

# Benchbook

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## Unfair Dismissals



### **About this benchbook**

This benchbook has been prepared by the Fair Work Commission (the Commission) to assist parties lodging or responding to unfair dismissal applications under the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material for matters before the Commission.

## Disclaimer

The content of this benchbook should be used as a general guide only. The benchbook is not intended to be an authority to be used in support of a case at hearing.<sup>1</sup>

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this benchbook or on any linked site.

The information provided, including cases and commentary, are considered correct as of the date of publication. Changes to legislation and case law will be reflected in regular updates to this benchbook from time to time.

This benchbook is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this benchbook may inadvertently contain such names.

## Case examples

Individual cases have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

The case examples used in this benchbook are interpretations of the decisions by Commission staff on specific issues which are addressed within the text. The case examples may not reflect all of the issues considered in the relevant decision. In the electronic version of the benchbook the original text of the decision can be accessed by clicking the link.

## Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

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<sup>1</sup> See for example *Springfield v Hegele Logistics Australia P/L* [2017] FWC 3524 (Platt C, 26 July 2017) at para. 18; *Boyd v MarketTrack Global Pty Ltd T/A Numerator* [2019] FWC 8489 (Dean DP, 16 December 2019) at para. 20.

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## Part 1 – How to use this benchbook

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This benchbook has been designed for electronic use and works best in that form. The electronic version has links to all of the cases referenced in the footnotes, as well as links to the legislation and other websites.

To access the electronic version please visit: [www.fwc.gov.au/resources/benchbooks](http://www.fwc.gov.au/resources/benchbooks)

**IMPORTANT:** Pages 23-31 dealing with whether a worker is an independent contractor or employee are currently under review in light of the High Court decisions in [Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd \[2022\] HCA 1](#) and [ZG Operations Australia Pty Ltd v Jamsek \[2022\] HCA 2](#). Please refer to these cases for the current approach to be taken in determining whether a worker is an independent contractor or employee.

### About the Commission

The Fair Work Commission (the Commission) is Australia’s national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country’s oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal, currently known as the Fair Work Commission, and its predecessors have made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying the provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act).

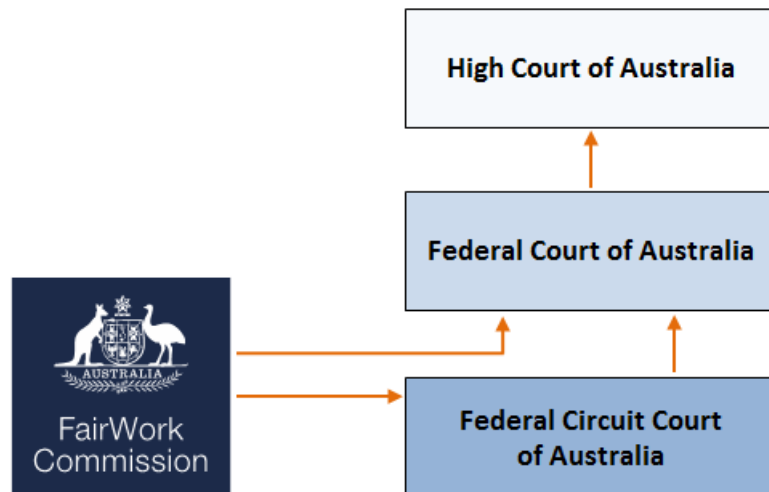
### Relationship between the Fair Work Commission and the Courts

 See Fair Work Act ss.563–568.

The [High Court of Australia](#) is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

The [Federal Court of Australia](#) is a superior court of record and has a broad jurisdiction including over all civil and criminal matters arising in the Fair Work jurisdiction. The Court also has a substantial and diverse appellate jurisdiction, including dealing with applications for judicial reviews of certain Commission decisions.

Some matters lodged with the Commission are first conciliated at the Commission. If the matter does not settle there an applicant can then apply to start proceedings in the Federal Court or the Fair Work Division of the [Federal Circuit and Family Court](#).



## The Commission Structure

The Commission is headed by a President, who is also a Judge of the Federal Court of Australia. Commission Members perform quasi-judicial functions under the Fair Work Act, including conducting public hearings and private conferences for both individual and collective matters. They also perform certain functions under the Registered Organisations Act, including determining applications for registration and cancellation of registration and for alterations to eligibility rules of employee and employer organisations. Commission Members are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government of the day. There are a number of different titles that may apply to Commission Members:

- President
- Vice President
- Deputy President
- Commissioner
- Expert Panel Member

## Appearing at the Commission

There are standards for the conduct of all people attending a hearing or conference at the Commission. The standards help the Commission to provide fair hearings for all parties.

Providing fair hearings involves allowing all parties to put their case forward, and to have their case determined impartially and according to law.

The Commission and all parties appearing before it, including representatives, have responsibilities to each other and in providing a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing because proceedings begin on time
- notify the Commission staff upon arrival by approaching them in the hearing or conference room
- if delayed it is important that contact is made with the appropriate Commission staff before the hearing is due to start



- switch off mobile phone or other electronic devices in the hearing or conference room
- address the Member of the Commission by his or her title (eg Deputy President or Commissioner)
- in a hearing, stand when addressing the Member of the Commission or to question a witness, and
- bring enough copies of documents so everyone involved can have a copy (eg three copies: one to keep, one for the other party and one for the Member).

