



AN EMPLOYEE'S GUIDE TO  
**UNFAIR DISMISSAL**



KINGSFORD  
LEGAL CENTRE

---

**ICLC** INNER CITY LEGAL CENTRE

---

## An Employee's Guide to Unfair Dismissal

---

*Do you think you have been unfairly dismissed from your job?*

If so, there may be something you can do about it. There are both federal and New South Wales unfair dismissal laws that allow you to make a claim to get your job back or to be compensated if you have been unfairly or unlawfully dismissed.

This guide looks at both the state and federal laws and provides a step-by-step overview of how each system works.

*Please note this website applies only to residents and the law of New South Wales, Australia as at August 2007.*

*Second edition 2007. Copyright Inner City Legal Centre and Kingsford Legal Centre. You may print all or part of this Guide for a non-profit purpose. To reproduce for any other purpose, permission should be sought from Kingsford Legal Centre and Inner City Legal Centre.*

### Disclaimer

The information contained on this site is general and is not intended as specific legal advice on any matter. If you have a legal problem you should consult a lawyer. To the extent permissible by law, Kingsford Legal Centre and Inner City Legal Centre disclaim all liability for anything contained on or accessed via this site and any use you make of it.

---



*This publication has been produced with the financial assistance of the Law and Justice Foundation of NSW. The Foundation seeks to advance the fairness and equity of the justice system and to improve access to justice, especially for socially and economically disadvantaged people. <http://www.lawfoundation.net.au>*

*Disclaimer: any opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Law and Justice Foundation's Board of Governors.*

---

### Acknowledgements

The second edition of the Employee's Guide to Unfair Dismissal was written by Joanne Moffitt, Natalie Ross, Trudy Sheehan and Catherine Whiddon. Inner City Legal Centre and Kingsford Legal Centre would also like to thank the following people who assisted with the publication of this Guide: Ingmar Taylor, Linda Tucker, Barry Jenkins, Jo Kwan, Vanessa McBride, Vanessa Mak, Katrina Wong, Jennifer Yeo, Christina Renner, Nicholas Sweeney, and Kip Fitzsimon.

The first edition was written by Julia Cabassi.

© August 2007

# CONTENTS

---

<b>1. INTRODUCTION</b>	<b>2 – 3</b>
1.1 So you think you have been unfairly dismissed? . . . . .	2
1.2 Get advice early and act quick - TIME LIMITS . . . . .	2
1.3 Where can I get advice? . . . . .	3
1.4 Other remedies . . . . .	3
<b>2. CHECKLIST –</b>	
<b>Find out whether you should use the New South Wales or Federal system</b>	<b>4 – 5</b>
Step 1: Work out who was your employer . . . . .	4
Step 2: Work out whether your employment was covered by state or federal award or agreement . . . . .	4
Step 3: Work out if you were employed by a "constitutional corporation" . . . . .	4
Step 4: Complete the following CHECKLIST to determine if you are able to bring a claim in the state or federal systems . . . . .	5
<b>3. THE FEDERAL SYSTEM</b>	<b>6 – 22</b>
3.1 What is unfair dismissal in the federal system? . . . . .	6
3.2 Who can make an unfair dismissal claim in the federal system? . . . . .	7
3.3 Who cannot make an unfair dismissal claim in the federal system? . . . . .	8
3.4 What is unlawful termination in the federal system? . . . . .	10
3.5 What is a claim for termination without notice in the federal system? . . . . .	10
3.6 Time limits . . . . .	12
3.7 How to make a claim in the federal system? . . . . .	12
3.8 What are "jurisdictional issues"? . . . . .	14
3.9 Conciliation . . . . .	15
3.10 Arbitration at the Australian Industrial Relations Commission . . . . .	18
3.11 Hearings in the Federal Court or Federal Magistrates Court . . . . .	21
<b>4. THE NEW SOUTH WALES SYSTEM</b>	<b>23 – 32</b>
4.1 What is unfair dismissal in the NSW system? . . . . .	23
4.2 Time limits . . . . .	23
4.3 Who can make an unfair dismissal claim in the NSW system? . . . . .	23
4.4 Who cannot make an unfair dismissal claim in the NSW system? . . . . .	24
4.5 How to make a claim in the NSW system . . . . .	25
4.6 Conciliation . . . . .	26
4.7 Arbitration . . . . .	28
4.8 Remedies: What orders can the IRC make? . . . . .	30
4.9 Costs . . . . .	30
4.10 What is a claim for termination without notice in the NSW system? . . . . .	31
<b>5. WHERE TO GET HELP</b>	<b>33</b>
<b>6. LEGAL TERMS AND ACRONYMS</b>	<b>34</b>

---

# 1. INTRODUCTION

---

## 1.1 So you think you have been unfairly dismissed

---

Do you think you have been unfairly dismissed from your job? If so, there may be something you can do about it. There are both federal and New South Wales unfair dismissal laws that allow you to make a claim to get your job back or to be compensated if you have been unfairly or unlawfully dismissed.

The state and federal industrial laws have different procedures for unfair dismissal claims. Applications under the state laws are made under the NSW *Industrial Relations Act 1996* (IRA) and lodged in the NSW Industrial Relations Commission. Applications under the federal laws are made under the federal *Workplace Relations Act 1996* (WRA) and lodged in the Australian Industrial Relations Commission.

Under the federal *Workplace Relations Act*, sacked workers can also make claims for unlawful termination as a result of discrimination by the employer, and for payment in lieu of proper notice.

This guide looks at both the state and federal laws and provides a step-by-step overview of how each system works.

### **Separation Certificate**

If you have been dismissed, you should request a separation certificate from the employer. This is a document used by Centrelink to determine what payments if any should be made to a dismissed employee. Depending on the type of payment being sought and the client's particular circumstances, a separation certificate may not be required. Speak to Centrelink to see if they require a separation certificate.

### **Reasons in writing**

Ask the employer for reasons for the dismissal in writing. The employer is not obliged at law to give reasons in writing. However, if the employer provides written reasons it makes it easier to assess

your position in relation to a possible claim for unfair dismissal, unlawful termination or discrimination.

### **Make notes of what happened**

If you are dismissed, as soon as possible make notes of:

- any events leading up to the dismissal and any witnesses to those events;
- the dismissal itself; and
- any contact between you and the employer or witnesses after the dismissal.

Put dates, times and places on these notes.

## 1.2 Get advice early and act quickly - TIME LIMITS

---

If you think you have been unfairly dismissed it is important to get advice as soon as possible and to act quickly.

Under federal unfair dismissal laws, you must lodge your application within **21 days** of being dismissed from work - that is, the last day of your employment.

Under state unfair dismissal laws, you must lodge your application within **21 days** of being dismissed from work.

These are strict time limits and if you think you have a claim you should get advice as quickly as possible. Do not delay putting in your claim because you are waiting for advice.

To avoid the risk of having your employer dispute your entitlement to claim because of a late application, it is important that you try to get your application in on time.

**Note:** It is possible to lodge a late application but it will only be accepted if you have good reasons for lodging it late. Get advice as soon as possible.

## 1. INTRODUCTION (continued)

---

**Important note:**  
You must make your claim within 21 days

### 1.3 Where can I get advice?

---

#### *Your trade union*

If you are a member of a trade union, contact your union. Unions provide their members with free, confidential advice and advocacy on industrial issues, including unfair dismissals, work conditions and wages, and other industrial disputes. As a member, you are entitled to receive assistance and support from union industrial officers. Your union may assist you by negotiating with your employer for your reinstatement and/or compensation, and act or represent you in an unfair dismissal claim. Some unions may be willing to assist you if you join up and pay union fees for a specific period in arrears or a fee for service. This will vary from union to union, but may prove a more cost effective option than the costs of a private solicitor and will ensure that you have access to your union in future.

#### *Community Legal Centres, LawAccess or the Legal Aid Commission*

If you are not a member of a union you can contact a community legal centre, or LawAccess or the Legal Aid Commission for free advice.

#### *The Workplace Ombudsman (formerly the Office of Workplace Services)*

The Workplace Ombudsman's responsibility is to ensure the rights and obligations of employees and employers under the new *Workplace Relations Act 1996* (Federal system) are understood and enforced fairly.

#### *Private lawyers*

You can contact a community legal centre or the Law Society of New South Wales for referral to a private lawyer who offers advice in employment law. Private lawyers will generally charge fees for their services so make sure you get an estimate of

costs before proceeding. Some private lawyers will offer the first appointment for free. Check this when making the appointment.

#### *The registries of the Australian Industrial Relations Commission or the New South Wales Industrial Relations Commission*

The registry (office) of the Australian Industrial Relations Commission (AIRC) or NSW Industrial Relations Commission (IRC) can also be contacted for assistance. Staff at both commissions can help you lodge your application and give you advice about the process of making a claim but they cannot give you advice about the likely success or otherwise of your case. You will need to discuss this with your union or a lawyer.

See *Where to get help* details at the end of this guide for contact details.

### 1.4 Other remedies

---

If you have been unfairly dismissed, there may be laws other than unfair dismissal laws that offer a remedy.

These include:

- A discrimination complaint under state or federal anti-discrimination legislation;
- A breach of contract or breach of industrial instrument claim in the common law courts;
- A Workers Compensation claim;
- A complaint of breach of Occupational Health and Safety laws; or
- A claim of misleading and deceptive conduct.

Choosing the best option at the outset is important. You should seek advice from a lawyer, union or community legal centre.

See *Where to get help* details at the end of this guide.

## 2. CHECKLIST

### Find out whether you should use the New South Wales or Federal system

It is important to identify which system, New South Wales or federal, applies to your type or place of employment so that you lodge your application in the right place.

#### Step 1: Work out who was your employer

All employees must receive a payslip. The payslip should tell you the name of your employer. At the end of each financial year employers must give their employees a PAYG Payment Summary to be used to complete their tax return. This will also have the name of your employer.

#### Step 2: Work out whether your employment was covered by a state or federal award or agreement

In New South Wales, employers and employees can be covered by either the federal or state industrial relations systems, and be employed under federal or state awards and agreements. Awards and collective and individual agreements (AWAs) are legal documents (sometimes called industrial instruments) that set standards of employment conditions and entitlements such as pay rates, annual leave, parenting leave and the required period of notice for termination of employment. There are different awards or agreements for different occupations, industries and workplaces. Some employees are not covered by any award or collective agreement or AWA.

The award or agreement should be displayed at your workplace but often it is not. If you don't know the name of your award or agreement, or even whether you are covered by one, you need to check the options below to work out your situation.

