

# Unfair dismissal



**Know  
YOUR  
Rights!**



Please contact NSWNMA immediately if your employment has been terminated, you've been forced to resign, or your employer has threatened termination.



## What is an 'unfair dismissal'?

If your employment has been terminated, you have been forced to resign, or your employer has threatened termination, you may have a right to make an unfair dismissal claim. An unfair dismissal occurs when a termination or threatened termination is *harsh, unreasonable or unjust*.

This could occur, for example, because the employee was not given a fair opportunity to respond to allegations that were the reason for dismissal (procedural fairness); there is insufficient evidence to prove the allegations (substantive fairness); or because termination of employment is too harsh an outcome in the circumstances.

An industrial tribunal can determine whether a dismissal was unfair and may make orders against the employer, such as re-instating the employee or awarding compensation.



## Making an application

Unfair dismissal applications are made to an industrial tribunal. In the state system, which applies to public sector employees, an unfair dismissal application is made to the Industrial Relations Commission of NSW. In the federal system, which applies to private sector employees, an unfair dismissal application is made to the Fair Work Commission.

To be eligible to make an unfair dismissal application, you need to have been employed for a minimum period, usually six months, however that period may vary depending on the size of the employer's business. Casual employees may also be eligible to make an

unfair dismissal claim if they worked on a regular basis and had an ongoing expectation of work.

In both the state and federal systems, employees have 21 days from the date they were notified of the dismissal to make an unfair dismissal application to the relevant tribunal. An unfair dismissal application should be made by NSWNMA on your behalf. It takes significant time to obtain the necessary information from you, to assess your claim, and to prepare and lodge an application. That's why it's critical to contact NSWNMA as soon as possible after a termination has occurred or has been threatened by your employer.

If the 21 days has already passed or you do not meet the minimum employment period, you should still contact NSWNMA for advice as soon as possible. An out of time application can be made in certain circumstances. And even if an unfair dismissal claim cannot be made, there may be grounds to make a claim of another kind.



## Conciliation

Unfair dismissal proceedings follow a two-stage process of conciliation and arbitration.

Conciliation involves a private conference or series of private conferences with a Commissioner or conciliator of the tribunal. The Commissioner or conciliator will hear from both parties; from NSWNMA on behalf of the employee and from the employer or their representative. The parties will then enter into discussions, with the assistance of the Commissioner or conciliator, in an attempt to reach an agreed resolution, which is called a settlement.

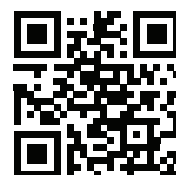
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Any settlement that may be reached can only be voluntarily entered into between the parties and usually represents a compromise on both sides. Some examples of settlement outcomes include the payment of a sum, usually expressed in an equivalent of a number of weeks' wages; acceptance of a resignation in place of the dismissal; and/or an agreement between the parties to not disparage (say negative things) about one another to the media or future employers.

The large majority of unfair dismissal matters settle at the conciliation stage. There are several reasons for this, including that the employee may have decided they do not want to return to work with the employer anymore, and a settlement may put the employee in a better position to move on and obtain future employment. A settlement at conciliation also has the benefit that it is confidential. Furthermore, the employee is able to exercise some control over a settlement outcome and avoid the uncertainty of a decision made by the tribunal.

If a matter does not settle at conciliation, then it will proceed to arbitration.



## Arbitration

Arbitration involves a formal hearing with evidence and examination and cross-examination of witnesses, usually including the dismissed employee. As a consequence, the process may take many months before it is concluded.

The Commissioner of the tribunal will consider all the evidence and at the end of the hearing, make a decision that is binding upon the parties. A decision may include dismissal of the claim; reinstatement of the employee to their previous position; re-employment to another position; or financial compensation up to a maximum of 26 weeks' wages. It should be noted that an award of 26 weeks' compensation is uncommon, and usually reserved for the clearest case of unfair dismissal and where the employee had at least 20 years' service with the employer.

The decision, including reasons, and the full names of the employee, employer and witnesses, are published by the tribunal and become a matter of public record that is accessible to everyone on the internet. This is why many employees who make an unfair dismissal claim prefer a confidential settlement. It should be noted that a settlement can be reached between the parties at any time, including during arbitration, right up to the moment before a decision is made by the tribunal.



## NSWNMA is here to advise, support and represent you

If you were a financial member of NSWNMA at the time of the alleged incident or incidents that caused the termination of your employment, then you can expect to receive the full benefits of NSWNMA membership, including advice, support and representation as appropriate.

First, we will assess your claim and determine whether it has reasonable prospects of success. Some cases may not have reasonable prospects of success because the evidence is not in the employee's favour, even if we agree the termination is unfair. If that's the case, then we will explain to you why we cannot proceed on your behalf.

If your case does have reasonable prospects for success, we'll discuss the unfair dismissal process with you and help you decide whether to make an application. If you decide to make an application then we can prepare and lodge it on your behalf, so long as it is not against the interests of NSWNMA to do so.

You will be assisted and represented by one of NSWNMA's Industrial Officers who have specialist experience in employment law and appearing before the industrial tribunals on behalf of nurses and midwives. This is all covered by your membership fees. However, should you choose to engage a private lawyer instead, you would need to pay them legal fees, and it is unlikely they would have the specialist experience in employment law for nurses and midwives that our Industrial Officers have.

NSWNMA will represent you at the tribunal, prepare statements and evidence if required, and enter into settlement negotiations with the employer if you ask us to do so. We will be there with you, and acting for you, every step of the way.



## Further support

It can be very stressful to have your employment end, or about to end, and to enter into an unfair dismissal process. If you're a registered nurse, midwife, enrolled nurse or student nurse or midwife, you may contact Nurse & Midwife Support for a confidential 24/7 counselling service. Visit: [nmsupport.org.au](http://nmsupport.org.au)

If you are feeling unwell or could be suffering from a health condition, please see your general practitioner. Your general practitioner can also refer you to counselling and other services.