## Name of the Tribunal

The name of the national workplace relations tribunal has changed a number of times throughout its history. For consistency, in this document, it has been referred to as the ‘Commission’. The table below outlines the name of the national workplace relations tribunal at various periods.

Name	Short title	Dates
<b>Fair Work Commission</b>	The Commission	1 January 2013–ongoing
<b>Fair Work Australia</b>	FWA	1 July 2009–31 December 2012
<b>Australian Industrial Relations Commission</b>	AIRC, the Commission	1989–2009
<b>Australian Conciliation and Arbitration Commission</b>	The Commission	1973–1989
<b>Commonwealth Conciliation and Arbitration Commission</b>	The Commission	1956–1973
<b>Commonwealth Court of Conciliation and Arbitration</b>		1904–1956

## Workplace relations legislation, Regulations and Rules

The following table sets out legislation dealing with workplace relations and the dates that the law was in operation. The current legislation is the Fair Work Act.

Name of legislation	Operative dates
<b><u><a href="#">Fair Work Act 2009 (Cth)</a></u></b>	1 July 2009 and 1 January 2010 (Staged commencement)
<b><i>Workplace Relations Act 1996 (Cth) (Incorporating the Workplace Relations Amendment (Work Choices) Act 2005 (Cth))</i></b>	27 March 2006
<b><i>Workplace Relations Act 1996 (Cth)</i></b>	25 November 1996

Name of legislation	Operative dates
<i>Industrial Relations Act 1988 (Cth)</i>	1 March 1989
<i><a href="#">Fair Work Regulations 2009 (Cth)</a></i>	1 July 2009 and 1 January 2010 (Staged commencement)
<i><a href="#">Fair Work Commission Rules 2013</a></i>	6 December 2013

## Coverage of national workplace relations laws

 See Fair Work Act s.14

A **national system employee** is an individual employed by a national system employer.<sup>2</sup>

A **national system employer** is an employer covered and bound by the national workplace relations laws.

Whether an employer is a national system employer depends on the location of the employment relationship (State or Territory) and, in some cases, the legal status and business of the employer.

### Who is covered by national workplace relations laws?

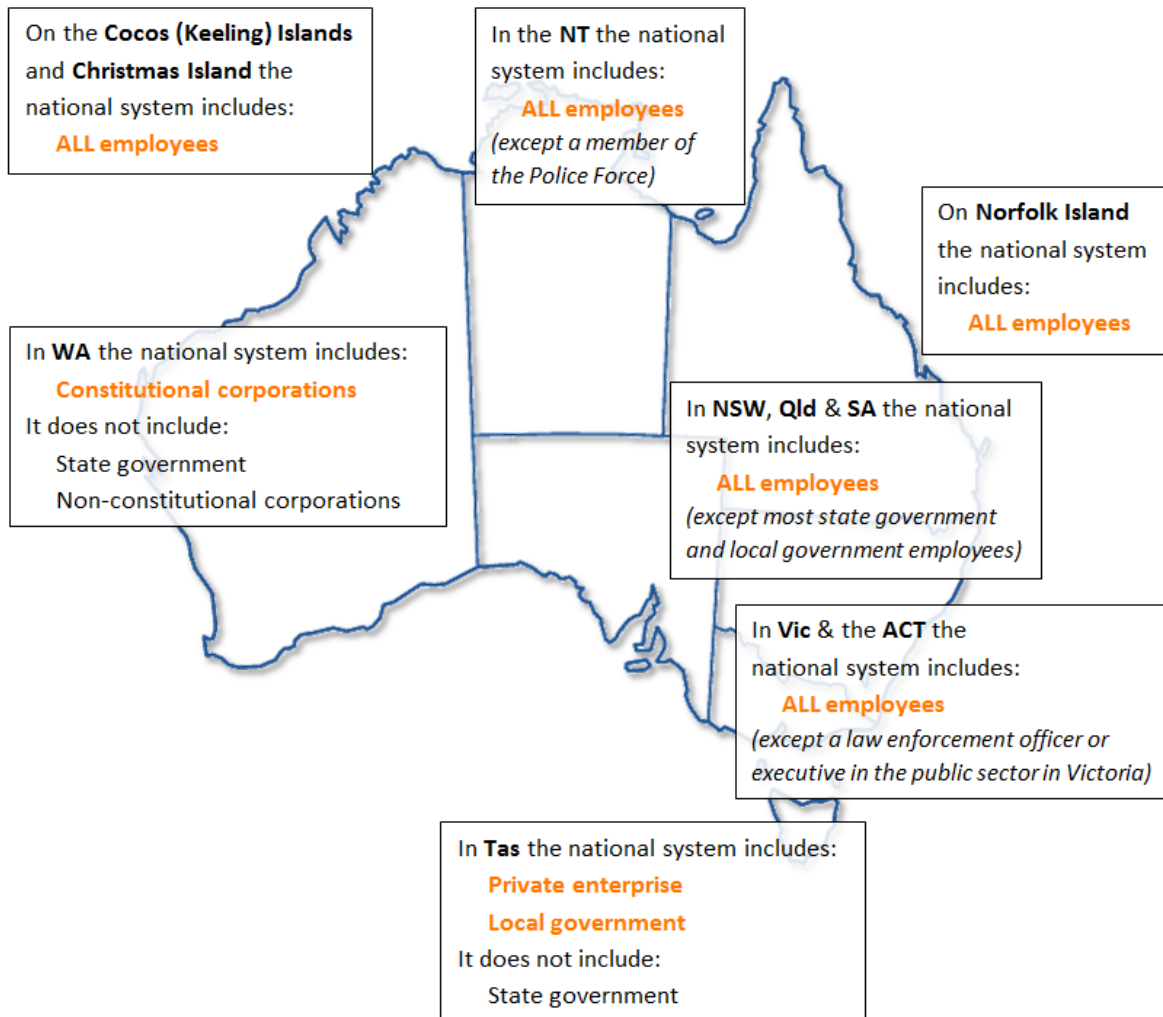
The national workplace relations system covers:

- all employees in Victoria (with limited exceptions in relation to State public sector employees), the Northern Territory and the Australian Capital Territory
- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- employees employed by private enterprise in New South Wales, Queensland, South Australia and Tasmania
- those employed by local government in Tasmania
- those employed by a constitutional corporation in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- those employed by the Commonwealth or a Commonwealth authority, and
- waterside employees, maritime employees or flight crew officers in interstate or overseas trade or commerce.

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<sup>2</sup> Fair Work Act s.13.

## Who does the national system include?



## Case law

Case law is comprised of previous decisions made by courts and tribunals which help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A **precedent** is a legal decision which provides guidance for future, similar cases.

An **authoritative** decision is one that must be followed on questions of law by lower courts and tribunals.

## Referencing

References in this benchbook use the following formats.

**Note:** In the electronic version of the Benchbook the cases referenced in the footnotes have all been hyperlinked and the cases can be accessed by clicking the links.

## Cases

<sup>41</sup> *Elgammal v BlackRange Wealth Management Pty Ltd* [\[2011\] FWA FB 4038](#) (Harrison SDP, Richards SDP, Williams C, 30 June 2007) at para. 13.

<sup>42</sup> *Visscher v The Honourable President Justice Giudice* [\[2009\] HCA 34](#) (2 September 2009) at para. 81, [(2009) 239 CLR 361].

<sup>43</sup> *ibid.*

<sup>44</sup> *Searle v Moly Mines Limited* [\[2008\] AIRCFB 1088](#) (Giudice J, O’Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [\[1995\] HCA 24](#) (11 October 1995) at para. 23, [(1995) 185 CLR 410 at p. 427].

The name of the case will be in italics.

The link will be to the original reference. If a case has been reported then there will also be a reference to the journal the case has been reported in. For example, some of the abbreviations used are:

- ‘HCA’ for ‘High Court of Australia’
- ‘FCAFC’ for a ‘Full Court of the Federal Court of Australia’
- ‘FWCFB’ for a ‘Full Bench of the Fair Work Commission’
- ‘FWA’ for ‘Fair Work Australia’
- ‘IR’ for ‘Industrial Reports’
- ‘CLR’ for ‘Commonwealth Law Reports’

Page or paragraph numbers are included at the end of the reference, to provide a pinpoint in the document where appropriate.

If a reference is identical to the one immediately before, the term ‘*ibid.*’ is commonly used.

Where one case refers to another case, the term ‘citing’ is used.

Item	Example
<b>Case names</b>	<i>Elgammal v BlackRange Wealth Management Pty Ltd</i> <i>Visscher v The Honourable President Justice Giudice</i>
<b>Link to case</b>	<a href="#">[2011] FWA FB 4038</a> (Harrison SDP, Richards SDP, Williams C, 30 June 2007) <a href="#">[2009] HCA 34</a> (2 September 2009), [(2009) 239 CLR 361]
<b>Paragraph number</b>	<a href="#">[2008] AIRCFB 1088</a> ... at para. 22.
<b>Page number</b>	(1995) 185 CLR 410 at p. 427
<b>Identical reference</b>	<sup>42</sup> <i>Visscher v The Honourable President Justice Giudice</i> <a href="#">[2009] HCA 34</a> (2 September 2009) at para. 81, [(2009) 239 CLR 361]. <sup>43</sup> <i>ibid.</i>
<b>Reference to other case</b>	<sup>44</sup> <i>Searle v Moly Mines Limited</i> <a href="#">[2008] AIRCFB 1088</a> (Giudice J, O’Callaghan SDP, Cribb C, 29 July 2008) at para. 22; citing <i>Byrne v Australian Airlines Ltd</i> <a href="#">[1995] HCA 24</a> (11 October 1995) at para. 23.

## Legislation and Regulations

<sup>3</sup> *Acts Interpretation Act 1901* (Cth) s.36(2).

<sup>4</sup> Fair Work Act s.381(2).

<sup>5</sup> Fair Work Regulations reg 6.08(3).

<sup>6</sup> *Police Administration Act* (NT) s.94.

<sup>7</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic).

<sup>8</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).

<sup>9</sup> *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation or regulations will be in italics unless a shortened version is being used.