1. Workplace Infoline (previously the Federal Wageline) on 1300 363 264 (free call within NSW).  
*Visit:* <http://www.wagenet.gov.au>
2. NSW Office of Industrial Relations Awards Enquiry Service on 131 628.  
*Visit:* <http://www.industrialrelations.nsw.gov.au/>
3. NSW Industrial Relations Commission (for state Enterprise Agreements).  
*Visit:* [http://www.agd.nsw.gov.au/lawlink/irc/ll\\_irc.nsf/pages/IRC\\_procedures\\_legislation\\_EA\\_index\\_All](http://www.agd.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_procedures_legislation_EA_index_All)

#### Step 3: Work out if you were employed by a "constitutional corporation"

Since the Workchoices laws came into force on 27 March 2006, employees who are employed by a "constitutional corporation" are covered by the Federal industrial relations system. This is the case even if they were previously covered by a state award or agreement, or not covered by any award or agreement.

Companies, associations and other bodies that have been incorporated are 'corporations'. Sometimes they will have Pty or Co or Ltd or Inc in their name. Whether they are constitutional corporations will depend on whether they can be classified as either 'trading' or 'financial' corporations.

Most businesses that are companies will be constitutional corporations. However, if a corporation is a charitable or not-for-profit organisation it may not be a constitutional corporation and you will need to get advice from a union or lawyer.

See *Where to get help* at the end of this guide.

## 2. CHECKLIST (continued)

---

### Step 4:

Complete the following CHECKLIST to determine if you are able to bring a claim in the State or Federal systems.

---

**1. You were employed as a maritime worker, stevedore or flight crew operator;**

YES  Section 3 - The Federal System

NO  Question 2

**2. You were employed in the Commonwealth Public Service or by a Commonwealth Authority;**

YES  Section 3 - The Federal System

NO  Question 3

**3. You were employed in Victoria, the Australian Capital Territory or Northern Territory;**

YES  Section 3 - The Federal System

NO  Question 4

**4. You were employed by a constitutional corporation (see Step 3 above) and were covered by an award or agreement or earned less than the prescribed amount (\$101,300 as of 1 July 2007);**

YES  Section 3 - The Federal System


NO  Question 5

**5. You were covered under a Federal award or Federal Certified Agreement and you were employed before 26 March 2011;**

YES  Section 3 - The Federal System


NO  Question 6

**6. You were employed in the NSW Public Service or a NSW government agency;**

YES  Section 4 - The New South Wales System

NO  Question 7

**7. You were employed by a sole trader, partnership, or a corporation that is not a "constitutional corporation" and your employment was covered under a NSW State award or registered enterprise agreement, or your annual salary package did not exceed the prescribed amount (\$101,300 as at 1 July 2007);**

YES  Section 4 - The New South Wales System

NO  Section 1.4 - Other Remedies

## 3. THE FEDERAL SYSTEM

---

### ARE YOU IN THE RIGHT SECTION OF THIS GUIDE?

If you have not already done so, please complete the CHECKLIST in Section 2.

In the Federal system, there are two main ways to challenge your termination. Claims can be made for unfair dismissal, unlawful termination (eg; discrimination), or both. You can also make a claim for payment if you haven't been given the correct notice or payment in lieu of notice. Information on unfair dismissal is explained in this section. Information on unlawful termination is in section 3.4 and information on a claim for payment of notice is in section 3.6. All three types of claims are made on the same form and lodged with the Australian Industrial Relations Commission (AIRC).

### 3.1 What is unfair dismissal in the federal system?

---

***The dismissal was 'harsh, unjust or unreasonable'.***

Unfair dismissal is the term used when the circumstances of the dismissal are 'harsh, unjust or unreasonable': either because the reasons for dismissal were unfair, or because the way in which the dismissal happened was unfair.

The following factors are considered when deciding whether a dismissal was 'harsh, unjust or unreasonable':

- Whether there was a valid reason for the dismissal, related to the employee's work performance or to the operation of the employer organisation;
- Whether the employee was notified of that reason;
- Whether the employee was given an opportunity to respond to any reasons related to their capacity or conduct;
- If the dismissal related to unsatisfactory work performance, whether the employee had been

warned about their unsatisfactory performance before termination;

- The degree to which the size of the employer's business, or the absence of dedicated human resource management specialists, may have had an impact on termination procedures; and
- Any other relevant matters.

#### ***What are valid reasons for dismissal?***

Generally, the lawful reasons an employer may give for terminating your employment are:

- Redundancy
- Misconduct
- Lack of ability to perform the required duties (eg; *poor work performance*)

#### ***Redundancy***

Redundancy occurs when the job you are doing is no longer needed to be done by anyone. This may be because of a downturn in production, sales or the economy; the introduction of new technology; business relocation; the sale or merger of the business; or an internal restructure of the business. It is the job that becomes redundant, not you. This does not necessarily mean you must leave that workplace - you may be offered another position within the company or organisation.

You will generally not be successful in an unfair dismissal claim if there is a genuine redundancy. However, if your employer has advised you that your position is being made redundant but then advertises a position similar to yours or employs someone else to do your job, it may not be a genuine redundancy and is therefore open to challenge.

#### ***Misconduct***

Valid reasons for dismissal include: theft, fraud, harassment, bullying, persistent lateness, disobedience, coming to work drunk or under the influence of drugs, rudeness to clients, customers or other employees; poor timekeeping (evidenced over a

### 3. THE FEDERAL SYSTEM (continued)

---

period of time); and absenteeism without reasonable cause.

If the behaviour amounts to serious misconduct the employee may be sacked on the spot without notice. However, to allege serious misconduct and sack an employee without notice, the employer must still follow fair procedures. This may mean allowing the employee to respond to allegations, conducting a fair investigation of the facts and a consideration of the employee's previous work record and length of service.

In rare cases, where the employee has lengthy service and an otherwise unblemished work record, it may be considered harsh (and therefore an unfair dismissal) to dismiss an employee for misconduct. This will depend on the seriousness of the misconduct.

#### **Poor work performance and warnings**

If an employee is genuinely unable to perform the required duties of the job the employer is validly able to dismiss that employee. However for this to be fair, the employer will usually need to show that it had raised these concerns with you and given you a chance to respond to any allegations, or to take steps to improve your performance. You should be allowed enough time to fix any perceived problem.

The legislation doesn't spell out how your employer should raise its concerns, so what is considered fair will depend on the circumstances. There is no specific requirement as to the number of warnings that must be given. This will usually depend on the circumstances and the seriousness of the allegations. You could expect a warning prior to your dismissal to put you on notice that if your conduct or behaviour doesn't improve, you will be dismissed. This warning doesn't need to be in writing.

However, a dismissal will not be considered unfair merely because of the absence of a prior warning if the reason for dismissal was serious misconduct.

### 3.2 Who can make an unfair dismissal claim in the federal system?

---

#### **You must have been dismissed**

Termination of employment or dismissal is usually a clear-cut event that happens when your employer tells you that your employment is about to end.

Resignations are not generally considered dismissals. However, in some circumstances when a resignation is not voluntary, it can be considered a dismissal. Where your employer has done something that has forced you to resign or leave, the courts have described this as a termination 'at the initiative of the employer'. This type of dismissal is known as a 'constructive dismissal'.

Another form of constructive dismissal is demotion or change in job description without cause or negotiation. This happens when your terms of employment were significantly changed or your wages and/or hours significantly reduced.

**"At the initiative of the employer" has been interpreted by the AIRC to mean "that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship".**

#### **Examples of constructive dismissal**

Peter was accused of theft and was told by his employer that although the matter of resignation was his decision, if he did not resign then the police would be called.

Karen received a letter advising her that she was no longer required as supervisor of the sales floor due to staffing levels. Without her agreement she was returned to the "shop floor" with a consequent reduction in her pay.

### 3. THE FEDERAL SYSTEM (continued)

---

#### 3.3 Who cannot make an unfair dismissal claim in the federal system?

---

All employees in the Federal system are able to apply for unlawful termination - see section 3.4 - *What is Unlawful Termination in the Federal System?*

However, there are restrictions on who is eligible to make a claim for unfair dismissal. These exclusions are applied regardless of how unfair your dismissal may have been.

**The following employees cannot make a claim for unfair dismissal:**

##### 1. Employees employed by an employer with 100 or fewer employees

You cannot make a claim of unfair dismissal if the employer employed 100 employees or fewer, including:

- the employee who was terminated; and
- any casual employee employed by the employer on a regular and systematic basis for at least 12 months but not including any other casual employee.

For the purposes of calculating the number of employees, the relevant time is the time when the employer gave the employee the notice of termination or the time when the employer terminated the employee's employment - whichever happened first.

Related bodies corporate (eg; holding companies, subsidiaries etc) are taken to be one entity. Franchises will generally be considered separate entities, subject to the terms of the franchise agreement.

##### 2. Workers who are not employees but contractors

Workers employed as independent contractors or sub-contractors cannot make an unfair dismissal or unlawful termination claim. However, sometimes workers are called 'contractors' but really they are employees. If you do not know if you are an employee or a contractor you should get advice as soon as possible.

---

##### 3. Employees who have been employed for less than 6 months

You cannot make an unfair dismissal claim if you have been employed for less than 6 months, unless a shorter period was agreed to, in writing, by the employer and yourself before you started employment. This qualifying period also applies following the sale of a business, unless it was agreed to be waived, in writing, by you and the new employer.

---

##### 4. Employees under a contract of employment for a fixed and specified period

You cannot make a claim of unfair dismissal if you were employed under a fixed term contract. Some jobs are contracts for a fixed period of time, such as 12 months. A fixed term contract can only be brought to an end when the fixed period is over, except for serious misconduct. See 3.5 - *What is a claim for termination without notice?* A contract that provides for the parties to give notice before the end of the specified contract period will not be considered to be a contract for a specific period.

*Scott is employed as a mechanic on a 12 month contract which provides that the employment may be brought to an end upon the giving of 4 weeks notice. Because the contract allows for termination by notice **before** the expiry of the 12 month term, it is not classified as a contract for a specified period for the purposes of the Workplace Relations Act. Therefore, Scott is still able to apply for unfair dismissal provided he has passed the 6 month qualifying period.*

### 3. THE FEDERAL SYSTEM (continued)

---

#### 5. Employees under a contract of employment for a specified task

Some employees are employed under a contract to work on a fixed task and their employment ceases when the task is completed. These employees cannot make a claim for unfair dismissal. If the employment continues after the end of the task without a new contract being made, then they are no longer excluded.

*Su-Kim took a position which involved the processing of certain transactions over the phone until the installation of a new computer program which was being developed to do the same job. She and her employer both understood that the position was to complete the specified task and that when the program was up and running Su-Kim's position would come to an end.*

#### 6. Casual employees engaged for a short period

Casual employees cannot make an unfair dismissal claim unless they have worked for a particular employer on a regular and systematic basis during a period of 12 months or more with a reasonable expectation of continuing employment. (However all casual employees can make unlawful termination claims - see section 3.4.)

