More Information

Workplace Infoline 1300 363 264

In this edition:

- The facts: Unlawful termination and unfair dismissal
- Unlawful Termination Assistance Scheme (UTAS)
- Quick question and answer: Workplace agreements

The facts: unlawful termination and unfair dismissal

It's important to understand the difference between unlawful termination and unfair dismissal and how this information applies to you and/or your business.

Unlawful termination

Under Australia's workplace relations system, it is unlawful for an employer to terminate employment for certain prohibited reasons. This is called unlawful termination. Unlawful termination provisions **apply to all employees** in Australia. Employees who are excluded from making unfair dismissal claims are not excluded from making unlawful termination claims where they believe their employment has been terminated for a prohibited reason.

An employee can apply to the AIRC if they believe their employment was terminated for a prohibited reason under section 659 of the *Workplace Relations Act 1996*, 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 involving alleged violation of laws or regulations or recourse to competent administrative authorities
- 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 Australian workplace agreement (AWA)
- absence from work during maternity leave or other parental leave
- temporary absence from work because of the carrying out of a voluntary emergency management activity.

The AIRC must try to conciliate the matter, and if conciliation is unsuccessful, the AIRC must issue a certificate and make a preliminary assessment of the merits of the application. At that point, the employee has 28 days to elect whether to proceed to court.

Unfair dismissal

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

The number of employees employed by the employer includes all full-time and part-time employees and casual employees engaged on a regular and systematic basis for at least 12 months, as well as employees of 'related bodies corporate' (ie. subsidiary and holding companies).

In general, 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 by a constitutional corporation
- employed in Victoria or a territory
- a Commonwealth employee
- employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer.

Exclusion from federal unfair dismissal laws

Employees that 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

- non-award/agreement employees earning more than the remuneration cap ($101,300, indexed annually)

Employees dismissed for genuine operational reasons are also unable to pursue an unfair dismissal claim. Genuine operational reasons include economic, technological, structural or similar matters relating to the employer's business.

How claims are processed

An application for unfair dismissal must be lodged within 21 days of termination of employment. The AIRC may extend this period in certain circumstances (eg. if there is a reasonable explanation for the delay).

The AIRC has the power to dismiss an application for unfair dismissal without a hearing if it is clear that one of the exclusions apply, the application is frivolous, vexatious or lacking in substance or the application was not made within 21 days of termination.

However, if the AIRC believes there may be a genuine operational reason for terminating employment, it must hold a hearing to determine the issue. If a genuine operational reason exists, the unfair dismissal application cannot proceed.

If none of the exclusions apply, the AIRC must attempt to settle the unfair dismissal claim. If settlement is unsuccessful, the AIRC must issue a certificate and make a preliminary assessment of the merits of the application.

An applicant can then elect to have the claim decided by the AIRC at an arbitration 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 related to the employee's capacity or conduct
- whether the employee was notified of the reason and given the opportunity to respond
- if the dismissal related to unsatisfactory performance by the employee, whether the employee had been warned before the dismissal.

Except for Victorian employees, employees of unincorporated businesses remain covered by state industrial and employment laws under Australia's workplace relations system. These employees may access state remedies for unfair dismissal.

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 1996* restricts an employee from pursuing multiple claims as a result of a single termination of employment.

Unlawful Termination Assistance Scheme

The Unlawful Termination Assistance Scheme (UTAS) provides financial assistance to people who may have lost their job for a prohibited reason under section 659 of the *Workplace Relations Act 1996*, such as those listed above.

Employees who believe they have been unlawfully terminated for a prohibited reason, may be eligible to receive assistance from the Australian Government. Eligible applicants may receive up to $4,000 worth of legal advice in relation to the merit of their claim so they can decide whether or not they have a case to take to court.

Before someone can apply for financial assistance under UTAS, they must first attempt to resolve their claim by attending a settlement conference at the AIRC. If settlement is unsuccessful and the AIRC finds that the claim may have merit or the merit cannot be determined, the person may then apply for UTAS assistance.

To be eligible for assistance their income prior to losing their job must be at or below the UTAS income limit, which is currently set at $54,487 per year for people who lost their job on or after 28 February 2007.

If their income is higher than the UTAS income limit, they can still apply for UTAS assistance and request special consideration of their circumstances.

For more information about UTAS, or to apply for assistance, please contact the Workplace Infoline on 1300 363 264, email utas@dewr.gov.au or visit the Workplace website on www.workplace.gov.au.

More information

For more information on unfair dismissal and unlawful termination, please call the Workplace Infoline on 1300 363 264.

Quick question and answer

Q: I am currently on an AWA but I have heard that there are other workplace agreements available. Can you please tell me about the other agreements?

A: There are currently six types of workplace agreements under Australia's workplace relations system.

Australian workplace agreement
An Australian workplace agreement is an individual written agreement between you and your employer that sets out the terms and conditions of your employment. You can appoint a bargaining agent to bargain on your behalf.
Read more Australian workplace agreement information

Employee collective agreement
An employee collective agreement is made between an employer and a group of employees who will be covered by the agreement. Employees can appoint a bargaining agent to bargain on their behalf.
Read more Employee collective agreement information

Union collective agreement
A union collective agreement is made between an employer and a union or unions that sets out terms and conditions of employment for employees covered by the agreement. The union or unions must have at least one member who will be subject to the agreement, and must be entitled to represent that employee.
Read more Union collective agreement information

Employer greenfields agreement
An employer greenfields agreement is an agreement that can be made where an employer is establishing a new project, business or undertaking before any employees have been employed in the business.
Read more Employer greenfields agreement information

Union greenfields agreement
A union greenfields agreement is an agreement that can be made between a union and an employer who is establishing a new project or business, before any employees have been employed in the business. The union must be entitled to represent the employees to whom the agreement would apply.
Read more Union greenfields agreement information

Multiple business agreement
A multiple business agreement is a collective agreement that enables multiple employers to make a single agreement that applies to all of their businesses. These agreements must be authorised Workplace Authority, and can be authorised where this is in the public interest. Typically, a multiple business agreement could be used in a franchise operation where there are a number of businesses carrying on the same type of business that wish to offer the same working conditions.
Read more Multiple business agreement information

Whether you're an employee or employer, there's one place you can go for information, help and advice. Call the Workplace Infoline on 1300 363 264 or alternatively visit the Workplace website at workplace.gov.au.