

Constructive Dismissal

VS Unfair Dismissal



The Fair Work Act 2009 offers guidelines for dismissal in Australia such as what types of dismissal are considered as fair and legal. Individual state laws also provide guidelines for filing a claim against an employer or contract agent who unlawfully dismisses an employee or contract worker.

What Is Constructive Dismissal?

Constructive dismissal refers to situations where an employee resigns from his or her position due to the actions or treatment (conduct) of the employer, or a feeling of having no choice. This forced resignation is most often deemed fair under Fair Work Australia guidelines.

Under the **Fair Work Act**, conduct is classified as either the failure to act, or an act on its own in situations such as the following:

- The employer threatens to dismiss the employee causing him or her to resign
- The employee is left with no reasonable option but resignation due to the conduct of the employer
- The employer makes drastic changes in the work duties or work location of the employee
- The employee suffers false allegations of misconduct
- The employee is subject to disciplinary warnings that are unreasonable

What Is Unfair Dismissal?

Unfair dismissal is when an employee is dismissed from their job in a harsh, unjust or unreasonable manner. The Fair Work Commission decided on cases of unfair dismissal in Australia. To apply for unfair dismissal, employees have to apply to the Fair Work Commission within 21 days after their dismissal takes effect.

Under the **Fair Work Act**, employees can apply to the Fair Work Commission if they have been dismissed on the basis of a breach of general protections or unlawful termination.

What constitute unfair dismissal in Australia?

- The dismissal was disproportionate to the conduct
- The dismissal will cause extreme personal or economic consequences
- The dismissal is based on allegations made by the employer that are untrue
- The dismissal was based on unreasonable circumstances or lacked fair process

WHAT CONSTITUTE LAWFUL DISMISSAL IN AUSTRALIA?

The **Fair Work Act** outlines the following scenarios as being lawful for dismissal:

- The employee does not exhibit the capacity or performance that the position demands
- The employee's conduct endangers the safety and welfare of fellow employees
- The employee's performance is lacking to the point of redundancy in delegating and completing tasks

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How to Defend an Unfair Dismissal Claim?

Employers find out they are involved in an unfair dismissal matter when they receive a copy of the dismissed employee's application from the Fair Work Commission. This is often the first time the employer is aware that the employee had made a claim against them. It is important for you to understand the processes to defend an unfair dismissal claim as it is the start of a formal legal process and won't just 'go away'.

Here are some recommended steps to defend an unfair dismissal claim:

- Lodge a response (Form 3 - Employer response to unfair dismissal application) with the Fair Work Commission within seven days of being served with the dismissed employee's application. This form can be obtained from any Fair Work Commission office public counter and downloaded from the Commission website
- Attach any supporting documents with Form 3 such as letter of dismissal, written warnings etc.
- Send a copy of the response to the dismissed employee
- Prepare for conciliation: Employer can choose to have a representative such as a lawyer who is skilled in Australian employment law matters at conciliation.

HELP

As an employer, it is important to understand the processes to defend an unfair dismissal claim. At Owen Hodge Lawyers, we proudly represent clients who have been defended unfair dismissal claim on various grounds. We work hard to ensure that your legal rights and businesses are protected.

Call us today at 1800 770 780 or contact us via email at ohl@owenhodge.com.au to schedule a consultation with our team of employment lawyers.