The jurisdiction of the legislation or regulations is included in brackets if the full name is cited. For example, some of the abbreviations used are:

- '(Cth)' is a Commonwealth law
- '(ACT)' is an Australian Capital Territory law
- '(NSW)' is a New South Wales law
- '(NT)' is a Northern Territory law
- '(Qld)' is a Queensland law
- '(SA)' is a South Australian law
- '(Tas)' is a Tasmanian law
- '(Vic)' is a Victorian law
- '(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

Item	Example
<b>Legislation or regulation name</b>	<i>Acts Interpretation Act 1901</i> Fair Work Act Fair Work Regulations <i>Industrial Relations (Commonwealth Powers) Act 2009</i>
<b>Jurisdiction</b>	<i>Acts Interpretation Act 1901</i> (Cth) <i>Police Administration Act</i> (NT) <i>Fair Work (Commonwealth Powers) and Other Provisions Act 2009</i> (Qld)
<b>Section number</b>	<i>Acts Interpretation Act 1901</i> (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(3)

## Guide to symbols

The symbols used in this benchbook are designed to provide assistance with identifying specific issues or to point to additional information that may assist the reader with their understanding of a particular issue.

### Symbols



**Further information on related topics.**



**Links to sections of legislation.**



**Contains issues that may form the basis of a jurisdictional objection.**



**Cases where the argument raised on this point was successful.**

**Note:** This does not indicate that the party that raised the point was successful overall.



**Cases where the argument raised on this point was unsuccessful.**

**Note:** This does not indicate that the party that raised the point was unsuccessful overall.



**Tips – helpful hints that may assist your understanding of the information.**



**Important information.**

### Glossary of terms

The glossary explains common terms used throughout this benchbook while legislative terms are defined in the relevant sections.

### Naming conventions

The parties to unfair dismissal matters have generally been referred to in this resource as ‘employee’ and ‘employer’. These terms have been adopted for convenience even though it is most often the case that they are former employees and former employers when appearing at the Commission.

After an application for unfair dismissal is lodged the parties are referred to as:

- Applicant (usually the person who lodged the application – the employee), and
- Respondent (the employer).

In the case of an appeal the parties are referred to as:

- Appellant (the person who lodges the appeal), and
- Respondent (the party who is responding to the appeal).

## What is a day?

Section 36(1) of the [Acts Interpretation Act 1901](#) (Cth)<sup>3</sup> deals with the manner in which time is to be calculated in interpreting the Fair Work Act. It reads:

*(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.*

This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred.<sup>4</sup>

## Glossary of terms

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<b>Adjournment</b>	To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely.
<b>Affidavit</b>	A sworn statement of fact which is made under oath before an authorised official.  An affidavit is used to give evidence in Commission (or court) proceedings.
<b>Appeal</b>	An application for a Full Bench of the Commission to review a decision of a single member of the Commission and determine if the decision was correct.  A person must seek the permission of the Commission to appeal a decision.
<b>Applicant</b>	A person who makes an application to the Commission.
<b>Application</b>	The way of starting a case before the Commission. An application can only be made using a form prescribed by the <i>Fair Work Commission Rules 2013</i> (Cth).
<b>Arbitration</b>	The process by which a member of the Commission will hear evidence, consider submissions and then make a decision in a matter.  Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses.
<b>Balance of probabilities</b>	It is the comparison of disputed facts to determine what is more likely to have occurred.  A fact is proved to be true on the balance of probabilities if its existence is more probable than not.

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<sup>3</sup> This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).

<sup>4</sup> *Re White's Discounts Pty Ltd t/as Everybody's IGA Everyday and Broken Hill Foodland* [PR937496](#) (AIRC FB, Giudice J, Drake SDP, Lewin C, 12 September 2003) at paras 15–16, [(2003) 128 IR 68].

**Collateral purpose** A proceeding is brought for a collateral purpose when its purpose is other than to seek an adjudication of the issues to which the application gives, such as to harass or embarrass the other party or to seek some other extraneous advantage.

**Compensation** A requirement to pay money to an applicant as reimbursement for loss suffered as a consequence of an action.  
  
The Commission must consider whether reinstatement is appropriate before considering if compensation should be ordered and, if so, how much.

**Commission member** See **member**

**Conciliation** An informal method of resolving an unfair dismissal application by helping the parties to reach a settlement.  
  
An independent conciliator can help the parties explore options for a resolution without the need for a conference or hearing before a member.  
  
Conciliation is usually the first step taken in the resolution of an unfair dismissal claim.

**Conference** A generally private proceeding conducted by a Commission member.

**Court** In this benchbook, a reference to 'Court' generally means the Federal Court or Federal Circuit and Family Court.

**Decision** A determination made by a single member or Full Bench of the Commission which is legally enforceable.  
  
A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.

**Directions** Instructions given by the Commission to the parties involved in a matter that contain important timeframes for the lodgment of documents in support of the case.

**Discontinue** To formally end a matter before the Commission.  
  
A discontinuance can be used during proceedings to stop the proceedings or after proceedings to help finalise a settlement. Once a matter has been discontinued it cannot be restarted.

**Employee organisation** See **union**



**Enterprise agreement** An enterprise agreement is an agreement made at the enterprise level and enforceable under legislation which sets out terms and conditions of employment of employees and their employer (or employers).

