

# UNFAIR DISMISSAL AND UNLAWFUL TERMINATION

## Unfair Dismissal

Employers who employ up to and including 100 employees are exempt from unfair dismissal laws.

An employee may lodge an unfair dismissal claim with the Australian Industrial Relations Commission (AIRC), if he or she has worked for the employer for six months or more and is employed in Victoria in an organization with 101 employees or more. The number of employees in a business includes part-time and certain casual employees, as well as employees of the employer's 'related bodies corporate' like subsidiary companies and holding companies.

## Exclusion from federal unfair dismissal laws

Employees who are excluded from federal unfair dismissal laws include:

- seasonal workers;
- employees engaged under a contract of employment for a specified period or a specified task;
- employees on probation;
- casual employees engaged for a short period;
- trainees; and
- non-award employees earning \$101,300 or above.

Employees who are dismissed for a genuine operational reason (ie redundancy) are also not allowed to pursue an unfair dismissal claim. Genuine operational reasons include economic, technological, structural or similar matters relating to the employer's business.

## How the AIRC processes claims

An application for unfair dismissal must be lodged within 21 days after termination of employment but the AIRC can extend this period in some circumstances.

The AIRC may dismiss an application for unfair dismissal without a hearing if it is clear that:

- the employer has up to and including 100 employees;
- the employee is excluded by the legislation from bringing an unfair dismissal claim (see above);
- the employee has not completed the necessary six month qualifying period;
- the application is frivolous, vexatious or lacking in substance; or
- the application was not made within 21 days of termination and does not warrant an extension of that time limit.

If it appears that there may be a genuine operational reason for terminating employment the AIRC must hold a hearing to determine the issue. If a genuine operational reason exists, the unfair dismissal application will not be successful.

If the unfair dismissal application is valid (i.e. it is not excluded on the grounds listed above), the AIRC is required to conciliate by holding a settlement conference for the unfair dismissal claim. If the conciliation is unsuccessful an applicant can then elect to have the claim decided by the AIRC at a hearing.

The AIRC, in determining an unfair dismissal claim must consider a number of factors including:

- whether there was a valid reason for the dismissal such as the employee's conduct;
- whether the employee was notified of the reason and given the opportunity to respond; and
- if the dismissal related to unsatisfactory performance by the employee, whether the employee had been warned before the dismissal.

Employees who are successful in a claim for unfair dismissal can seek orders for reinstatement, and/or payment of damages. The maximum that can be awarded in damages is 6 months of the employee's usual pay.

State, territory and Commonwealth equal employment opportunity or discrimination laws may also contain remedies in relation to termination of employment. However, the Workplace Relations Act prevents an employee from substantially pursuing the same claim more than once.

## Unlawful Termination

It is unlawful for an employer to terminate an employee's employment on discriminatory grounds. This is called unlawful termination. Unlawful termination provisions apply to all employees in Australia. Employees who may be excluded from making unfair dismissal claims are not excluded from making unlawful termination claims.

An employee can apply to the AIRC, the Human Rights and Equal Opportunity Commissioner (HREOC) or the Equal Opportunity Commissioner of Victoria (EOCV) if he/she believes his/her employment was terminated for an unlawful reason, including:

- temporary absence from work because of illness or injury;
- trade union membership or participation in trade union activities;
- non-membership of a trade union;
- seeking office as a representative of employees;
- the filing of a complaint, or the participation in proceedings, against an employer;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, sign, extend, vary or terminate an AWA;
- absence from work during maternity leave or other parental leave; and
- temporary absence from work because of the carrying out of a voluntary emergency management activity.

Employees who believe their employment has been unlawfully terminated can make an application to the AIRC (within 21 days) or HREOC/EOCV (within 12 months) on one or more grounds listed above, including discriminatory grounds. The AIRC, HREOC or EOCV must try to conciliate the matter, and if conciliation is unsuccessful, the employee must elect whether to proceed to court for a hearing.

Employees who are successful in a claim for unlawful termination can seek orders for damages. In the HREOC and EOCV there is no maximum amount that can be awarded.

**If a termination occurs that could be either unfair or unlawful, the employee must elect to proceed with one claim and cannot proceed with both.**

This article contains general information only and is provided as legal advice. Professional advice should be taken before any course of action is pursued, or any information here is relied upon.

For advice about employment issues contact Jodie Gerritsen or Henri Kauthen on 9890 3321.



701 Station Street, Box Hill, Victoria 3128  
Tel : 03 9890 3321 Fax : 03 9898 4266  
email : [legal@robinsongill.com.au](mailto:legal@robinsongill.com.au)  
[www.robinsongill.com.au](http://www.robinsongill.com.au)