



Funded by the Office for Women, NSW Department of Premier and Cabinet



IMPORTANT NOTE: THIS FACT SHEET ONLY APPLIES TO WOMEN WHO WORK IN NEW SOUTH WALES

# TERMINATION OF EMPLOYMENT

## “I’VE JUST BEEN DISMISSED!” – WHAT TO DO AND WHERE TO GO FOR HELP

Getting the ‘sack’ is a catastrophic event for most workers. Some dismissed workers may be able to make a claim against their employer for unlawful termination, or unfair dismissal or discrimination. Below is a brief summary of available options.

But remember, **the time limit is 21 days from the date of termination** to start an action for unlawful termination or an unfair dismissal.

- ❖ **filing a complaint, or participation in proceedings**, against an employer for an alleged breach of the law
- ❖ **refusing to negotiate, make, sign, extend, vary or terminate** an Australian workplace agreement (AWA)
- ❖ temporary absence from work to carry out **voluntary emergency services activities**.

### WHAT IS UNLAWFUL TERMINATION?

A worker’s employment has been ‘unlawfully terminated’ if the termination was based on one or more of a number of reasons listed in the Workplace Relations Act. These include failure to give the employee the required notice or payment instead of notice (see below) and reasons concerning alleged discrimination.

Any unlawful termination claim concerning alleged discrimination must be based on one or more of the following –

- ❖ temporary absence due to **illness or injury**
- ❖ **trade union** membership or participation in trade union activities outside of working hours or, with the employer’s consent, during working hours
- ❖ **non-membership** of a trade union
- ❖ seeking office or acting as a **representative of employees**
- ❖ absence during **maternity or parental leave**
- ❖ **discrimination** on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin

Under WorkChoices a worker can also make a claim of unlawful termination if they were not given a **reasonable period of notice** on termination, or **not paid compensation** in lieu of notice. The minimum notice payable is –

Employee Continuous Service	Minimum Notice
Less than 1 year	1 week
More than 1 year, but less than 3 years	2 weeks
More than 3 years, but less than 5 years	3 weeks
More than 5 years	4 weeks

One additional week of notice is to be paid to an employee aged over 45 years and has completed at least two years of continuous service.

If a worker is covered by an award, and if that award has more generous notice provisions, then the award provisions will apply.



## WHAT IF MY EMPLOYER'S BUSINESS HAS BEEN TAKEN OVER?

In the case of a transmission of business, the previous employer is not obligated to pay notice if –

- ❖ the employee is re-employed by the new owner of the business; and
- ❖ that new owner comes under an enforceable obligation (such as an award that counts service before and after the transmission as continuous service) to give or pay notice in respect of the earlier period of service.

## WHAT IS UNFAIR DISMISSAL?

- ❖ A worker can make an unfair dismissal claim where an employer doesn't give a worker a 'fair go all round' when dismissing them. Workers or the workers' representatives can lodge an unfair dismissal claim with the Australian Industrial Relations Commission (AIRC) to try to get their job back or to get some monetary compensation.
- ❖ When considering an unfair dismissal claim the AIRC looks at issues such as –
  - ❖ whether the employer had a valid reason for terminating the worker's employment
  - ❖ whether that reason was communicated to the employee; and
  - ❖ whether the worker had an opportunity to respond to the reason given for their termination.

## WHO CAN MAKE AN UNFAIR DISMISSAL APPLICATION?

Claims of unfair dismissal are made to the Australian Industrial Relations Commission (AIRC) if the matter is covered by WorkChoices or a federal award. However, if a worker is not covered by WorkChoices they may still be able to make an unfair dismissal claim to the NSW Industrial Relations Commission (IRC).

**Are you covered by WorkChoices?** (see Fact Sheet: Wages and Conditions - are you covered by federal workplace relations system (WorkChoices)?)