Sometimes people are called 'casual' and are paid as 'casual' but they work regular shifts every week; they can't take time off without approval or without organising their own replacement, and they have a reasonable expectation of continuing employment. These people may not be true 'casuals' and may still be able to bring an unfair dismissal claim if employed between 6 and 12 months. Seek legal advice if this is the case.

#### 7. Trainees and apprentices

Certain trainees under a traineeship agreement are not able to bring an unfair dismissal claim. The training agreement must be consistent with the *National Training Wage Interim Award 1994* or the *National Training Wage Award 2000* and be

registered with a state or federal training authority. Because these requirements are so specific, don't immediately assume that because you are called a 'trainee' you cannot make a claim. Seek legal advice.

Apprenticeships fall under the jurisdiction of the NSW Department of Education and Training. An apprentice is appointed a designated apprenticeship officer. These officers help to mediate disputes between employers and apprentices.

Enquiries about apprenticeship disputes should be referred to the Department of Education and Training: Apprenticeships and Traineeships. See *Where to get help* at the end of this guide.

#### 8. Employees dismissed for genuine operational reasons

An application must not be made for unfair dismissal if the employee was terminated for "genuine operational reasons" or for reasons that include genuine operational reasons. Operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's business. Examples include the loss of a contract, the introduction of new equipment, or a restructure of the business.

Whether a dismissal is for "genuine operational reasons" is a complex issue and you should get advice from your union or a lawyer.

#### 9. Employees engaged on a seasonal basis

An employee cannot make a claim for unfair dismissal if they are employed on a seasonal basis (eg; a fruit picker).

#### 10. Employees who have made other claims relating to the dismissal

An unfair dismissal claim must not be made if other legal proceedings have already been commenced relating to the dismissal, such as a discrimination complaint.

### 3. THE FEDERAL SYSTEM (continued)

---

#### 11. Employees who are not employed under an award or agreement and have a salary package greater than the prescribed amount

An employee who is not covered by an Award, Certified Agreement or Australian Workplace Agreement (AWA) and whose maximum remuneration is over the prescribed amount is excluded from making an unfair dismissal claim. This amount increases every year on 1 July and was \$101,300 on 1 July 2007. Remuneration is calculated as an annual salary package and includes superannuation, personal use of a car, payment of other expenses such as telephone, health cover, school fees, accommodation etc.

#### 3.4 What is unlawful termination in the federal system?

---

All employees, whether covered by a state or federal industrial instrument or not, can make a claim of unlawful termination. The various exclusions that apply to unfair dismissal claims, explained in *section 3.3*, do not apply to unlawful termination claims.

It is unlawful to terminate the employment of an employee on discriminatory grounds, including:

- Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

If you believe you were terminated on any of these discriminatory grounds, you should get advice about whether to proceed with a claim of unlawful termination of employment or to claim under federal or state anti-discrimination laws.

It is also unlawful to dismiss an employee for the following reasons:

- Temporary absence from work because of illness or injury;

- Trade union membership or participation in trade union activities;
- Non-membership of a trade union;
- Acting or seeking to act as an employee representative;
- Making a legal complaint or participating in proceedings against the employer involving alleged breaches of laws or regulations (for example, making a complaint to WorkCover about an unsafe workplace);
- Refusing to make, sign, extend, vary or terminate an Australian Workplace Agreement (AWA);
- Absence from work during maternity leave or other parental leave; and
- Temporary absence from work because of voluntary emergency activity.

#### 3.5 What is a claim for termination without notice in the federal system?

---

An employer must not dismiss an employee without giving them the required period of notice or payment in lieu of notice unless the employee is guilty of serious misconduct (see *What is serious misconduct?*). As an employee, you are also entitled to all wages and leave entitlements up to the date of the dismissal.

The Workplace Relations Act sets out the minimum notice that you should receive when dismissed. This depends on how long you have been employed and your age (see *the box on opposite page for details*).

The notice periods given in the box are minimum periods of notice only. If you are employed under an award or Australian Workplace Agreement it may specify longer notice periods which you would be entitled to. If you are not covered by an award or other industrial instrument, you should check if

### 3. THE FEDERAL SYSTEM (continued)

your contract of employment allows for longer notice periods. Notice periods, whether under an award, agreement or contract, can be longer than those outlined in the Act but cannot be shorter. Notice need not be in writing.

#### Minimum Periods of Notice

Period of Employment	Notice Required
1 year or less	At least 1 week
More than 1 but not more than 3 years	At least 2 weeks
More than 3 but not more than 5 years	At least 3 weeks
Over 5 years	At least 4 weeks

*If you are over 45 years old and have been in employment for at least 2 years of continuous service, add an extra week.*

#### Payment in lieu (instead) of notice

Your employer can give you payment instead of notice, that is, 'pay you out' rather than have you work during the notice period. In this case, the payment must be at least equal to the total amount you would have been entitled to if you had continued to work until the end of the required notice period.

#### What is serious misconduct?

The only situation where employer notice (or payment in lieu) is not required is where the employee's serious and wilful misconduct entitles the employer to instantly or summarily dismiss the employee. The employer may ask the employee to leave the workplace immediately.

Some things the courts have found may constitute serious misconduct are:

- theft;
- fraud;

- assault;
- misappropriation of funds;
- serious harassment (including sexual harassment);
- abusing or threatening another employee;
- malicious damage to property;
- a wilful, serious breach of codes of conduct or workplace policies;
- wilful disobedience of a lawful and reasonable instruction given by a supervisor; and
- behaviour wilfully endangering themselves or others.

However, what will constitute 'serious misconduct' depends on the facts in each circumstance so seek advice if you feel you have been unfairly treated.

#### Employees who cannot claim for 'Failure to comply with notice provisions'

Employees who are excluded from making claims under the notice provisions are:

- Casual employees employed for less than 12 months;
- Daily hire employees in the building and construction industry;
- Daily hire employees in the meat industry;
- Weekly hire employees in the meat industry, whose termination is determined solely by seasonal factors; and
- Maritime employees (whose employment is covered by Schedule X (Marine Cooks, Stewards and Seamen) of the Maritime Industry Seagoing Award 1983 (as in force on 16 November 1994)).

## 3. THE FEDERAL SYSTEM (continued)

---

### 3.6 Time limits

#### Don't forget the 21 day time limit.

An unfair or unlawful dismissal claim, or a claim for termination without notice, must be made within 21 days from the date of the effect of the termination of employment – that is, the last day you worked. This is a strict time limit, and if you think you may have a claim you should get advice as quickly as possible. However, you should not delay in putting in a claim just because you are waiting for advice.

#### Can a claim be accepted out of time?

The AIRC may accept a late application, although your employer might object to this as a jurisdictional issue. See 3.8 *What are "jurisdictional issues"?*

The legislation doesn't spell out the circumstances in which the AIRC will accept a late application although it does refer to a decision called *Brodie-Hanns v MTV Publishing Ltd*, which established principles to be applied by the AIRC when determining out of time applications.

The factors that are considered include:

- Whether there was a good/acceptable reason for the delay. The starting position is that the time limit should be complied with unless there is an acceptable explanation for the delay. Special circumstances however are not necessary.
- How late the application was made.
- The merits of the application.
- Whether to grant an extension would be fair to other persons in a similar position as the applicant.
- Whether you took some action before filing the claim which demonstrated that you contested the termination, for example asking the employer for re-employment or compensation.
- Whether your employer was allowed to believe that the matter was concluded.

- Whether an extension of time would be prejudicial (cause difficulties) to your employer (or to others), for example, if the delay makes it difficult for your employer to defend the claim or if the dismissal was so long ago that witnesses would not be available.

The AIRC will look at each application on its own merits and circumstances to decide whether an extension of time would be fair in the circumstances.

### 3.7 How to make a claim in the Federal system

---

Claims for unfair dismissal, unlawful termination and failure to give notice are initially lodged with the Australian Industrial Relations Commission (AIRC).

A summary of the process for making a claim of unfair dismissal and /or unlawful termination and/or failure to give notice is explained here, with more detail below:

1. The employee completes and files an application for relief in respect of termination of employment with the AIRC (Form R27). A filing fee must be paid or an application to waive the filing fee on the basis of financial hardship should also be filed.
2. The AIRC will confirm in writing that they have received your application and will send a copy of your application to the employer.
3. The employer files an Employer's Notice of Appearance (7 day time limit).
4. At the same time, the employer may also notify the Commission that there is a jurisdictional issue or that your application is seen as frivolous, vexatious or lacking in substance (*see this section for more details*). If this happens with your claim you will be notified to attend the AIRC to have these preliminary issues dealt with.
5. The AIRC notifies the employee and employer of the time, date and location of a conciliation conference.

### 3. THE FEDERAL SYSTEM (continued)

6. A conciliation conference is held.
7. If conciliation fails and the case is not settled, the claim can be heard in either the AIRC, the Federal Court, the Federal Magistrate's Court or a state court, depending on the kind of claim (see this section for more details).

Copies of forms and information about termination of employment claims can be found on the AIRC website (visit: <http://www.airc.gov.au>).

#### **Form R27 - Application for relief in respect of termination of employment**

You will have to give the following information on the form:

- Your name, address and contact details.
- Whether you require the assistance of an interpreter.
- Your employer's name and address. You should refer to a PAYG Payment Summary, pay slip, letter of appointment, contract of employment, workplace agreement or correspondence from the employer in order to ascertain the correct name of the employer. If you believe the employer is a company, details can be searched for on the Australian Securities and Investment Commission website (visit: <http://www.asic.gov.au/asic/asic.nsf>).
- Details of your employment, including the date you commenced employment and the date termination took place.
- If you are lodging the application more than 21 days after your termination took effect, you must provide reasons for seeking an extension of time to lodge your application.
- Whether a union or lawyer or someone else is acting on your behalf.
- What are the ground/s of your application - eg; unfair dismissal, unlawful termination of employment, and /or failure to give notice.

- A brief summary of the reasons given for termination if you know them.
- The remedies you are seeking (eg; reinstatement and/or compensation).
- A signed declaration that you will not make or have not made a claim about your dismissal elsewhere.

The registry staff at the AIRC can give advice about filling in the form, if necessary, but cannot give advice as to the merits of your claim.

#### **Grounds of your claim**

On the application form (Form R27) you are required to indicate the ground or grounds upon which your application is based as shown in the extract from the form below. You can identify more than one ground.