An enterprise agreement sets out rights and obligations of the employees and the employer(s) covered by the agreement.

An enterprise agreement must meet a number of requirements under the Fair Work Act before it can be approved by the Commission.

**Error of law** An error of law is a common ground for legal review. It occurs when a member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.

**Evidence** Information which tends to prove or disprove the existence of a particular belief, fact or proposition.

Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence.

Evidence is usually set out in a witness statement, an affidavit or given orally by a witness in a hearing.

**Fair Work Act** *Fair Work Act 2009 (Cth).*

**Fair Work Regulations** *Fair Work Regulations 2009 (Cth).*

**First instance** A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.

**Fixed term contract** An employment contract where the time of commencement and the time of completion are unambiguously identified by a term of the contract.

This can be achieved by stating definite dates, or by stating the time or condition (such as a specific task) by which one or other end of the period time is fixed, and by stating the duration of the contract of employment.

An employer does not terminate an employee's employment when the term of employment expires; rather, employment comes to an end by agreement or by the operation of law.

**Full Bench** A Full Bench of the Commission comprises at least three Commission members, one of whom must be a presidential member. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the Fair Work Act.

A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.

**Frustrated (Contract)** When the terms or obligations of a contract cannot be fulfilled due to unforeseen circumstances where the parties are without fault.

Examples include the destruction of the employer’s plant or equipment; to the illness or incapacity of the employee.

A contract which is found to have been frustrated is considered terminated at the time of the frustration.

**Hearing** A generally public proceeding or arbitration conducted before a Commission member.

**Industrial instrument** A generic term for a legally binding industrial document which details the rights and obligations of the parties bound by the document, such as an enterprise agreement or award.

**Jurisdiction** The scope of the Commission’s power and what the Commission can and cannot do.

The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.

**Lodge** The act of delivering an application or other document to the Commission.

**Matter** Cases at the Commission are referred to as matters.

**Mediation** A method of dispute resolution promoting the discussion and settlement of disputes.

**Member** Someone appointed by the Governor-General as a member of the Commission. A member may be a Commissioner, a Deputy President, a Senior Deputy President, a Vice President or the President.

**Notice of Listing** A formal notification sent by the Commission setting out the time, date and location for a matter to be heard. A Notice of Listing can also include specific directions or requirements.

**Order** A formal direction of the Commission which gives effect to a decision and is legally enforceable.

**Outer limit contract** An employment contract which has a fixed term, ending upon a given date or at the end of a defined period of time or upon the completion of a specified task, but which contains a broad and unqualified power to terminate the contract within its fixed term.

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<b>Outline of submissions</b>	<p>A written document that clearly sets out the matters which support a case before the Commission.</p> <p>This could be the grounds on which an employee claims their dismissal was unfair, or on which an employer claims that the dismissal was fair. This document should include how the specific facts of the case address unfair dismissal law, as set out in decisions of the Commission and in the legislation.</p> <p>All facts, information and evidence that you wish to bring to the attention of the Commission should be included in the outline of submissions.</p>
<b>Party (Parties)</b>	<p>A person or organisation involved in a matter before the Commission.</p>
<b>Pecuniary penalty</b>	<p>An order to pay a sum of money which is made by a Court as a punishment.</p>
<b>Procedural fairness</b>	<p>Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made.</p> <p>Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself.</p> <p>The terms ‘procedural fairness’ and ‘natural justice’ have similar meaning and can be used interchangeably.</p>
<b>Quash</b>	<p>To set aside or reject a decision or order, so that it has no legal effect.</p>
<b>Referred state</b>	<p>States that have referred some (or all) of their workplace relations powers to the Commonwealth.</p> <p>All states except Western Australia have referred these powers.</p>
<b>Reinstatement</b>	<p>To return an employee to the job they previously held before they were dismissed. If the original position is not available the employee should be returned to a position as close as possible in remuneration and status to the original position.</p>
<b>Remedy</b>	<p>The possible outcomes of a matter before the Commission.</p> <p>This could include an order for reinstatement or compensation made by the Commission.</p>
<b>Representative</b>	<p>A person who acts on a party’s behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else.</p> <p>Generally, a lawyer or paid agent can only represent a party before the Commission with permission of the Commission.</p>

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<b>Repudiation (Contract)</b>	To terminate or reject a contract as having no authority or binding effect.
<b>Respondent</b>	A party responding to an application made to the Commission.
<b>Serving documents</b>	See <b>service</b>
<b>Service (Serve)</b>	<p>Service of a document means delivering the document to another party or their representative, usually within a specified period.</p> <p>Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the <a href="#">Fair Work Commission Rules 2013</a>.</p>
<b>Settlement</b>	An agreed resolution of a dispute. Generally, a negotiated outcome which both parties are satisfied with and bound by.
<b>Sham contract</b>	<p>When an employer deliberately disguises an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee.</p> <p>It can also occur when employees are pressured to become independent contractors, where they are threatened with being dismissed, or are misled about the effect of changing their working arrangements.</p>
<b>Small Business Fair Dismissal Code</b>	A code declared by the Minister for Education, Employment and Workplace Relations for small businesses to follow when dismissing an employee so the dismissal is deemed fair.
<b>Statutory declaration</b>	<p>A written statement in a prescribed form in which a person declares something to be true.</p> <p>Such a statement is declared before, and witnessed by, an authorised official (such as a justice of the peace) but is not sworn on oath.</p>
<b>Subclass 457 Visa</b>	<p>A visa for skilled workers from outside Australia who have been sponsored and nominated by a business to work in Australia on a temporary basis – up to 4 years.</p> <p>A business can sponsor a skilled worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill specific types of skilled position.</p>
<b>Submissions</b>	See <b>outline of submissions</b>
<b>Summary dismissal</b>	Where an employer dismisses an employee without notice (or payment in lieu of notice) – instant dismissal.

