

Under the federal law, employee dismissals must not be based on prohibited reasons such as an employee's race, sex, age, disability, absence from work due to illness and union membership.



The current unfair dismissal laws apply only in relation to the dismissal of an employee of a constitutional corporation, a Commonwealth public sector employee, an employee in Victoria or a Territory, or a waterside, maritime or flight crew worker employed in interstate or overseas trade or commerce. Employees not falling into these categories can only access **State Unfair Dismissal Laws** (treated separately).

The following provisions will apply to all employees nationally:

- requirement for minimum notice or pay in lieu, except in cases of serious misconduct¹;
- prohibition against dismissal on discriminatory grounds; and
- the requirement to notify the Commonwealth Employment Service of the termination of 15 or more employees on redundancy grounds.

Excluded classes of employees include: contracts of employment for a fixed term or specified task, a probationary period, a casual employee engaged for a short period, a trainee or, a non-Award High income earner (exceeding \$64,000 a year).

Recent amendments to the 'unfair dismissal' legislation (under the Howard Government) are based on the principle of a **fair go all around**, striking a balance between employers and employees. The *Australian Industrial Relations Commission* handles cases by **conciliation** and if the matter is not resolved then it is referred to **arbitration**. In deciding whether a dismissal is harsh, unjust or unreasonable it will be required to take into account all relevant factors, including:

- whether there was a valid reason for the dismissal;
- whether the reason was given to the applicant;
- whether the applicant was given an opportunity to respond to any reason related to their capacity or conduct; and
- whether there was any warning as to unsatisfactory performance.

¹Under the regulations, serious misconduct includes:

- wilful or deliberate behaviour inconsistent with the continuation of the contract of employment;
- conduct which causes an imminent and serious risk to the health or safety of any person, or the reputation, viability or profitability of the employer's business; and
- theft, fraud, assault, intoxication and refusal to carry out a lawful and reasonable instruction which was consistent with the employee's contract - unless the employee can show that, in the circumstances, the conduct did not make employment unreasonable.



Reinstatement is the preferred remedy for those who succeed in an unfair dismissal claim, although the legislation will provide for compensation. However, compensation cannot exceed the amount received by the employee in the six months immediately preceding the termination, or \$32,000 - whichever is lower. The recent amendments to the legislation empower the court to consider a range of factors in deciding on a remedy including, the viability of the employer's business, the employee's length of service, likely remuneration and the employee's efforts to mitigate any loss.

The recent amendments to the legislation also change the structure of legal costs. Restrictions on awarding costs have been relaxed to discourage frivolous and vexatious claims (which often meant substantial costs for the employer).

Comasters can advise employers, and employees, of their respective rights and on the avoidance of legal pitfalls.

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