



## Employment Disputes and Litigation

*Some of the most commonly asked questions about Employment Disputes and Litigation are discussed on this page.*

### 1. What is unfair dismissal?

An employee has been unfairly dismissed when:

- The person has been dismissed, and
- Their dismissal was harsh, unjust or unreasonable, or
- If the employer is a small business, the dismissal was not consistent with the small business fair dismissal code.

The dismissal must not be a case of genuine redundancy.

### 2. What is harsh, unjust or unreasonable?

In considering whether a dismissal was harsh, unjust or unreasonable, the following factors are considered:

- Whether there was a valid reason for the dismissal related to the employee's capacity or conduct.
- Whether the employee was notified of that reason and given an opportunity to respond.
- Any unreasonable refusals by the employer to allow the employee to have a support person present to assist at any discussions in relation to dismissal.
- If the dismissal related to unsatisfactory performance by the employee, whether they had been warned about the unsatisfactory performance before the dismissal.
- The degree to which the size of the employer's enterprise and the degree to which the absence of dedicated human resource management specialist or expertise would be likely to impact on the procedures following in effecting the dismissal.
- Any other matters that is relevant.

### 3. Who can I make an unfair dismissal application to?

If you are employed in the private sector or by the Commonwealth or a Commonwealth Authority in New South Wales then an application can be made to Fair Work Australia if the following conditions are satisfied:

- If you have satisfied the minimum employment period which is one year where the employer is a small business employer which means they have less than 15 employees or six months where the employer is not a small business employer which means they have 15 or more employees, and



- You must earn less than the high income threshold which increases every year and is currently \$118,100.00 unless you are covered by an award.

If you believe you have been unfairly dismissed you must apply to Fair Work Australia within 14 days after the date of the dismissal.

If you are a New South Wales public sector employee or a local government employee within New South Wales then any claim for unfair dismissal must be made to the New South Wales Industrial Relations Commission. In order to make a claim the employee must either:

- Be covered by a state industrial award or enterprise agreement, or
- Is award-free but earns no more than \$113,800.00.

There are also limitations on applications by the following:

- Apprentices or trainees,
- Independent contractors,
- Employees on a three month probation period if determined in advance,
- Some casual employees,
- Employees on contracts of employment for a specified period of time less than six months, and
- Employees engaged under a contract of employment for a specific task.

Any application to the New South Wales Industrial Relations Commission must be made within 21 days from the date of the dismissal.

#### **4. What if I do not satisfy the conditions required enabling me to make an application to either Fair Work Australia or the New South Wales Industrial Relations Commission?**

If you have been terminated and are unable to make a claim to either of these tribunals then the remedy available to you is to start court proceedings based upon your employment agreement. This is a more complicated process than an application for unfair dismissal and as such you should seek legal advice to assist you.

#### **5. What if my employer asks me to resign in lieu of being terminated?**

If your employer threatens termination of employment but provides you with an alternative to resign it is important that you seek immediate legal advice. You should not sign any documents without first obtaining legal advice and do not make any admissions to your employer in relation to your conduct or performance.

#### **6. What is unlawful termination?**

Unlawful termination is when an employee is dismissed by their employer for reasons including:

- A person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carers responsibility, pregnancy, religion, political opinion or social orientation.
- Temporary absence from work because of illness or injury.
- Trade union membership or non membership.



- Participation in trade union activities.
- Being absent from work during maternity leave or other parental leave.
- Filing a complaint or participating proceedings against an employer.

Unlawful termination applications must be made to Fair Work Australia within 60 days of the termination.

## **7. What should I do if I am requested to attend a disciplinary meeting by my employer?**

Disciplinary meetings can be an extremely stressful situation to be faced with. If you are required to attend such a meeting then you must make sure that proper minutes of the meeting are taken by a friend or colleague. The role of the friend or colleague is not to participate in the meeting but to simply take accurate notes of what is said. You should not agree to the meeting being either taped or videoed. You should not allow yourself to be pressured into a resignation or accepting a demotion or change of your duties. If your employer is pressing you into accepting these sorts of outcomes then you should seek an adjournment prior to making any decision so that you can obtain urgent legal advice. Prior to the commencement of any meeting you should request your employer provide you with a written outline of the agenda and full details of any allegations that they are making. If they refuse to provide this to you, then you should submit to your employer in writing at the commencement of the meeting a letter noting that your request has been refused. At the end of the meeting you should request your employer provide you with confirmation of the outcome of the meeting.

## **8. What if one of my former employees is in breach of their obligations regarding a restraint of trade clause or confidentiality agreement?**

If you suspect that a former employee is breaching either of these clauses and you are concerned that your business may suffer damage then you need to seek urgent legal advice as it may be necessary to obtain an injunction against the former employee. One requirement of an injunction is that the party seeking the injunction acts quickly and as such at the first sign of trouble you need to seek legal advice.

## **9. My former employer is threatening to take legal action against me alleging breaches of my employment contract, how do I respond?**

If your former employer is threatening to take legal action against you, you need to seek urgent legal advice regarding your obligations under your employment contract and to advise you what options are available to you.

*If you would like further information, or require assistance, please contact us on (02) 4731 5899 or send us an email by clicking on the 'Contact Us' page on our website.*