

Unfair dismissal

Check the facts and follow correct procedure before dismissing an employee.

Employees in a business with 15 or more employees can claim unfair dismissal after only 6 months service and after 12 months in a smaller business.

An unfair dismissal claim to the Fair Work Commission alleges the dismissal was harsh, unjust or unreasonable. The Commission considers whether the employee was:

- validly dismissed because of their capacity or conduct, and its effect on the safety and welfare of others
- notified of that reason and given an opportunity to respond
- unreasonably refused a support person at any discussions about dismissal
- warned about unsatisfactory performance before dismissal

The Commission also considers the size of the business, expertise with HR or any other matters that could affect the dismissal procedure.

It is best practice to ask new employees to sign their contract and handbook to show that have read them. This allows you to then fairly and consistently enforce all rules and procedures.

**FOR ADVICE, PLEASE CONTACT
US ON 1300 651 415.**

Bullying & harassment

Bullying and harassment at work is serious.

You must take steps to prevent or minimise this behaviour.

Although bullying and harassment appear similar, the legal approach is different. Bullying is repeated, unreasonable behaviour at work that creates a risk to health and safety, including:

- aggressive, intimidating or humiliating behaviour
- bad language or rudeness
- teasing, practical jokes or spreading rumours
- unreasonable expectations of work done

Harassment is isolated or repeated behaviour that undermines someone's dignity and is unacceptable or humiliating to them. Unlike bullying, harassment is discriminatory and targets someone because of age, gender, race, disability or ethnicity.

Employers need a clear bullying and harassment policy, with some offering training to help workers recognise this behaviour.

Employees can lodge a claim at any time with the Fair Work Commission to stop ongoing bullying at their workplace.

- The Commission has 14 days to respond and then gives the employer seven days to respond
- A formal hearing decides whether the person is being bullied and if there is a risk it will continue
- The Commission may make an order to stop the bullying behaviour and review the company's bullying policy.

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Discrimination

Employers discriminate if they treat one employee less favourably than another because of their personal attributes.

The most common types of discrimination are disability and pregnancy.

You have to take positive action to prevent discrimination during recruitment and in your workplace. Never discriminate against someone because of these attributes:

- race or colour
- sex or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion or political opinion
- national extraction or social origin

If you impose a requirement or practice that unnecessarily disadvantages a certain group, this is indirect discrimination. For example, early starting hours could disadvantage parents of young children; banning beards could hurt some religious employees.

When an employee gets less favourable treatment because they have complained about discrimination, this is victimisation. Harassment is another type of discriminatory behaviour (see Bullying and harassment). Sometimes victims of discrimination may feel too ashamed to complain. Employers must positively act to stop discrimination and should have a comprehensive anti-discrimination policy that encourages them to speak up.

This fact sheet provides an overview only of discrimination but cannot consider individual circumstances.

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Independent contractors

The difference between an independent contractor and an employee is not always clear cut.

An employee usually works full time, part time or casually and has to work as the employer directs them.

A contractor usually works the hours required to carry out a specific task or complete a project and has more control over the way they work. Seek advice at the start to decide whether you are engaging an employee or contractor. Someone may be a contractor under the Fair Work Act – not allowed annual leave or other entitlements – but an employee for workers compensation and superannuation. A court or tribunal examines all possible factors:

- degree of control over how and when the work is done
 - expectation of ongoing work
 - financial risk
 - whether superannuation contributions are needed
 - who provides tools and equipment
 - income tax deductions
- method of payment
 - leave entitlements
 - ability to work for other companies
 - right to delegate or subcontract work

If you incorrectly categorise an employee as a contractor, you could be liable for sham contracting. Sham contracting is a breach of obligations under employment law, such as leave entitlements or termination payments, and responsibilities under tax, insurance and superannuation law.

This fact sheet provides an overview only of independent contractors but cannot consider individual circumstances.

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