## WHO CANNOT LODGE AN UNFAIR DISMISSAL CLAIM?

The following workers **cannot** make a claim in the AIRC if they are covered by WorkChoices and if they were –

- ❖ employed by an employer with **100 or fewer employees**
- ❖ serving a **six-month qualifying period of employment** or a shorter or longer period agreed to in writing before employment started
- ❖ dismissed for **genuine operational reasons**, which include economic, technological, structural or similar reasons relating to the employer's business
- ❖ serving a **probationary period** determined in advance
- ❖ engaged on a **seasonal basis**
- ❖ engaged under a contract of employment for a **specified period or task**
- ❖ engaged under a **traineeship agreement** or **approved traineeship** for a specified period
- ❖ engaged as a **casual employee** for a short period unless employed by an employer on a regular and systematic basis over a period of at least 12 months and the employee had a reasonable expectation of continuing employment with the employer
- ❖ not employed under an **award** or **workplace agreement** and **earning \$101,300** a year or above in remuneration; or
- ❖ pursuing **other related termination proceedings**.

**Note:** The above restrictions relate to unfair dismissal but do not apply to **unlawful termination** applications.

However, an employee is not able to lodge such an unlawful termination claim if he or she is pursuing other related termination proceedings.

If you are in the NSW system and not covered by WorkChoices, the following workers **cannot** make an unfair dismissal claim in the **NSW Industrial Relations Commission** –

- ❖ workers who are **award-free** and whose current annual remuneration is more than **\$101,300**
- ❖ those who are engaged under a contract of employment for a specified period of time, if the specified period is less than **six months**
- ❖ those engaged under a contract of employment for a **specific task**



- ❖ those serving a **probation or qualifying period** if the period was determined in advance and is three months or less; or if more than three months, it is reasonable having regard to the nature and circumstances of the employment; or
- ❖ those engaged on a **casual basis**, except employees who are engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at about six months and who would, but for the dismissal, have had a reasonable expectation of continuing employment with the employer
- ❖ **apprentices and trainees.**

## KEY POINT!

Any worker not covered by WorkChoices and not excluded as above can make an application in the NSW Industrial Relations Commission for unfair dismissal.

## HOW DO I MAKE A CLAIM?

### Making a claim under WorkChoices

- ❖ Workers covered by WorkChoices can make an unlawful termination claim or an unfair dismissal on the same form at the Australian Industrial Relations Commission (AIRC). **The application must be lodged within 21 days** from the date of the written notice of termination or date of termination. The fee to file is currently **\$55.70**. The filing fee may be waived in cases of serious hardship.
- ❖ A worker lodging an unlawful termination claim can list one or more of the listed unlawful grounds, including discriminatory grounds on the application.

### Making a claim in the NSW Industrial Relations Commission

- ❖ Workers not covered by WorkChoices and who are eligible, may make a claim for unfair dismissal at the [NSW Industrial Relations Commission \(IRC\)](#). **The application must be lodged within 21 days** and the fee is currently **\$58.00**. The fee may be waived in cases of serious hardship.

## KEY POINT!

If you are dismissed, do not delay - get advice from [Law Access](#) or a [local community legal centre](#).

You have only **21 days** to make a claim.

## WHAT HAPPENS NEXT?

After filing an unfair dismissal and/or unlawful termination claim, a conciliation conference between the worker and the employer will be held within a few weeks (in Sydney as well as country towns). The reason for the conference is to try to help the parties to agree on the terms of a settlement. In this way, the matter can be resolved relatively quickly and inexpensively.

## WHAT IS A CONCILIATION CONFERENCE?

This is a private and confidential meeting that is usually chaired by a Member of the AIRC. The meeting is informal or semi-informal (and may be conducted by telephone) with no record of proceedings or transcript other than when the matter is settled by agreement of the parties and the terms are put in writing.

This conciliation is an important first step in resolving an unfair dismissal or unlawful termination claim - it is very important that both the worker and the employer attend. If the employee fails to attend a conciliation conference, the application may be dismissed.

The purpose of conciliation is to try and resolve a claim by agreement without proceeding to a full hearing. A claim may not proceed to hearing unless all reasonable attempts to settle it by conciliation have been made.

