

## Navigating unfair dismissal claims: A guide for employers

Unfair dismissal claims are common. While being proactive and obtaining legal advice prior to dismissal can help, it won't always prevent a claim from being lodged.

In this briefing we explain the process the Fair Work Commission (FWC) follows when it receives a claim, and give you some tips on how to respond.

### What happens after the claim is filed?

When an employee files an unfair dismissal claim, the FWC follows a structured process:

- (1) **Acknowledgment:** The FWC will send an acknowledgment to both the employee and employer confirming receipt of the claim.
- (2) **Response:** Employers are required to submit a response within 7 days of receiving the claim, using the 'Employer Response Form' (Form F3).
- (3) **Conciliation:** A conciliation conference is scheduled, typically within a few weeks, to facilitate settlement. This is a voluntary and informal process aimed at resolving the dispute without a formal hearing.
- (4) **Outcome:** If an agreement is reached the terms are put into writing and the case is concluded.
- (5) **Preparation for hearing:** In the absence of a resolution, the case goes to hearing or arbitration. Both parties prepare by gathering evidence, including documents and witness statements, to support their case.
- (6) **Hearing or arbitration:** Both parties present their evidence and arguments. The FWC considers all the information presented and makes a decision based on the merits of the case.
- (7) **Decision:** The FWC's decision can include reinstatement, compensation, or no remedy. The decision is legally binding and can only be appealed on legal grounds. Sometimes the FWC makes the decision on the day of the hearing, otherwise it may take weeks or even months to get the decision.

### Can an employer object to an unfair dismissal claim?

You can object to an unfair dismissal claim if the employee is not eligible to make the claim. This is referred to as a "jurisdictional objection". Examples can include:

- **Out of time** – The employee didn't lodge the claim within 21 days after the dismissal took effect.
- **No dismissal** – If an employee has resigned.
- **Redundancy** – If the employee was terminated because their role was redundant.
- **Minimum tenure** – Employees must have been employed for a minimum of 6 months (or 12 months if the employer is a small business).
- **High income earner** – If an employee earns more than the high-income threshold (currently \$167,500 and indexed annually) and they aren't covered by an Award or Enterprise Agreement.

Raising an objection won't always stop the claim from going to conciliation. However, if it doesn't settle at conciliation the FWC will usually have a 'jurisdictional hearing' to decide whether the claim can continue.

### Responding to a claim

Receiving an unfair dismissal claim can be unnerving. Here is what to do:

- (1) **Carefully read the information provided.** You will usually receive a copy of the application, a blank response form, an information guide, and sometimes a 'Notice of Listing'.

- (2) **Gather relevant information.** Try to understand what the employee is arguing. Take the time to speak to employees and managers who were involved, and get their side of the story. Collate any relevant information such as the dismissal letter, warning letters, meeting notes, the employment contract and the final pay slip.
- (3) **Complete the response form.** A well crafted response is important. Consider including the factual background (the employment history and context of the dismissal), documentation (evidence of warnings or other relevant communications) and evidence of procedural fairness (detail the steps taken to ensure procedural fairness including discussions and final meetings).
- (4) **'File' the response.** You have 7 days to complete the employer response and send it to the FWC and the employee who has made the application.

## Next steps

Remember, each case is unique and if you aren't sure, seeking legal advice is recommended to make sure that the business puts its best case forward.

## More information

If you want help with an unfair dismissal claim, please reach out to Emily or Joe.

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