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<b>Union</b>	<p>An organisation which represents the interests of employees which has been registered under the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth).</p> <p>A union can also be referred to as an employee organisation.</p>
<b>Untenable</b>	<p>If something is untenable it cannot be defended; it is incapable of being maintained against argument.</p>
<b>Waiver</b>	<p>An applicant can request that the application fee for lodging an unfair dismissal application be waived due to serious financial hardship. A copy of the Application for Waiver of application fee form can be found on the Commission’s website.</p>
<b>Witness</b>	<p>A person who gives evidence in relation to a situation that they had some involvement in or saw happening. A witness is required to take oath or affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence.</p>
<b>Witness statement</b>	<p>A written statement that is usually in the form of a sworn or affirmed affidavit or statutory declaration. The witness statement should detail the information that the witness will rely on during the hearing.</p>

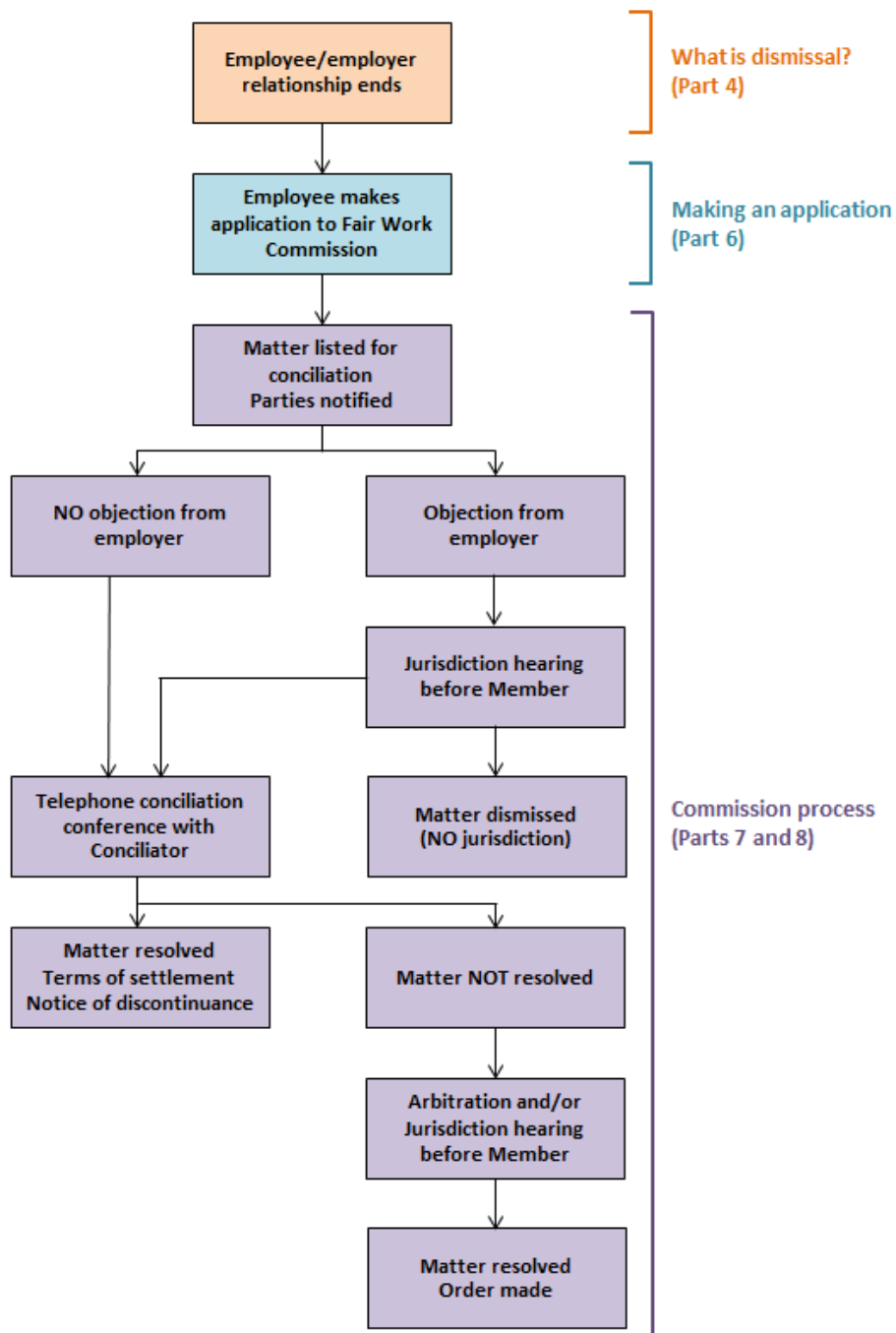
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## Part 2 – Overview of benchbook

This benchbook has been arranged to reflect the process users would follow when making an application for unfair dismissal. Issues that may arise at a certain point during the process will be addressed as they come up. As a result, this benchbook may not deal with these issues in the same order as the *Fair Work Act 2009* (the Fair Work Act).