## WHAT HAPPENS IF CONCILIATION FAILS?

- ❖ If an **unfair dismissal** claim is not settled at conciliation, the employee can choose to have the claim heard at a formal arbitration hearing at the AIRC.
- ❖ If an **unlawful termination** claim is not settled at conciliation, the worker can choose to have the claim heard in the Federal Magistrates Court. The [Department of Employment and Workplace Relations \(DEWR\)](#) can provide funds for legal advice for the worker to help them decide whether to continue the claim in the Federal Magistrates Court.
- ❖ If an **unfair dismissal** claim is not settled at conciliation in the **NSW Industrial Relations Commission (IRC)** the worker can choose to have the claim heard at a formal arbitration hearing at the IRC.
- ❖ Remember, the **exclusion for working for an employer with 100 or fewer employees** under WorkChoices, **does not apply** in the NSW Industrial Relations Commission.



### HAVE YOU ALSO GOT A CLAIM FOR DISCRIMINATION?

Anti-discrimination laws may apply depending on the circumstances of your dismissal. See the WERP Fact Sheet *Discrimination in the Workplace*.

### WOULD I BE ENTITLED TO ANY SOCIAL SECURITY PAYMENTS?

You may be entitled to a payment so apply to Centrelink immediately. As it is important to apply for the right payment, get advice from the [Welfare Rights Centre](#).

### WHAT IF I'M ADVISED TO APPLY FOR AN UNEMPLOYMENT PAYMENT?

If you are applying for an unemployment payment such as Youth Allowance or Newstart Allowance, you must tell Centrelink –

- when you finished work
- the reasons you are no longer working; and
- how much annual leave and other leave payments or termination pay you received or are entitled to receive from your employer.

This is generally provided in an **Employment Separation Certificate** completed by your employer, if you have been employed in the last 12 months. You can get an Employment Separation Certificate from Centrelink for this purpose, or supply the information in another way eg by asking your employer to write a letter on business letterhead. You may want to supply the information in another way if you think your former employer may put incorrect information on the Certificate or refuses to supply one.

### WHAT IF YOUR PREVIOUS EMPLOYER WON'T GIVE YOU AN EMPLOYMENT SEPARATION CERTIFICATE?

Failure to provide the Certificate can result in your claim for payments being rejected by Centrelink. Centrelink guidelines state that your payment should not be delayed or refused if you have difficulty obtaining an Employment Separation Certificate through no fault of your own. You should explain to Centrelink why you are unable to provide the Certificate and Centrelink should then –

- contact your employer directly for the Certificate and if necessary consider prosecuting the employer; or
- grant your payment and obtain the necessary information later.

Contact your union or [community legal centre](#) if you are having problems getting the Certificate.

### IS AN EMPLOYMENT SEPARATION CERTIFICATE ALWAYS REQUIRED?

You do not have to provide this Certificate if –

- you have been unemployed for more than 12 months
- you have experienced sexual harassment or violence at the workplace
- your previous employer has closed down.

### IS THERE A DELAY IF I WAS DISMISSED FOR MISCONDUCT OR VOLUNTARILY LEFT EMPLOYMENT?

If Centrelink considers that you left your job voluntarily ('without reasonable excuse') or became unemployed as a result of 'misconduct' **you may face an immediate eight week no payment penalty**. This penalty cannot be applied if you left because of harassment or for health reasons.

Once again, get the support of your union or [community legal centre](#) when dealing with Centrelink in this area.

**Disclaimer** The information contained in this fact sheet is only intended as a guide to the law and should not be used as a substitute for legal advice. If you have any further questions we strongly suggest you seek legal advice.

The views expressed herein do not necessarily reflect the views of the Office for Women, NSW Department of Premier and Cabinet.

Note: This information applies to people who live in, or are affected by, the law as it applies in the State of New South Wales, Australia.

The information contained in this fact sheet is current as at 1 July 2007.