Australian Government

WorkChoices

WorkChoices and termination of employment

FACT SHEET 9

Unfair dismissal

Under WorkChoices, employers who employ up to and including 100 employees* will be 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 by a constitutional corporation (see the 'WorkChoices and who is covered' fact sheet); or
- employed in Victoria or a territory; or
- a Commonwealth employee; or
- employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer.

*The method for calculating the number of employees in a business will include part-time and certain casual employees, as will employees of the employer's 'related bodies corporate' like subsidiary companies and holding companies.

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; and
- employees earning $98,200 or above.

Employees who are dismissed for a genuine operational reason 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. The AIRC can extend this period.

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;
- 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 attempt to conciliate the unfair dismissal claim. The AIRC must try to conciliate the matter, and if conciliation is unsuccessful, the AIRC must produce a certificate on the merits of the application.

An applicant can then elect to have the claim decided by the AIRC at an arbitrated 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.

Except for Victorian employees, employees of unincorporated businesses will remain covered by state industrial and employment laws under WorkChoices. 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 prevents an employee from substantially pursuing the same claim more than once.

Protection against unlawful termination

Under WorkChoices, it will continue to be 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 are excluded from making unfair dismissal claims are not excluded from making unlawful termination claims.

An employee can apply to the AIRC if they believe their 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.

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.

Employees who believe their employment has been unlawfully terminated can make an application to the AIRC on one or more grounds listed above, including discriminatory grounds. The AIRC must try to conciliate the matter, and if conciliation is unsuccessful, the AIRC must issue a certificate on the merits of the application. At that point, the employee has 28 days (this was previously 14 days) to elect whether to proceed to court.

Under WorkChoices, this time period has been extended to allow the employee time to seek legal advice.

Unlawful termination financial assistance scheme

Employees who believe they have been unlawfully terminated may be eligible to receive up to $4,000 of independent legal advice, based on the merits of their claim.

They will be eligible for assistance if they have a certificate from the AIRC indicating that their claim has merit and could not be resolved through conciliation. The application for assistance will be assessed by the Department of Employment and Workplace Relations on the basis of financial need.

To be eligible for assistance, the person's income prior to termination must be below $915.70 per week or $47,745 per year. This is the average weekly total earnings for adult full-time non-managerial employees and will be adjusted every two years.

WorkChoices is a new system of workplace relations legislation that covers up to 85 per cent of Australian employees. This series of fact sheets is available to assist workers and employers to understand their rights and obligations under the legislation.

For more information call the **WorkChoices Infoline** on **1300 363 264** or visit the **WorkChoices** website **www.workchoices.gov.au**

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