<b>Grounds for application</b>	
<b>18 – Grounds upon which this application is based</b>	Identify the ground or grounds under subsection 643 (1) of the Act upon which this application is based:
	(a) on the ground that the termination was harsh, unjust or unreasonable; and/or  (b) on the ground of an alleged contravention of: <ul style="list-style-type: none"> <li>• section 659 (discrimination or other prohibited reasons); and/or  <i>[Write here the paragraph(s) in subsection 659(2) of the Act on which the applicant relies]</i></li> <li>• section 660 (<i>failure to notify Centrelink</i>); and/or</li> <li>• section 661 (<i>failure to give notice of termination</i>)</li> </ul>

### 3. THE FEDERAL SYSTEM (continued)

---

You have three main options. These are:

- Unfair Dismissal which is the first box on the form and is part (a) "on the ground that the termination was harsh, unjust or unreasonable";
- Unlawful Dismissal which is the second box described as "section 659"; or
- Failure to give notice which is the fourth box described as "section 661".

The third box described as section 660 (*failure to notify Centrelink*) may apply if 15 or more employees were dismissed at the one time. You should seek advice if you wish to base your claim on this ground.

#### **Lodging the form and fee**

The form can be lodged in person, by post, document exchange, fax or electronic lodgement via the AIRC website ([www.airc.gov.au](http://www.airc.gov.au)) in which case you must provide credit card details on the application, together with a filing fee of \$51.40 (this amount may change from time to time so check with the AIRC Registry). The fee may be refunded if the matter is discontinued.

The Registrar may waive the filing fee if it will cause serious hardship. Application for waiver of the fee should be attached to Form R27. The AIRC has a fee waiver form on their website.

Once your application has been lodged, your claim will be recorded and given a file number. You should receive a letter confirming receipt of your application.

#### **Notifying your employer**

The AIRC will send a copy of your claim to your employer, together with forms for the employer to fill in and return to the AIRC. This is why it is important to give the correct contact details to avoid any delays in notifying your employer. Your employer will be asked to return a Notice of Employer's Appearance (Form R28) to the AIRC within seven days of receiving your application, and send a copy to you.

The AIRC will notify you and your employer in writing of the time, date and location of a conciliation conference, which both of you are required to attend. If for any reason you can't attend on that date you need to apply for an adjournment in writing providing full reasons. Adjournment applications will only be granted on substantial grounds. If you fail to attend a conciliation conference, your application may be dismissed.

Your employer may object to your application at any time on 'jurisdictional grounds' or if they think the application is frivolous, vexatious or lacking in substance. To do this, the employer must complete and lodge the correct form in the AIRC Registry and send a copy to you. This form will inform you about the issue/s the employer alleges prevent you from making a claim for unfair dismissal.

### **3.8 What are "jurisdictional issues"?**

---

Your employer may claim that the AIRC has no power (ie; is not allowed) to consider your claim because the jurisdictional conditions have not been met. If the employer does this, the AIRC will request written submissions or hold a hearing to decide whether your application should be accepted. Examples of the common jurisdictional issues your employer may raise are:

- That you are not eligible to make a claim for unfair dismissal (eg; because you were a trainee or a short term casual. See 3.3 *Who cannot make a claim for unfair dismissal in the federal system*); or
- That your application should not be accepted because it was lodged out of time.

#### **Deciding on jurisdictional issues**

Where the employer has raised a preliminary jurisdictional issue, the AIRC must deal with this before taking any further steps - unless the employer agrees to conciliation being held before the jurisdictional issue is decided.

### 3. THE FEDERAL SYSTEM (continued)

---

In deciding whether to hold a hearing, the Commission must take into account the cost to the business of the employer in attending a hearing. If the Commission decides not to hold a hearing, it will invite the employee and the employer to provide further information and will take such information into account when making its decision.

If a hearing is held, the parties will be notified in writing of the time, date and location of the hearing. Both the employee and employer will be required to attend.

It is important to get advice from your union or a lawyer before a jurisdictional hearing to ensure you can answer the issues raised by your employer. It would be helpful to have evidence of events and conversations such as emails, time sheets, pay slips, letters and diary entries that may support your case.

If the jurisdictional issue is decided in your favour the matter will proceed to a conciliation conference. If the AIRC decides against you, your file will be closed, subject to any application for costs, and you cannot proceed any further.

**NOTE:** that if you have lodged an unfair dismissal application that also included an unlawful termination application, the unlawful termination claim will continue if the jurisdictional issue only related to the unfair dismissal application.

Skye was dismissed because she took a day off sick. She rang the employer and told her shop manager she had been to the doctor and had a medical certificate saying she had the flu and would not be able to return to work for 3 days. The employer told her to come into work or she would be sacked. Skye had only worked with the employer for 5 months, so the employer argued the AIRC did not have jurisdiction to hear the unfair dismissal application because Skye had not worked in the shop for more than 6 months (the qualifying period). The employer also showed the Company's payroll only employed 20 employees. The Commission found it did not have jurisdiction to hear the unfair dismissal application. However, a conciliation

concerning the alleged unlawful termination whilst Skye was temporarily absent because of illness went ahead.

#### 3.9 Conciliation

---

Conciliation is usually the first step in the proceedings, except when there is a jurisdictional hearing. The aim is for claims to be processed as quickly as possible and to avoid unnecessary costs for both parties.

Conciliation involves a 'round the table' confidential discussion between you and your employer in front of a Commissioner from the AIRC. You will be given the chance to present your side of the story about your dismissal, as will your employer. The Commissioner will try to help both parties clarify the facts and reach a settlement. The Commissioner is primarily focussed on resolving the matter at the conciliation conference. However, if the matter doesn't settle at the first conciliation you can request a second conciliation conference, or the Commissioner may decide a follow-up conciliation conference is necessary. The majority of matters settle at conciliation or soon after.

Both you and your employer have a right to be represented at the conciliation conference but many people represent themselves. You may be represented by your union or a lawyer. Alternatively, you may take a support person to listen and observe or take notes.

##### *How to prepare for conciliation*

In conciliation it is important to be creative, flexible and willing to negotiate. But you must also be clear about what your bottom line is when it comes to reaching an appropriate settlement. Some of the things you should consider when working out what is reasonable compensation in your case are listed under Compensation.

### 3. THE FEDERAL SYSTEM (continued)

---

Before the conciliation conference...

1. Prepare a summary of the facts which support your claim.
2. List the issues you think your employer will raise and your response to those issues (eg; lateness, complaints etc.).
3. Decide how you want to settle the matter, that is, if you want reinstatement, re-employment and/or compensation.
4. If you are asking for reinstatement, seek compensation for lost wages between the time of your dismissal and reinstatement.
5. If you think reinstatement would not be possible, you will need to decide on an appropriate amount of compensation. Consider other options you might want from the settlement, for example, getting a reference or statement of service from your employer, or the opportunity to resign.

Information about conciliation conferences can be found in the video information package Termination of Employment - The Conciliation Process, produced by the AIRC.

The package contains a 15-minute video (also available in CD-ROM format) and a 12-page booklet. It provides an overview of subjects including the conciliation process, preparing for a conciliation conference, what happens in a conference, the use of interpreters and likely outcomes.

Copies of the booklet are available at no cost from Registry public counters in your capital city. The text of the booklet is available on the AIRC web site ([www.airc.gov.au](http://www.airc.gov.au)). The video has been distributed to unions and regional libraries throughout Australia and can also be viewed in Registry premises in your capital city.

#### **What happens if my claim is settled at conciliation?**

If you come to an agreement with your employer at the conciliation conference, you may be asked to

sign Terms of Settlement outlining the agreement you and your employer have reached. You must also lodge a Notice of Discontinuance (Form R32) with the AIRC to inform them that you no longer want to proceed with your claim. You must serve (personally or by mail or fax) a copy of this form on your employer. This form can be obtained from the AIRC Registry or their website. This form tells the AIRC that you don't want to take your claim further.

It is important that you don't lodge this form until your employer has actually done what they agreed to do in the settlement. Wait until your employer has reinstated you, re-employed you, or paid you the agreed compensation. If your employer fails to carry out the terms of the settlement that they agreed to, you should contact the AIRC to ask for the matter to be re-listed before the Commissioner who conciliated it.

Your employer may ask you to sign a Deed of Release as part of a settlement of your claim. This is an enforceable legal document setting out what has been agreed to in the settlement. Commonly it will have terms where the employee agrees not to bring any further claims against the employer, and where both parties agree to keep the settlement confidential. You should get legal advice if you don't understand the terms of a deed.

#### **What happens if my claim is not settled at conciliation?**

Most claims settle or are withdrawn and only a small percentage proceed to a formal hearing. If you cannot come to an agreed settlement with your employer, the following procedure will occur:

The AIRC Commissioner must issue a written conciliation certificate setting out:

- An indication to you and your employer of the Commissioner's view of the merits (likely success) of the ground/s in your application.
- If the Commissioner thinks fit, a recommendation that you do not proceed on one or more of the grounds in your application.

### 3. THE FEDERAL SYSTEM (continued)

---

- If, given what you have provided to the Commission, it considers your matter does not have reasonable prospects of success both you and your employer should be notified and you must be provided with an opportunity to provide further information. If the information is not provided or the Commissioner concludes that your application does not have reasonable prospects of success, your unfair dismissal claim will be dismissed.
- The certificate may also indicate that it was not possible to assess the merit of the application without hearing evidence.

You will then have to consider if you want to proceed to a hearing of your claim - but you need to act quickly as there are time limits.

The decision about what to do and where any further proceedings should be heard is a difficult one, and it is important to obtain legal advice about what is the best option in your case.

1. If the ground of your claim is for unfair dismissal you can proceed to arbitration in the AIRC. See *3.10 Arbitration at the Australian Industrial Relations Commission*.
2. If the ground of your claim is unlawful termination you can proceed to a hearing in the Federal Magistrate's Court. See *3.11 Hearings in the Federal Court or Federal Magistrates Court*.
3. If the grounds of your claim are both unfair dismissal and unlawful termination you can either proceed to arbitration in the AIRC on the grounds of unfair dismissal, or proceed to the Federal Court or Federal Magistrate's Court on the ground of unlawful termination.

In this case the usual choice would be to proceed to arbitration in the AIRC. This is because if you are eligible to claim under the unfair dismissal provisions, the discrimination issues could form part of your case to say that the dismissal was unfair. Procedures in the AIRC are less formal than in a court and the rules of evidence do not apply.

4. If your claim only involves failure on the part of the employer to give notice you should pursue the matter in the Local Court. See *section 4.10*. Usually, the Local Court would provide the most cost effective avenue for enforcing notice claims.
5. If your claim involves both unfair dismissal and failure to give notice you may choose to proceed with arbitration at the AIRC on the unfair dismissal and go to the Local Court on the notice issue.
6. If the grounds of your claim are for failure to give notice and unlawful termination you can choose to proceed in both the Local Court for the notice and either the Federal Court or Federal Magistrate's Court for the unlawful termination.