### Unfair dismissal process under the Fair Work Act

**Note:** The diagram below sets out the unfair dismissal process as it applies to a majority of the matters that come before the Commission. However each case is dealt with on its own merits and may include steps or processes different to those shown below.



## Definition

 See Fair Work Act s.385

Under the Fair Work Act a person has been unfairly dismissed, if the Fair Work Commission (the Commission) is satisfied that an employee (who is protected from unfair dismissal) has been dismissed and the dismissal:

- was harsh, unjust or unreasonable, and
- was not consistent with the Small Business Fair Dismissal Code<sup>5</sup> (in the case of employees of a small business), and
- was not a case of genuine redundancy.



### Related information

- When is a person protected from unfair dismissal?
- What does ‘dismissed’ mean?

Part 5 – What makes a

- What is a small business?
- What is a genuine redundancy?

## Purpose of unfair dismissal provisions

 See Fair Work Act s.381

The objects of the unfair dismissal provisions are:

- To establish a framework for dealing with unfair dismissal that balances the needs of business (including small business) and the needs of employees.
- To establish procedures which are quick, flexible and informal and address the needs of employers and employees.
- To provide remedies where a dismissal is found to be unfair with an emphasis on reinstatement.

## Fair go all round

The procedures and remedies (referred to in the second and third dot points above) and the manner of deciding and working out remedies are intended to ensure that a ‘fair go all round’ is accorded to the employee and employer concerned.<sup>6</sup>

This section of the Fair Work Act enshrines the principle established in *re Loty and Holloway v Australian Workers’ Union*.<sup>7</sup>

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<sup>5</sup> See for example *TIOBE Pty Ltd T/A TIOBE v Chen* [2018] FWCFCB 5726 (Ross J, Clancy DP, Lee C, 12 September 2018).

<sup>6</sup> Fair Work Act s.381(2).

<sup>7</sup> *Re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95 (23 March 1971).

## When is a person protected from unfair dismissal?

An employee of a national system employer (called a national system employee) who has been dismissed is protected from unfair dismissal and eligible to make an application for unfair dismissal remedy if:

- they have completed the minimum period of employment
- AND
- they earn less than the high income threshold (which is currently \$167,500<sup>8</sup> per year), or
- a modern award covers their employment, or
- an enterprise agreement applies to their employment.



It is not an unfair dismissal if the dismissal was:

- a genuine redundancy, or
- consistent with the Small Business Fair Dismissal Code (in the case of employees of small business).



### Related information

- What is a national system employer?
- What does 'dismissed' mean?
- High income threshold
- Modern award coverage
- Application of an enterprise agreement
- What is the minimum period of employment?
- What is a genuine redundancy?
- What is the Small Business Fair Dismissal Code?

## Time limit for making an application

An unfair dismissal application must be lodged with the Commission within **21 days** after the dismissal takes effect.

The Commission may only allow a further period for lodgment in exceptional circumstances.



### Related information

- Timeframe for lodgment – 21 days

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<sup>8</sup> The high income threshold for the period 1 July 2022–30 June 2023 was \$162,000.



## Part 3 – Coverage

### Who is protected from unfair dismissal?

An employee of a national system employer (called a national system employee) who has been dismissed is protected from unfair dismissal and eligible to make an application for unfair dismissal remedy if:

- they have completed the minimum period of employment
- AND
- they earn less than the high income threshold (which is currently \$167,500<sup>9</sup> per year), or
  - a modern award covers their employment, or
  - an enterprise agreement applies to their employment.



It is not an unfair dismissal if the dismissal was:

- a genuine redundancy, or
- consistent with the Small Business Fair Dismissal Code (in the case of employees of small business).

### What is a national system employer?

 See Fair Work Act s.14

Whether an employer is a national system employer depends on the location of the employment relationship (state or territory) and, in some cases, the legal status and business of the employer.

In broad terms a **national system employer** includes:

- all employers in Victoria (with limited exceptions in relation to some State public sector employees), the Northern Territory and the Australian Capital Territory
- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- private enterprise employers in New South Wales, Queensland and South Australia
- private enterprise employers and local government employers and employees in Tasmania
- employers that are constitutional corporations in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- the Commonwealth and Commonwealth authorities
- the employers of waterside employees, maritime employees and flight crew officers in interstate or overseas trade or commerce.

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<sup>9</sup> The high income threshold for the period 1 July 2022–30 June 2023 was \$162,000.



**Related information**

- What is a constitutional corporation?

