

Migraine Australia is a national patient advocacy organisation to support all Australians living with migraine and their families. We are the voice of migraine in Australia.

# MIGRAINE & UNFAIR DISMISSAL



# UNFAIR DISMISSAL

**Unfair dismissal claims must be made within 21 days from the date of dismissal.**

## WHO IS ELIGIBLE?

You are protected from unfair dismissal if:

- You are an employee of a national system employer. This will depend on the state or territory in which you live, which may exclude state and local government employees.

AND

- You met the minimum period of employment. This must be consistent with the Small Business Fair Dismissal Code and will depend on the size of the business:
  - 6 months where there are 15 or more employees
  - 1 year if there are fewer than 15 employees at the time of dismissal.

AND

- You earn less than the high-income threshold (\$183,100 per year) OR a modern award or enterprise agreement covers your employment.
- To be eligible for unfair dismissal you must satisfy the following:
- You are an employee. This does not include genuine independent contractors or casuals who worked on an irregular basis. Seek legal advice on these definitions.

AND

- Your dismissal was initiated by your employer.

AND

- **The dismissal was not a case of genuine redundancy.**

AND

- The dismissal was harsh, unjust, or unreasonable.

If you are unsure if you are eligible, see the Fair Work Commission - Unfair Dismissal Eligibility Quiz <https://www.fwc.gov.au/termination-of-employment/unfair-dismissal/eligibility> for guidance and seek legal advice.

## WHAT IS UNFAIR, UNJUST, AND UNREASONABLE?

Factors to consider when determining whether you were unfairly dismissed include:

- If there was a valid reason related to your capacity or conduct; **and**
  - E.g. This must be true and justifiable and connected to your employment.
  - Importantly, even if there is a valid reason, the dismissal still may be harsh and therefore unfair.
- If you were notified of that reason; **and**
  - You must be notified before a decision to terminate has taken place.
- If you had the opportunity to respond to any reason related to your capacity or conduct; **and** ➢ You must have the opportunity to respond to any allegations and your employer must give proper consideration to your response before making a decision to terminate. ➢ This could be during a formal disciplinary meeting
- Any unreasonable refusal by the employer to have a support person present; **and** ➢ In any meeting discussing your conduct that could lead to dismissal you are entitled to have a support person of your choosing, this could be a friend, family member, union official or a colleague who is not connected to the events.
  - Your employer may say that your support person cannot say anything on your behalf.

This is not true, your support person can assist in discussion where you are unable to, call for a break or raise any concerns with the procedure.

- If the dismissal related to unsatisfactory performance - you had been warned about that unsatisfactory performance before the dismissal; **and**
  - You must be given the opportunity to correct any performance issues
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; **and**
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; **and**
- Any other matters that FWA considers relevant. For example
  - Length of service
  - Your employment record
  - Your age
  - The conduct that led to termination
  - Whether your employer followed their own disciplinary process
- (section 387, Fair Work Act 2009)

## PROCEDURAL FAIRNESS

- *In addressing the above points, the importance of procedural fairness can also be considered, meaning whether the process the decision-maker undertook to make the decision rather than the decision itself. Procedural fairness requires:*
  - *You are made aware of the allegations made against you*
  - *You are given the opportunity to respond to these allegations*
  - *There is sufficient and appropriate evidence to support the allegations and decision*
  - *A lack of bias by the decision maker.*
- *Even where there is a valid reason to terminate, a lack of procedural fairness can make the termination unfair.*

## THE PROCESS

- To lodge an unfair dismissal application with the Fair Work Commission, you will need to lodge a Form F2 along with any supporting information. This must be lodged within 21 days of your dismissal taking effect.
- You can lodge an application yourself see the Fair Work Commission - Unfair Dismissal Application Quiz <https://www.fwc.gov.au/content/rules-form/unfair-dismissal-application> and pay the application fee of \$74.50, unless you can satisfy serious hardship to apply for a fee waiver.
- You can seek legal advice and/or assistance from
  - Your union (<https://www.australianunions.org.au/>) OR
  - A community legal centre (<https://clcs.org.au/findlegalhelp>) OR
  - A private solicitor
- After submitting your application, your matter will be listed for conciliation, this could take up to six to eight weeks. The conciliation will be by phone with a FWC Conciliator, who is to assist the parties come to a resolution. Conciliation is an informal and confidential process. Remedies that can

be awarded can include :

- Reinstatement, however, this is very rare, OR
- Compensation, which could include terms such as changing the classification of your termination to a resignation, a statement of service and/or monetary compensation.
  - ⇒ Monetary compensation is capped at the lesser of 26 weeks or half the high-income threshold.
  - ⇒ Factors to consider in the monetary amount include, your length of service, any notice pay already received, your efforts to find other work and the amount of time you have been or are likely to be out of work.
  - ⇒ This will be confirmed in a legally binding document referred to as a Deed or Release of Terms of Settlement.
- If you do not settle the matter at conciliation, the claim will proceed to an Arbitration hearing at the Fair Work Commission. This could take up to several months for a hearing date and will require you to present evidence for your case. The matter will be decided by the Commission and will be in the public domain. However, most matters are resolved at conciliation, which is quicker, cheaper and gives you more control over the outcome.

## CONNECT WITH MIGRAINE AUSTRALIA

[www.migraine.org.au](http://www.migraine.org.au)

[hello@migraine.org.au](mailto:hello@migraine.org.au)

[www.facebook.com/migraineaus](https://www.facebook.com/migraineaus)

Instagram & Twitter : @migraineaus