#### ***Lodging Notice of Election to Proceed to Arbitration or to Begin Court Proceedings***

If conciliation has failed and you want your claim to be formally determined at hearing, you must lodge in the AIRC Registry a Notice of Election to Proceed to Arbitration or to Begin Court Proceedings (Form R33). The time limit for lodging this form is **7 days** after the issue of the written Conciliation Certificate if unfair dismissal and/or failure to pay notice are the only grounds for the claim, and **28 days** after the issue of the Conciliation Certificate if unlawful termination is at least one ground for the claim.

These time limits are very important so do not delay if you wish to proceed. You must also serve a copy of this form immediately on your employer either personally, by post or by fax. If the Notice of Election is not lodged within time, the application lapses and the file will be closed.

The AIRC does have discretion to accept a Notice of Election form outside these time limits if it would be unfair not to do so.

### 3. THE FEDERAL SYSTEM (continued)

---

#### **Legal advice about whether to elect to go to a hearing**

The Federal Government has introduced an Unlawful Termination Assistance Scheme that enables employees to obtain up to \$4,000 to get legal advice on the merit of their unlawful termination claim (but NOT unfair dismissal claims).

The system is available for an employee whose application to the AIRC does not settle at conciliation and the Commission issues a certificate indicating that the claim may have merit or that the merit cannot be determined.

The employee must obtain a voucher from the Department of Employment and Workplace Relations that must be shown to the legal practitioner before advice can be provided.

To obtain a voucher the employee must meet a threshold of weekly earnings immediately prior to termination being at or below the income threshold (currently \$47,745 per year).

A legal practitioner cannot provide services under the Scheme unless he or she has signed an undertaking and is on a register of legal practitioners with the Department of Employment and Workplace Relations.

Payment is made directly to the legal practitioner by the Department.

**Note: that the legal funding is only for advice and is not available for work associated with lodging the claim, preparing the matter for hearing or conducting the hearing.**

#### **Legal Representation at arbitration or hearing**

Arbitration in the AIRC and hearings in a court are more formal than the conciliation stage and you should think carefully about whether you will need legal representation.

If you are in a union, your union may be able to represent you or will advise you about how to argue and present your case. Some unions will also appear for non-members for a fee. If you are not a union member, free advice is available from community legal centres and the Legal Aid Commission.

Legal Aid is not generally available for representation in employment matters and community legal centres can only provide representation in limited circumstances.

You may have to pay if you want a lawyer to represent you at an arbitration hearing in the AIRC or at a court hearing.

In deciding whether to get legal representation, you should consider:

- The cost (measured against the likelihood of success and how much compensation you are likely to get);
- Whether you feel confident enough to represent yourself; and
- Whether your employer is represented.

Registry staff can provide you with information about the procedure, standard form summonses for witnesses and documents you may require for the hearing. However, they cannot provide advice.

If you decide to represent yourself, you should read the guide "Attending and Preparing for Hearings" on the AIRC website. It gives information on procedure in a hearing, the preparation of witness statements, and the issuing of summons.

### **3.10 Arbitration at the Australian Industrial Relations Commission**

---

Unfair dismissal claims that do not settle at conciliation proceed to arbitration at the AIRC. Arbitration is a formal hearing of the case before a member of the AIRC (though not by the same member who was involved in the conciliation). The

### 3. THE FEDERAL SYSTEM (continued)

---

parties may reach a settlement at any time before and during the arbitration proceedings.

#### **Preparing for the arbitration hearing**

The hearing date for arbitration proceedings will be listed several weeks or months after the conciliation conference. A Notice of Listing will be sent to the parties which will generally include written directions for the filing of documents relevant to your case, such as witness statements and copies of documents upon which you intend to rely. You can ask for a summons to be issued to ensure witnesses attend the hearing (Form R60). You can also ask the AIRC to issue a summons ordering your employer to bring relevant documents to the hearing, for example, wage records (Form R61).

If for some reason you are unable to comply with the directions and/or need the hearing adjourned to a later date you have to make an application in writing to the Commissioner explaining your reasons for seeking the variation or adjournment. You should note that:

- If you fail to comply with directions, the matter may be deemed to have been discontinued; or
- If your employer fails to comply with directions, the arbitration may proceed and be heard and determined on the basis of your evidence alone.

If you fail to attend the arbitration the application may be dismissed with costs.

#### **The arbitration hearing**

The AIRC must hear the case in a way that avoids unnecessary technicalities and is fair and practical.

However, the hearing still follows a similar model to formal court procedure with the presentation of evidence and the cross-examination of witnesses. You will sit with your representative, if you have one, until you are called to give your account of what happened. Most evidence from you and your employer should have been provided before the hearing in witness statements, but further evidence

can be given in person under oath. Either you or your representative can then call any other witnesses to give evidence in support of your case. You can 'tender' documents by providing them to the AIRC during the hearing as part of your case. Your employer will be given a similar opportunity to present evidence by tendering documents and calling witnesses. You and your witnesses will be cross-examined by your employer or their representative and similarly, you can cross-examine your employer and your employer's witnesses. Cross-examination of each witness occurs immediately after the witness has given their evidence.

#### **Remedies – what orders can the AIRC make?**

The AIRC will consider several things when ordering a remedy including:

- the effect of the order on the viability of the employer's business;
- the duration of your employment;
- the amount of income you would have received if you were not dismissed;
- your efforts to find other employment; and
- any other matter that the Commission considers relevant.

***If the AIRC decides your dismissal was harsh, unjust or unreasonable it may order one or more of the following:***

#### **Reinstatement/re-employment**

This is an order that your employer must reappoint you to your previous position, or appoint you to another position on terms and conditions no less favourable than those of your previous position.

#### **Continuity of service**

The AIRC can make any orders it believes necessary to maintain the continuity of your employment if you are reinstated or re-employed. This will enable your period of service to be unbroken for the purposes of your annual leave,

### 3. THE FEDERAL SYSTEM (continued)

---

long service leave, sick leave, superannuation and other entitlements. The AIRC can also order your employer to pay you wages to cover the period between your dismissal and reinstatement.

#### **Compensation**

If the AIRC decides that reinstatement is not appropriate, for example, if someone else has been appointed to your job, or because of the breakdown in the relationship between the employer and employee, the AIRC can order your employer to pay you compensation for the loss of your job.

#### **Deciding the amount of compensation**

When deciding how much compensation to order, the AIRC will consider:

- the effect of the order on the viability of the employer's business;
- how long you were employed by your employer;
- the amount of income you would have received if you were not terminated;
- your efforts to find other employment;
- how unfair the dismissal was;
- your ability to find alternative employment;
- your age and seniority;
- your employment record with your employer (eg; if you have a good work record or not); and
- any other relevant consideration.

#### **Limits to compensation amounts**

There are limits to the amount of compensation the AIRC can order:

- For employees covered by an award or agreement, compensation is limited to a maximum of six months salary; and
- For employees not employed under industrial instrument conditions, compensation must not exceed \$45,200 (indexed annually) or six months salary - whichever is lesser.

The emphasis, when determining the level of compensation, is on the economic loss you have suffered as a result of your dismissal, with lost wages being the most important issue. You cannot get compensation for stress and illness related to your dismissal.

If misconduct contributed to the decision to dismiss, any amount awarded in lieu of reinstatement must be reduced by an appropriate amount in consideration of the misconduct.

It is important to use the above factors and compensation limits as a guide when attempting to negotiate an appropriate settlement with your employer in the conciliation conference.

Following these arbitration proceedings, a formal decision will be made which is binding on both parties and may include orders regarding reinstatement and/or compensation or dismissal of your application. The Commission's decisions may be published, including on the AIRC website.

#### **What if I am not satisfied with the AIRC's decision?**

If you are dissatisfied with the decision, you have a right to appeal to the Full Bench of the AIRC. The only ground of appeal that you can argue is that the Commission was in error in deciding to make the order. Appeals must be lodged within 21 days of the decision you are appealing. You should get legal advice if you are considering appealing.

#### **Costs in the Australian Industrial Relations Commission**

Generally, both you and your employer have to pay your own legal costs, regardless of the outcome. However, the AIRC does have the power to order you to pay the employer's legal costs if your application was vexatious or made without reasonable cause, or where you acted unreasonably by failing to discontinue your application when the AIRC had indicated that it had no merit.

### 3. THE FEDERAL SYSTEM (continued)

---

#### 3.11 Hearings in the Federal Court or Federal Magistrate's Court

---

Unlawful termination claims that do not settle at conciliation proceed to a hearing in the Federal Court or the Federal Magistrates Court.

##### *Time limits for making an application in the Federal Court*

Once you've lodged a notice of election with the AIRC to proceed in the Federal Court or Federal Magistrate's Court, you must make an application to the court within 14 days (although there is discretion to allow a claim out of time). You must file Federal Court Form 5, accompanied by Form 5A; and attach to it the Conciliation Certificate.

##### *Filing fees*

The filing fee is currently \$55.70, but pensioners and Health Care Card holders are exempt, and the fee can be waived if it will cause you financial hardship. You will need to complete a Statement of Financial Position to support your application for a waiver. Waiver forms can be obtained from the Federal Court Registry and the Federal Court website [www.fedcourt.gov.au](http://www.fedcourt.gov.au).

##### *Federal Court or Federal Magistrate's Court?*

An applicant has a choice to file in either the Federal Court or the Federal Magistrate's Court.

Cases are dealt with more informally in the Federal Magistrate's Court and proceed to hearing quicker.

Further, in the Federal Magistrate's Court alternative dispute resolution is strongly encouraged. For example, it is likely that most unlawful termination claims will be referred to mediation conducted by Registrars of the Court.

Both courts have the power to transfer a matter to the other court. Such an order would usually be made at an early stage of the proceedings. Matters suitable for the Federal Magistrate's Court are those which will take less than 2 days to be heard, turn primarily on their facts and raise no new questions of law.

There are no cost consequences for commencing in one jurisdiction and being transferred to the other (other than the party's own costs of appearing in the 'wrong' jurisdiction).

##### *The hearing*

Hearings in the Federal Court or Federal Magistrate's Court follow a similar procedure as outlined for arbitration in the AIRC (see *section 3.10 Arbitration in the Australian Industrial Relations Commission*). This section contains only a brief summary and highlights differences between arbitration in the AIRC and hearings in the Federal Court or Federal Magistrate's Court.

