

# Factsheet No. 2

## Your Options Following a Dismissal



This fact sheet provides some basic information about the two most common legal actions available to you if you have lost your job: 1. an unfair dismissal claim; and 2. a general protections dismissal claim.

- **Unfair Dismissal**
  - A) Have you been dismissed?
  - B) Was it unfair?
- **General Protections Dismissal**
- **What to choose – unfair dismissal or general protections?**
- **Are there other actions that I can take if I have lost my job unfairly?**
- **How do I decide what to do?**

There are a number of legal actions which you may be able to take if you have been dismissed from your job in circumstances that are unfair.

The two most common legal actions available to you if you have lost your job are:

1. an unfair dismissal claim;
2. a general protections dismissal claim.

The information in this fact sheet is basic, general information only. It is not a detailed explanation of the law and it should not be relied on as legal advice.

At the end of the fact sheet, you will find contact details for places where you can get legal advice, and where you can find more detailed information about the issues raised in this fact sheet. If, after reading this fact sheet, you are considering making either an unfair dismissal or a general protections claim, we strongly recommend that you use those

contact details to get more detailed information and to seek legal advice.

**IMPORTANT:** You have **21 days** from the date you were dismissed to take action. (Please note – the 21 days includes weekends).

### Unfair Dismissal

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Under the *Fair Work Act 2009* (Cth), you may be able to make an unfair dismissal claim if:

1. You were dismissed; AND
2. The dismissal was harsh, unjust or unreasonable, OR
3. You were told that the dismissal was a redundancy, but it was not a genuine redundancy; AND
4. You were employed for at least 12 months before you were dismissed if your employer was a small business with less than 15 employees, or for at least six months before you were dismissed if your employer was not a small business.

### A) Have you been dismissed?

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A person is dismissed if they are fired, sacked or terminated. You might also be dismissed if:

- your employer gave you no choice but to resign, for example, by continuously bullying you;
- your employer didn't tell you that your employment had finished but acted as though it had, for example, by not giving you any more shifts;
- you were demoted or transferred to a job that pays significantly less with different duties or working conditions; or
- you were unreasonably asked to transfer to a different location, for example if your employer said you have to move to a new city or you would be dismissed.

### **B) Was it unfair?**

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Your dismissal might be unfair if it was harsh, unjust or unreasonable. For example, if you were dismissed because:

- you made a small mistake or were late to work on one occasion;
- a mistake was made by a group of employees but you were the only one dismissed;
- you failed to meet deadlines because you were given more work than what is reasonable;
- you did not meet performance requirements but were not told why, and were not given a reasonable opportunity to improve your performance.

Your dismissal might also be unfair if you were told that you were being made redundant, but in fact it was not a genuine redundancy. Your redundancy may not be genuine if:

- your employer still requires the job that you were performing to be done by someone;
- there are other jobs into which your

employer could have re-deployed you, but didn't;

- your employer didn't consult with you about the redundancy, as required by your award.

### **General Protections Dismissal**

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A general protections dismissal occurs when your employer dismisses you because you have exercised a workplace right, or for a reason that is discriminatory.

Workplace rights include the right to:

- correct pay, leave or other entitlements;
- join a union or participate in union activities;
- make a complaint or enquiry about workplace conditions; or
- have a benefit provided under an industrial law or instruction (e.g. an award, enterprise agreement, workplace safety law).

Discriminatory reasons for terminating a person's employment include terminating the person on the basis of their sex, carer's responsibilities, disability, race or age.

If you have been terminated for a discriminatory reason or because you sought to exercise a workplace right, you may be able to bring a general protections claim to the Fair Work Commission under the *Fair Work Act*.

### **What To Choose – Unfair Dismissal or General Protections?**

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The table on the following page summarises the main differences between the two:

**What To Choose – Unfair Dismissal or General Protections?**

	<b>Unfair dismissal</b>	<b>General protections dismissal</b>
<b>Process</b>	Heard in the Fair Work Commission ( <b>FWC</b> ), which is a tribunal (a more informal type of court)	Conciliated at the FWC but if the matter does not settle, it will be continued in the Federal Circuit Court which has a far more formal and complex procedure than the FWC tribunal
<b>Speed</b>	Applications are generally finalised faster	Applications might take more time to finalise and there may be a need to apply to the Federal Court or the Federal Circuit Court before orders can be made on your case
<b>Minimum time employed</b>	Minimum employment period of: <ul style="list-style-type: none"> <li>• One (1) year if the employer is a small business employer (fewer than 15 employees); or</li> <li>• Six (6) months if the employer is not a small business employer</li> </ul>	No minimum employment period requirement
<b>Limit on maximum earnings</b>	One of the following must apply to the employee in order to make an unfair dismissal claim: <ul style="list-style-type: none"> <li>• the employee is covered by an award;</li> <li>• the employee is covered by an enterprise agreement; or</li> <li>• the employee’s annual earnings is less than the high income threshold (which is \$136,700 from 1 July 2015 onwards).</li> </ul>	No maximum earnings amount
<b>Employee or contractor</b>	Only available to employees	Available to both employees and contractors
<b>Casual or permanent employees</b>	Generally not available to casual employees (unless the casual employees work regular and systematic hours with a reasonable expectation of ongoing employment)	Available to both casual and permanent employees
<b>Amount of compensation</b>	Maximum compensation is capped at \$68,350 (from 1 July 2015 onwards).	No cap on the amount of compensation
<b>Cost of running a case</b>	There is an application fee of \$68.60. Generally less expensive running a case in the FWC	Generally more expensive if the case goes to the Federal Circuit Court

## **Are There Other Actions That I Can Take If I Have Lost My Job Unfairly?**

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In addition to an unfair dismissal claim or a general protections dismissal claim, there may be other types of legal action that you can take if you have been dismissed.

These actions could include a discrimination complaint under state or federal anti-discrimination laws, or a claim for unpaid wages and entitlements (if, for example, you were not paid the correct redundancy or termination pay).

## **How Do I Decide What to Do?**

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Identifying the proper legal action after a dismissal can be complicated, because of the numerous and different options available.

Before you take any legal action, it is best to seek legal advice. Getting legal advice will help you to identify the action that best suits your situation.

For legal advice about dismissal, you can contact:

- Community Legal Centres NSW. Go to [www.clcnsw.org.au/](http://www.clcnsw.org.au/) or call 02 9212 7333
- Legal Aid NSW. Go to [www.legalaid.nsw.gov.au/](http://www.legalaid.nsw.gov.au/) to find your local office.
- LawAccess NSW. Go to [www.lawaccess.nsw.gov.au/](http://www.lawaccess.nsw.gov.au/) or call 1 300 888 529.
- The Law Society of NSW Solicitor Referral Scheme, for a referral to a private lawyer. Go to [www.lawsociety.com.au/community/findingalawyer/probono](http://www.lawsociety.com.au/community/findingalawyer/probono) or call 02 9926 0333.

It is also a good idea to read some more detailed information about the law. You can get more detailed information by looking at:

- The website for the Fair Work Commission which is at [www.fwc.gov.au](http://www.fwc.gov.au) under the link headed “Employees”. You can also call the Fair Work Commission on 02 8374 6666.

- The website for the Fair Work Ombudsman which is at [www.fairwork.gov.au](http://www.fairwork.gov.au) under the link headed “Ending Employment”. You can also call the Fair Work Ombudsman on 13 13 94.

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*This factsheet is no substitute for legal advice. If you have a problem please seek legal advice from your local community legal centre*