluded from making a claim if any of the following applies to you:

- you have been working for your employer for less than 6 months, or, if your employer is a small business employer, less than 12 months (see the definition of a small business employer below);
- you are working for a small business employer (see the definition of a small business employer below) who has complied with the Fair Dismissal Code. You can find the Fair Dismissal Code on the website of the Fair Work Commission. You should seek advice if you do not believe your small business employer has complied with the Code;
- you are a casual employee (except where you have worked on a regular and systematic basis for the required amount of time as described above and prior to the dismissal you had a reasonable expectation of continuing employment);
- you earn over \$139,900 per year and you are not covered by an Modern Award or agreement. This amount is indexed each year;
- you are employed under a fixed term contract of employment or a training arrangement for a specified period of time (or season) or for a specified task and the contract, task, season or training period has ended;
- your dismissal was for 'serious misconduct' (as discussed above);
- you are an independent contractor; or
- your dismissal was a genuine redundancy.

In deciding whether your dismissal was unfair, the Fair Work Commission will look at:

- whether there was a valid reason for the dismissal related to your capacity or conduct;
- whether you were notified of that reason;

- whether you were given any opportunity to respond to the reason;
- whether your employer unreasonably refused any request you made to have a support person present at any discussions relating to the dismissal;
- whether you had been warned about unsatisfactory performance before the dismissal (if this was the reason for the dismissal); and
- the size of the business and the absence of dedicated human resource management specialists.

As at 1 July 2016, the filing fee or cost of lodging an unfair dismissal application is \$69.60. The compensation limit for a successful unfair dismissal claim is \$69,950, or 6 months of the dismissed employee's annual income, whichever is less.

What is a small business employer?

A small business employer is an employer with less than 15 employees, no matter how many hours they work. Casual employees are only counted if they are employed on a regular and systematic basis.

General protections and dismissal

Under the *Fair Work Act 2009* it is against the law for your employer to terminate your employment, or demote you (if the demotion involves a significant reduction in duties or remuneration), because of any of the following:

- race or colour
- sexual preference
- trade union activity or membership
- religion
- family or carer's responsibility
- sex (gender)
- age
- pregnancy or potential pregnancy
- political opinion
- national extraction or social origin
- marital status
- physical or mental disability
- having or exercising a workplace right
- making an inquiry or complaint about your employment
- temporary absence from work due to illness or inquiry
- absence from work during parental leave

General protection termination applications must be made within 21 calendar days

after the termination took effect.

Unlike unfair dismissal, any employee can make a general protections claim on the above grounds. There are no exclusions.

A general protections application is made to the Fair Work Commission. If the matter is unable to be resolved via conciliation conference the parties can agree to have the matter resolved via arbitration in the Fair Work Commission. Alternatively, the applicant may make a separate application to the Federal Court or Federal Circuit Court.

If you believe you have been dismissed for a discriminatory reason, you may be able to make a complaint under anti-discrimination law instead of a general protections claim under the *Fair Work Act 2009*. See factsheet 11 *Discrimination and sexual harassment* for more information and seek advice on which law is most applicable to your situation.

Note that under the *Fair Work Act 2009*, there is also protection for employees who are treated adversely at work (but not dismissed) for a discriminatory reason or because they exercised a workplace right. See factsheet 11 *Discrimination and sexual harassment* and 12 *General protections and adverse action* for more information.

Where can I get more help?

NT Working Women's Centre

Freecall: 1800 817 055

Web: www.ntwwc.com.au

The Fair Work Commission

Ph: 08 8936 2800

Local call: 1300 799 675

Web: www.fwc.gov.au

The Fair Work Ombudsman

Fair Work Info line: 13 13 94

Web: www.fairwork.gov.au

Your Union

Unions NT

Ph: 8941 0001

Web: www.unionsnt.com.au

Darwin Community Legal Service

Freecall: 1800 812 953

Web: www.dcls.org.au

NT Legal Aid Commission

Freecall: 1800 019 343

Web: www.ntlac.nt.gov.au

To access an interpreter

Interpreting and Translating Service NT

Ph: 1800 676 254

Web: www.itsnt.nt.gov.au/

Aboriginal Interpreter Service

Ph: 8999 8353

Web: www.ais.nt.gov.au/

For people with a hearing and/or speech impairment

National Relay Service

Ph: 133 677

Freecall: 1800 555 677

The NT Working Women's Centre provides free and confidential information, advice and assistance to women about work related matters.

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