The hearing follows formal court procedure with the presentation of evidence from witnesses and cross-examination, and tendering of documents, similar to the procedure outlined for arbitration in the AIRC. After all the evidence has been presented, the court will decide whether your termination was unlawful.

For an unlawful termination claim to succeed the dismissed employee needs to satisfy the Court on the balance of probabilities that the employment was terminated for a discriminatory or prohibited reason or for reasons that included discriminatory or prohibited reasons.

##### *What orders can the court make?*

If the court decides in your favour and finds that your dismissal was unlawful, a number of orders may be made:

- **Penalty** - the court can impose a penalty on the employer, up to \$10,000.
- **Reinstatement** - the court can order your employer to reinstate you by reappointing you to your previous position.
- **Re-employment** - the court can order that you are appointed to another position on terms and conditions no less favourable than those of your previous position.

### 3. THE FEDERAL SYSTEM (continued)

---

- **Continuity of service** - the court can make any orders it thinks necessary to maintain the continuity of your employment if you are reinstated or re-employed. This will enable your period of service to be unbroken, for the purposes of restoring your annual leave, long service leave, sick leave, superannuation and other entitlements.
- **Backpay** - the court can also make an order requiring your employer to pay you wages to cover the period between your dismissal and reinstatement.
- **Payment in lieu of notice** - if your employer dismissed you without the required notice or payment in lieu, the court can make an order requiring them to pay you an amount of damages equal to the wages you should have been paid when your employment was terminated.
- **Compensation** - the court can order your employer to pay you compensation for the loss of your job. There are limits on the compensation that can be awarded which are the same as those that apply to compensation for cases dealt with in the AIRC.

For employees covered by an award or agreement, compensation is limited to a maximum of six months salary;

For employees not employed under industrial instrument conditions, compensation must not exceed \$45,200 (indexed annually) or six months salary, whichever is the lesser.

The court cannot order compensation for stress or illness caused by the dismissal.

Although the *Workplace Relations Act* doesn't provide the Court with specific factors that should be taken into account in determining the amount of compensation, as it does for the AIRC, the same factors are likely to be considered:

- the effect of the order on the viability of the employer's business/organization;
- how long you were employed by your employer;
- the amount of income you would have received if you were not terminated;
- your efforts to find other employment;
- any other relevant consideration;
- how unfair the dismissal was;
- your ability to find alternative employment;
- your age and seniority; and
- your employment record with your employer.

#### **What if I am not satisfied with the court's decision?**

If you're dissatisfied with the decision, you have a right to appeal. Appeals must be lodged within **21 days** of the date of the decision. You should get legal advice before you lodge an appeal.

#### **Costs in the Federal Court and Federal Magistrates Court**

Generally, both you and your employer have to pay your own legal costs, regardless of the outcome. However, the court does have the power to order that you pay the employer's legal costs if your application was vexatious or made without reasonable cause. The court can also order one party to pay the legal costs of the other if they conduct the case unreasonably.

An adviser must not encourage an employee to make or pursue an unfair termination application if on the facts disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that there was no reasonable prospect of success. The Federal Court or Federal Magistrates Court may, if it considers it appropriate in all the circumstances of the case, make an order imposing a penalty on the adviser.

## 4. THE NEW SOUTH WALES SYSTEM

---

### ARE YOU IN THE RIGHT SECTION OF THIS GUIDE?

If you have not already done so please complete the CHECKLIST in Section 2.

In the NSW system you can challenge the termination of your employment by making a claim of unfair dismissal. The claim is lodged with the NSW Industrial Relations Commission (IRC). There is no distinction between unfair dismissal and unlawful termination of employment as under the federal system.

The NSW system applies to employees who are **not** covered by a Federal award or agreement and who are employed by sole traders, partnerships, NSW government departments, and corporations that are **not** "constitutional corporations" (see section 2 for information on "constitutional corporations").

### 4.1 What is unfair dismissal in the NSW system?

---

Under the NSW *Industrial Relations Act 1996* an unfair dismissal is one that is harsh, unjust or unreasonable.

The Industrial Relations Commission will consider the following matters in deciding whether a dismissal was unfair:

- whether there was a reason given for the dismissal or threatened dismissal and if it was a valid reason;
- whether you were given a warning of unsatisfactory work performance before being dismissed or threatened with being dismissed;
- whether you were given an opportunity to respond to any warning or complaint related to your work performance or conduct;
- whether you asked your employer to reinstate or re employ you and were refused and if so, whether a satisfactory explanation was given;

- the nature of your duties immediately before you were dismissed or threatened with being dismissed, compared with the likely nature of your duties if you were to continue or be reinstated; and
- whether you were given notice or payment in lieu of notice.

The Commission can take into account any other matters it considers relevant.

### 4.2 Time limits

---

Your unfair dismissal claim must be lodged with the IRC within **21 days** from the date of your dismissal. In the case of a threatened dismissal, you can apply before termination actually occurs.

The IRC has a discretion to accept late applications if there is a good reason for the delay. It may consider:

- the reason for the delay;
- the length of the delay;
- any hardship that may be caused to you or your employer if the application is or isn't rejected;
- your employer's conduct in relation to the dismissal or threat of dismissal; and
- other matters that the Commission considers appropriate, such as the strength of your case.

Late applicants will need to provide an extra sheet with their application which provides reason for the delay.

### 4.3 Who can make an unfair dismissal claim in the NSW system?

---

#### **You must have been dismissed**

Termination of employment or dismissal is usually a clear-cut event that happens when your employer tells you that your employment is about to end.

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

Resignations are not generally considered dismissals. However, in some circumstances when a resignation is not voluntary, it can be considered a dismissal where your employer has done something that has forced you to resign or leave. This type of dismissal is known as a 'constructive dismissal'.

Another form of constructive dismissal is demotion or change in job description without cause or negotiation. This happens when your terms of employment were significantly changed or your wages and/or hours significantly reduced.

### **Examples of constructive dismissal**

*Peter was accused of theft and was told by his employer that although the matter of resignation was his decision, if he did not resign then the police would be called.*

*Karen received a letter advising her that she was no longer required as supervisor of the sales floor due to staffing levels. Without her agreement she was returned to the "shop floor" with a consequent reduction in her pay.*

### **4.4 Who cannot make an unfair dismissal claim in the NSW system?**

---

Not all employees who are covered by the NSW system are eligible to make a claim of unfair dismissal.

**The following categories of employees cannot make a claim for unfair dismissal under the NSW Industrial Relations Act:**

#### **1. Workers who are not employees but contractors**

Workers employed as independent contractors or sub-contractors cannot make an unfair dismissal claim. However, sometimes workers are called 'contractors' but in reality they are employees. If you do not know if you are an employee or a contractor you should get advice as soon as possible.

#### **2. Employees under a contract of employment for a specified period of time that is less than six months**

Some jobs are contracts for a set period of time, such as 3 months. To truly be a fixed term contract it can only be brought to an end when the 3 months is over, except for serious misconduct. A contract that provides for the parties to give notice before the end of the specified contract period will not be considered to be a contract for a specific period.

---

#### **3. Employees engaged under a contract of employment for a specified task**

For example: Su-Kim took a position which involved the processing of certain transactions over the phone until the installation of a new computer program which was being developed to do the same job. She and her employer both understood that the position was to complete the specified task and that when the program was up and running Su-Kim's position would come to an end.

---

#### **4. Employees engaged on a casual basis for a short period**

Employees engaged "on a casual basis for a short period" have been described as having no entitlement to ongoing employment, or certainty in the days, hours and shifts worked. For their part they can accept or refuse work to suit themselves. Casuals receive a higher hourly rate of pay but do not receive all the entitlements of fixed term or permanent full and part-time employees.

However just because someone is called a 'casual' does not necessarily mean they are unable to make a claim for unfair dismissal. If they have worked for their employer on a regular and systematic basis for more than 6 months and have a reasonable expectation of continuing employment then they are not considered to be 'engaged on a casual basis for a short period' and may be able to make a claim for unfair dismissal.

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

### 5. Employees serving a probation or qualifying period of three months or less

Employees serving a probation or qualifying period of three months or less (or if the probation period is more than the three months and is reasonable in regard to the nature and circumstances of the employment).

*Stanley was employed as a senior manager in a large firm. His position was highly paid and encompassed a broad range of complex activities. His contract stipulated a six month probationary period (the maximum allowable). Because of his high wages and seniority, and the complex position, this was considered a reasonable period in regard to the nature and circumstances of the employment.*

*Veronica was employed on a process line requiring her to complete a small number of highly repetitive tasks. A period of probation longer than three months is unlikely to be considered reasonable.*

No extension of the probation period beyond three months will be allowed if the employee was not informed of the possibility of extension BEFORE the employee started the position.

### 6. Employees who are apprentices or trainees

You may still be eligible to make a claim if it was not a traineeship agreement or approved traineeship or was not limited in duration to a specified period.

### 7. Employees who are covered by a federal award if they are entitled to make an application to the Australian Industrial Relations Commission for unfair dismissal

(See section 3 - The Federal System)

### 8. Special temporary employees of political office holders

For example, a Minister or a Parliamentary Secretary or the Leader of the Opposition in the House of Representatives and NSW Police senior executives appointed by the Police Commissioner.

### 10. Employees who are not covered by an award or enterprise agreement and who have a salary package valued at more than the prescribed amount

The prescribed amount changes each year on 1 July and as at 1 July 2007 is \$101,300. The current prescribed amount can be found on the IRC website.

## 4.5 How to make a claim in the NSW system?

---

The process for making an unfair dismissal claim is summarised here, with more detail following:

1. The employee completes and files form 7A "Application for relief in unfair dismissal" with the IRC registry within 21 days of being dismissed.
2. The IRC sends a copy of the application form to the employer.
3. The employer files a response to the application and the IRC sends this response to the employee.
4. The IRC will notify the employee and employer of a date to attend the IRC for conciliation.
5. A conciliation meeting will be held before a Commissioner.
6. If the claim is not settled at conciliation, the Commission will make directions to the employee and employer to prepare for a hearing.
7. An arbitration hearing is held before a Commissioner.

### The application form

Application forms are available from the IRC registry and on the IRC website (<http://www.lawlink.nsw.gov.au/irc>).

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

When filling in the claim form, you'll need to provide the following information:

- **Contact details** - your name and address and your employer's name and address.

Take particular care to give the correct name of your employer as errors can lead to delays in processing your claim. A common mistake is to only give the trading name of the company. Make sure you get the right name by checking any formal documents you may have, for example, a payslip or tax group certificate. It is often useful to write '..... (employer's name), trading as ..... (trading name)'

- **Details about your work** - the position you held and the name of the award (or other industrial instrument) you are covered by.
- **Representation** - whether a union or lawyer is acting for you.
- **What you are claiming** - reinstatement, re-employment and/or compensation.
- **Details about the unfairness** - your reasons for believing that the dismissal was harsh, unjust or unreasonable (eg; that your employer failed to give you any warning or an opportunity to respond to the reason given for dismissal). Keep your summary of the facts and explanation brief and simple.
- **Statutory Declaration** - you will need to declare that the contents of your claim are true by signing the statutory declaration on the claim form before a Justice of the Peace or a solicitor.
- **Undertaking not to proceed with other redress relating to dismissal [Form 11]**. You may also be asked to sign the undertaking saying you will not make a claim under any other laws in relation to your dismissal. If you think you may be eligible to claim under other laws, for example, anti-discrimination laws, you should seek advice before signing the undertaking.

### *Lodging the application form*

Your application form has to be lodged at the registry of the IRC. You must lodge **three** copies of your application with your original form, and any other relevant documents (such as termination documents, letters, payslips etc.). Applications can also be lodged by post.

If your application form is correct the registry staff will stamp the forms. They will send a copy to your employer and they will give you a stamped copy to keep.

There is a filing fee of \$50.00 unless you can show financial hardship. An application form for Waiver or Reduction of Filing Fee can be downloaded from the IRC website.

The Registry will set a listing date for the conciliation of the unfair dismissal claim. There is a standard time of 21 days from filing to first listing for cases in Sydney. Regional matters will be listed as soon as possible.

If you are a union member, your union can lodge the forms on your behalf. There is no filing fee for Unions acting on behalf of members.

Registry staff can check your documents and tell you about the procedure for processing applications, but cannot advise you on the conduct of your case.

### *Response from Employer*

You do not need to give a copy of your application to your employer - the IRC will do this for you. Your employer is required to lodge a notice of appearance and response with the IRC within 10 days of receiving a copy of your application.

## 4.6 Conciliation

---

Once you have lodged an application, the IRC must try to assist the parties to settle the matter by conciliation. Your claim will be listed before a member of the commission for a conciliation

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

conference, sometimes called a preliminary hearing. The IRC Registry will advise you on the time, date and location of the conciliation conference.

Conciliation is an informal process designed to help you and your employer come to an agreement, without having to go through a formal hearing in the commission.

The process of conciliation varies depending on the individual commissioner. You will usually be given the opportunity to present your side of the story about your dismissal, as will your employer. The commissioner may try to clarify the facts and help each of you reach an agreement. Some commissioners conduct the whole conciliation proceeding on the record (which means the proceedings are taped) whereas others may conduct a 'round the table' discussion, off the record, or a combination of the two. Some commissioners talk to the parties separately to explore the prospects of reaching a settlement, whereas others send the parties out to negotiate between themselves. If the matter doesn't settle it may be listed for further conciliation.

Employees often attend a conciliation without being represented. You may be represented by your union or a lawyer if you want someone to speak on your behalf. The IRC will need to grant you leave (give permission) to be represented by a lawyer.

### **Before the conciliation conference....**

- prepare a summary of the facts which support your claim;
- list the issues you think your employer may raise and your response to those issues;
- decide how you want to settle the matter (i.e. reinstatement, re-employment and/or compensation);
- if you do not think reinstatement is feasible, prepare reasons why you think this is the case; and
- get advice from your union or a lawyer, particularly to help you decide on your settlement options.

### ***The outcomes of conciliation***

The primary remedy for an unfair dismissal claim is reinstatement or re-employment. If you're asking for reinstatement, you should also ask for compensation for lost wages between the time of your dismissal and reinstatement. However, employers will only rarely agree to reinstatement in conciliation and you should consider what compensation you would be prepared to accept to resolve the matter.

You should also consider other options, for example: getting a reference from your employer, or a statement of service, or for your employment records to say that you resigned rather than being dismissed.

In conciliation it is important to be creative, flexible and willing to negotiate. But you must also be clear about what your bottom line is when it comes to reaching an appropriate settlement. Some of the things you should think about when working out what is a reasonable amount of compensation in your case are listed in *4.8 Remedies*.

Most unfair dismissal claims are settled at the conciliation stage without the need for a hearing so it is important to get advice on your settlement options. Again, your union or legal adviser will be able to help you decide on appropriate terms of settlement.

### ***What happens if my claim is settled at conciliation?***

If you come to an agreement with your employer at the conciliation conference you may be asked to sign Terms of Settlement outlining the agreement you and your employer have reached. You must also file a Notice of Discontinuance with the IRC withdrawing your claim of unfair dismissal. You should wait until your employer has actually done what they agreed to do in the settlement (eg; reinstated you, re-employed you, or paid you the agreed compensation) before you file a Notice of Discontinuance. If your employer fails to carry out the settlement, you could proceed with your application to arbitration. You will need to contact the Commission to have the matter relisted.

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

Your employer may ask you to sign a Deed of Release as part of a settlement of your claim. This is an enforceable legal document outlining what has been agreed to in the settlement. Commonly it will have terms where the employee agrees not to bring any further claims against the employer, and where both parties agree to keep the settlement confidential. You should get legal advice if you don't understand the terms of a deed.

### **What happens if my claim is not settled at conciliation?**

If conciliation fails the Commission will arrange for your case to go to a formal hearing called an arbitration. The Commissioner's decision at arbitration is legally binding. Only a small percentage of claims proceed to a formal arbitration hearing in the IRC.

The arbitrated hearing is usually conducted by the same Commissioner who handled the conciliation proceedings unless you or your employer request that the matter be re-allocated to another Commissioner. It may be appropriate to make such a request if things have been said during the conciliation proceeding which lead you to think it would be better to have the arbitration conducted by a Commissioner with no pre-knowledge of the matter. You can only make such a request after conciliation has concluded but before an arbitration hearing has commenced. The best time to make the request is at the time that the Commission is setting a date for the arbitration hearing.

## 4.7 Arbitration

---

### **Legal representation at arbitration**

Arbitration is more formal than the conciliation stage and you should think carefully about whether you will need legal representation.

If you are in a union, your union may be able to represent you or will advise you about how to argue and present your case. Some unions will also appear for non-members for a fee. If you

are not a union member, free advice is available from community legal centres and the Legal Aid Commission.

Legal aid is not generally available for representation in employment matters and community legal centres can only provide representation in limited circumstances.

You may have to pay if you want a lawyer to represent you at an arbitration hearing in the AIRC or at a court hearing.

In deciding whether to get legal representation, you should consider:

- The cost (measured against the likelihood of success and how much compensation you are likely to get);
- Whether you feel confident enough to represent yourself; and
- Whether your employer is represented.

Registry staff can provide you with information about the procedure, standard form summonses for witnesses and documents you may require for the hearing. However, they cannot provide advice.

***Before the arbitration hearing the Commissioner will give directions to the parties covering the following matters:***

### **Witnesses**

You will need to tell the Commissioner how many witnesses you will be calling to give evidence. Some witnesses may be reluctant to appear before the Commission, particularly people who are still working for your former employer. If you need their evidence to support your claim, you should ask for reluctant witnesses to be summoned to appear at the hearing. A summons or subpoena to give evidence, is a formal document which orders the person to attend a hearing. Registry staff will be able to help you with this. Often you will be the only witness. Usually there is no benefit requiring reluctant witnesses to attend unless they are essential to prove your case.

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

### **Statements to be filed**

In most cases the Commissioner will require that the evidence to be presented at the hearing is provided beforehand in writing. Evidence may be required in a special format called an affidavit (this is a statement of evidence that must be sworn or affirmed before a lawyer or Justice of the Peace, like a statutory declaration) or in the form of a signed statement, or sometimes in the form of a short summary of the evidence you and your witnesses will give orally at the hearing. It is not necessary to file written material unless the Commission directs you to. If you are directed to file witness statements or affidavits, you will be given a date by which the documents must be filed at the IRC and copies served on the employer.

---

### **Documents**

If you require documents from your employer or some other person, you can ask the Commissioner to give directions that the employer produce the documents by a certain date or you can file a summons or subpoena for the production of documents, ordering the document to be brought to the IRC by a certain date before the hearing. Registry staff will be able to help you with this. Sometimes it is possible to come to an informal agreement with your employer to exchange any required documents by a certain date without having to issue a summons.

---

### **Jurisdictional issues**

Your employer may raise jurisdictional issues, that is, issues about whether the Commission can or should hear your claim because of some alleged defect in your claim. The employer may claim that you are not covered by the legislation because you fall into one of the categories of workers who are excluded, for example, probationers, (see 4.4. *Who cannot make an unfair dismissal claim in the NSW system?*) or that your claim is out of time. If you dispute the matters raised by your employer, the issue will usually be considered at the formal hearing, not at the conciliation conference or directions hearing. If jurisdictional matters are raised, it is important to get legal advice before the hearing to ensure that you can establish your eligibility before the Commission.

Generally the IRC will not impose detailed procedures for providing your case in writing if you are unrepresented, but this may depend on how complex your case is. The Commissioner will aim to ensure both parties have access to enough information from the other so that each can prepare their case.

---

### **The hearing**

Although the IRC isn't bound to conduct formal hearings or to use the formal rules of evidence and admissibility of evidence, arbitration hearings are nevertheless conducted formally with the presentation of evidence and cross-examining of witnesses.

You are required to sit with your representative (if you have one) until you are called to give your account of what happened. You will give your evidence orally under oath. Either you or your representative can then call any other witnesses to give evidence in support of your case. Your employer or their legal representative will be able to cross examine (question) you and any of your witnesses. Your employer and any of their witnesses will then give their evidence, and you or your legal representative will be able to cross examine them. Cross-examination of witnesses occurs immediately after the witness has given their evidence.

Both you and your employer will be given an opportunity to present evidence by 'tendering' documents. After all the evidence has been presented, you or your representative can make a closing submission summing up the most important points in your case.

After hearing all the evidence and submissions, the Commissioner will then decide whether your dismissal was harsh, unreasonable or unjust (see 4.1 - *What is unfair dismissal in the NSW system?*).

The IRC can order a number of different remedies, detailed in section 4.8 *Remedies: what orders can the IRC make?*

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

The Commissioner's decision is legally binding although either party can appeal (see section 4.8 *What if I am not satisfied with the IRC's decision?*).

### 4.8 Remedies: what orders can the IRC make?

---

If the IRC decides that the dismissal was fair it will dismiss your application. If it decides you have been unfairly dismissed, a number of orders can be made.

#### **Reinstatement**

An order can be made requiring your employer to reinstate you by reappointing you to your previous position. The IRC may also order your employer to pay you back pay for the period between dismissal and reinstatement.

#### **Re-employment**

If the IRC decides it wouldn't be feasible to order reinstatement to your previous position, an order may be made for your employer to re-employ you in another suitable job with the company or organisation. In addition, the Commission may order your employer to pay you back pay for the period between dismissal and re-employment.

#### **Continuity of Employment**

If you have been reinstated or re-employed, the IRC can also order that the period of your employment is taken not to be broken by the termination so that you can retain any entitlements based on continuous service, such as long service leave and annual leave.

#### **Compensation**

If the IRC decides that reinstatement or re-employment are impracticable remedies, it may order your employer to pay you compensation. The maximum amount of compensation possible under the *Industrial Relations Act* is six months wages, based on your average earnings for the six months prior to your dismissal.

If you were employed for a period less than six months prior to your dismissal, the maximum amount of compensation cannot be more than the total amount you earned before being dismissed.

The IRC will consider a number of factors when deciding whether to order compensation and what amount to order. It will take into account whether you have made reasonable attempts to find another job and if you have another job, how much you have received in wages. It is also likely to consider:

- How long you were employed by your employer;
- How unfair the dismissal was;
- Your ability to find alternative employment;
- Your age and seniority; and
- Your employment record with your employer.

You should use the above factors and compensation limits as a guide when attempting to negotiate an appropriate settlement with your employer at the conciliation conference.

#### **Threatened dismissal**

If your claim relates to a threat of dismissal, the IRC may order your employer not to dismiss you.

#### **What if I am not satisfied with the IRC's decision?**

If you are not satisfied with the IRC's decision, you may appeal to the Full Bench of the IRC. An appeal must be made within 21 days of the Arbitration decision. The Commission has a discretion to extend this time limit. If you wish to appeal, you should seek union or legal advice as soon as possible.

### 4.9 Costs

---

Generally, legal costs are not awarded in the IRC and you will have to pay your own legal expenses, whether you win or lose. It would be unlikely you would have to pay your employer's costs if you

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

lose. However, the IRC does have the power to order you to pay your employer's legal costs if it decides your claim is frivolous or vexatious. An order for costs can also be made against either party if the Commission considers they have unreasonably failed to agree to an offer to settle the claim.

### 4.10 What is a claim for termination without notice in the NSW system?

---

If your employment is terminated, you must be given the required amount of notice or payment instead of notice. The NSW *Industrial Relations Act* doesn't specify the amount of notice required. The amount of notice you should have received may be set out in a letter of appointment or written contract, in a company policy that was referred to in your letter of appointment or written contract, or in your Award.

If no notice period was agreed, then you would normally be entitled to reasonable notice. What is reasonable will depend on a number of things, including:

- your age;
- the position you held;
- the nature of your employment;
- your length of service; and
- the likely difficulty in finding another job.

If you're not sure how much notice you're entitled to, talk to your union or get legal advice.

#### **Payment in lieu (instead) of notice**

Your employer may pay you out for the notice period. In this case, the payment must be at least equal to the total amount you would have earned if you had continued to work during the notice period.

#### **Can I be dismissed without notice or payment instead of notice?**

Dismissal without a period of notice, or payment in lieu of notice, is known as summary dismissal. Generally, your employer can only dismiss you summarily or on the spot if you're guilty of serious misconduct.

Serious misconduct must be serious and wilful and show an intention on the employee's part that they no longer mean to be bound by the employment contract. The following examples of serious misconduct would probably justify summary dismissal:

- theft;
- fighting at the workplace (unless solely in self-defence);
- serious harassment of other employees (eg; sexual harassment);
- drunkenness at work which affects the performance of duties;
- wilful disobedience of a lawful command;
- objectionable, abusive or obscene language in circumstances where it is inconsistent with the worker's duties (eg; a salesperson abusing customers); and
- conviction of a crime where it reflects on the worker's ability to carry out their duties (eg; a bank teller might be lawfully dismissed by the employer if convicted of some form of theft or fraud, but not if convicted, for example, of possession of marijuana).

In rare cases, where the employee has lengthy service and an otherwise unblemished work record it may be considered harsh (and so an unfair dismissal) to dismiss an employee for misconduct. This will depend on the seriousness of the misconduct.

## 4. THE NEW SOUTH WALES SYSTEM (continued)

---

### ***What should I do if my employer doesn't give me notice or payment instead of notice?***

If you were dismissed with no notice or insufficient notice or inadequate payment in lieu of notice, but otherwise accept that your employer was entitled to dismiss you, contact your union or the NSW Office of Industrial Relations for advice on recovering the correct payment (see *section 5 Where to get help*).

If you are covered by a NSW award, the Office of Industrial Relations will require you to complete a complaint form outlining what payment in lieu of notice you were owed (and any other outstanding entitlements such as long service leave and annual leave), and what award you are covered by. They will then write on your behalf to your employer to collect the money owed to you. You should receive a copy of this letter. The Office of Industrial Relations will advise you to notify them again if you don't receive your entitlements within 28 days.

For more information about this complaint procedure, call the Office of Industrial Relations on 131 628.

If this doesn't result in payment of the money owed you can claim the money as a debt in the Local Court or the Chief Industrial Magistrate's Court. The time limit for doing this is 6 years from the date that the payment in lieu of notice should have been paid to you.

For further information on these options see the Recovering Unpaid Wages Guide on the Office of Industrial Relations website (<http://www.industrialrelations.nsw.gov.au/>).

If you believe you were unfairly dismissed in addition to not receiving the correct notice, you may be able to resolve these two issues together at conciliation. This avoids the need to make a separate complaint or claim (as described above). If you are represented by a union, it can make a claim on your behalf for payment in lieu of notice, together with your unfair dismissal claim.

## 5. WHERE TO GET HELP

---

### **Employment law information and referral**

#### **Law Access NSW**

Ph 1300 888 529

[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

#### **Legal Information Access Centre**

[www.liac.sl.nsw.gov.au](http://www.liac.sl.nsw.gov.au)

---

### **Free legal advice**

#### **Your local community legal centre**

[www.nswclc.org.au](http://www.nswclc.org.au)

#### **Legal Aid Commission of NSW**

Ph 02 9219 5000

[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

---

### **Private solicitors**

*For a referral to a solicitor in your area who practices in employment law, contact;*

#### **The Law Society of NSW Solicitor Referral Service**

Ph 02 9926 0300 (Sydney)

Ph 1800 422 713 (outside Sydney)

[www.lawsociety.com.au](http://www.lawsociety.com.au)

---

### **Trade Unions**

*For information about union services & membership*

#### **Unions NSW**

Ph 02 9264 1691

[www.council.labor.net.au](http://www.council.labor.net.au)

---

### **Courts and Commissions**

*For copies of forms & information about procedure*

#### **Australian Industrial Relations Commission**

Ph 1300 799 675

[www.airc.gov.au](http://www.airc.gov.au)

#### **Federal Magistrates Court**

Ph 02 9230 8567

[www.fmc.gov.au](http://www.fmc.gov.au)

#### **Industrial Relations Commission of New South Wales**

Ph 02 9228 7766

[www.lawlink.nsw.gov.au/irc](http://www.lawlink.nsw.gov.au/irc)

---

### **Awards & agreements (industrial instruments)**

*For information about whether your job or workplace is covered by an award or collective*

*or individual agreement*

#### **Workplace Infoline (Federal system)**

Ph 1300 363 264

[www.wagenet.gov.au](http://www.wagenet.gov.au)

#### **NSW Office of Industrial Relations Awards Enquiry Service (NSW system)**

Ph 131 628.

[www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au)

#### **NSW Industrial Relations Commission (for NSW Enterprise Agreements)**

[www.agd.nsw.gov.au/lawlink/irc/ll\\_irc.nsf/pages/IRC\\_procedures\\_legislation\\_EA\\_index\\_All](http://www.agd.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_procedures_legislation_EA_index_All)

---

### **Complaints about wages and conditions**

#### **Workplace Ombudsman (Federal system)**

Ph 1300 724 200

[www.wo.gov.au](http://www.wo.gov.au)

#### **NSW Office of Industrial Relations (NSW system)**

Ph 1300 366 632

[www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au)

---

### **Traineeships/Apprentices**

#### **NSW Department of Education and Training**

Ph 132811

<http://apprenticeship.det.nsw.edu.au>

---

### **Discrimination complaints**

#### **Anti Discrimination Board of New South Wales**

Ph 02 9268 5555

[www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb)

#### **Human Rights and Equal Opportunity Commission**

Ph 02 9284 9600

[www.hreoc.gov.au](http://www.hreoc.gov.au)

---

### **Legislation**

*To get copies of relevant laws*

[www.austlii.edu.au](http://www.austlii.edu.au)

---

### **Interpreters**

*To have the assistance of an interpreter to get information or advice*

#### **Translating and Interpreting Service**

Telephone interpreters

Ph 131 450

## 6. LEGAL TERMS & ACRONYMS

---

<b>AIRC:</b>	Australian Industrial Relations Commission
<b>IRC:</b>	Industrial Relations Commission of New South Wales
<b>FMC:</b>	Federal Magistrates Court
<b>OIR:</b>	NSW Office of Industrial Relations
<b>AWA:</b>	Australian Workplace Agreement
<b><i>Workplace Relations Act 1996:</i></b>	The federal law covering employment.
<b><i>Industrial Relations Act 1996:</i></b>	The New South Wales law covering employment.
<b>Arbitration:</b>	an independent process for resolving disputes outside the court system.
<b>Constitutional Corporation:</b>	Companies, associations and other bodies which have been incorporated are 'corporations'. Sometimes they will have Pty or Co or Ltd or Inc in their name. Whether they are constitutional corporations will depend on whether they can be classified as either 'trading' or 'financial' corporations. Most businesses that are companies will be constitutional corporations. However, if a corporation is a charitable or not-for-profit organisation it may not be a constitutional corporation.
<b>Industrial instrument:</b>	A collective term that includes awards, enterprise and certified agreements and Australian Workplace Agreements.
<b>Jurisdictional issues:</b>	Refers to the power of a court or commission to make decisions in a matter. If a court or commission does not have jurisdiction it cannot hear and decide the claim.
<b>Remedies:</b>	These are orders made by a court or commission following a finding in favour of the claimant.









**KINGSFORD  
LEGAL CENTRE**

---

**Kingsford Legal Centre**

**Tel: 02 9385 9566**

**The Law Building, Ground floor,  
University of NSW 2052**

**website: [www.kingsfordlegalcentre.org](http://www.kingsfordlegalcentre.org)**

---

**ICLC INNER CITY LEGAL CENTRE**

---

**Inner City Legal Centre**

**Tel: 02 9332 1966**

**PO Box 368 Darlinghurst 1300**

**website: [www.iclc.org.au](http://www.iclc.org.au)**