**Who is not a national system employer?**

See Fair Work Act ss.14, 30D and 30N

In broad terms, the following are not national system employers:

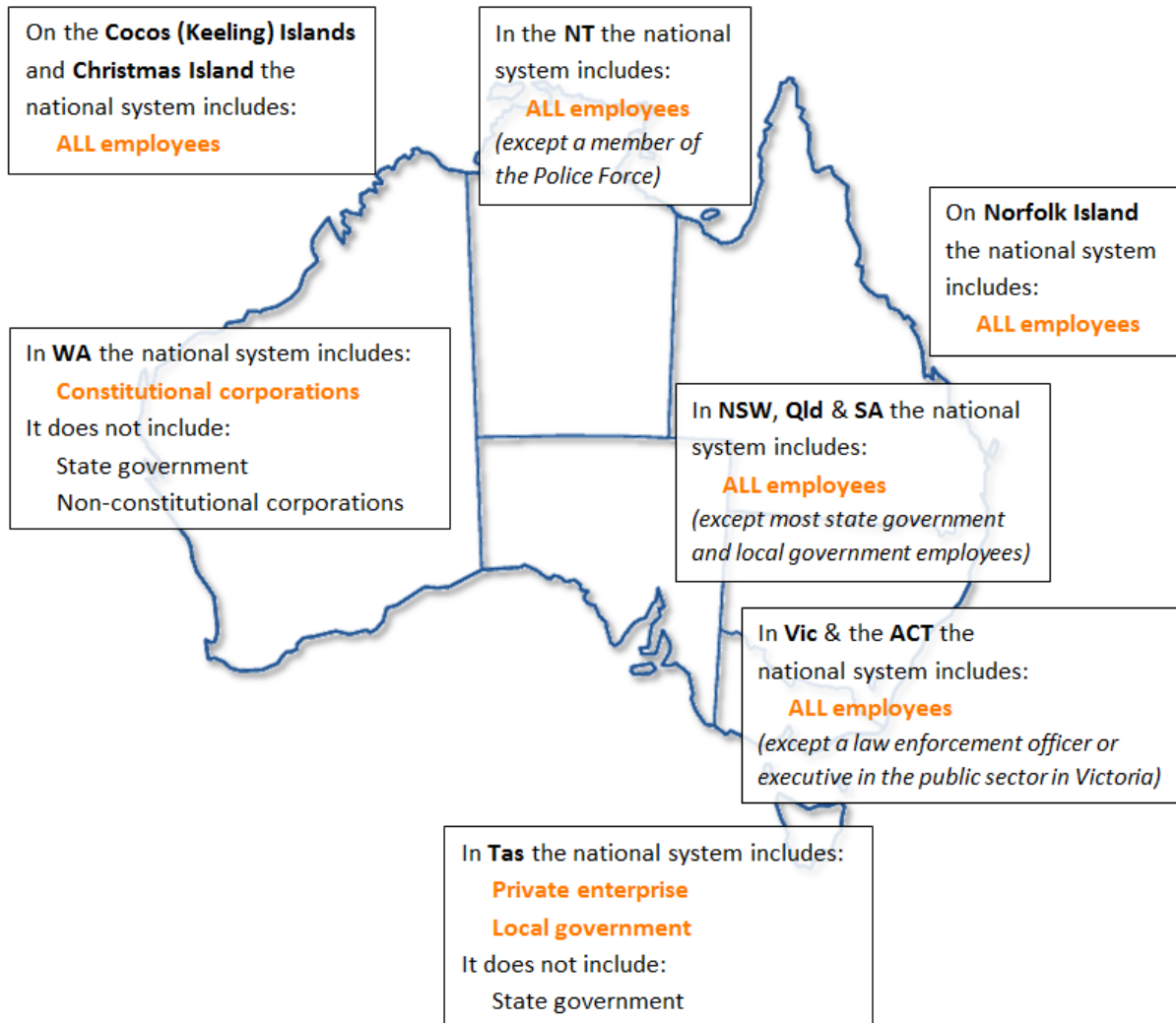
- State government employers in New South Wales, Queensland, Western Australia, South Australia and Tasmania
- local government employers in New South Wales, Queensland and South Australia
- employers that are non-constitutional corporations in Western Australia (including an individual, a sole trader, partnership or trust)
- employers of employees at higher managerial levels in the public sector in Victoria.



**Related information**

- People excluded from national unfair dismissal laws
- What is a constitutional corporation?
- Partnerships – Western Australia

## Map – what does the national system include?



### Case example: **Employee working one hour a week covered**

***Matthews v San Remo Fisherman's Co Operative*** [2019] FWC 4877 (Gregory C, 12 July 2019).

In this unfair dismissal application, the applicant had been employed as a pelican feeder since 2001. He worked one day each week for one hour, and received an hourly rate of \$29.00, meaning that his weekly income was also \$29.00. He was dismissed from his employment following an argument in which he swore at the Co-Op's General Manager.

The Commission emphasised that any employee is entitled to pursue an unfair dismissal application after they have been dismissed, regardless of the nature of their employment arrangements, provided they satisfy the relevant jurisdictional requirements.

## People excluded from national unfair dismissal laws

**IMPORTANT:** Pages 23-31 of this benchbook, dealing with whether a worker is an independent contractor or employee, are currently under review in light of the High Court decisions in [Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd \[2022\] HCA 1](#) and [ZG Operations Australia Pty Ltd v Jamsek \[2022\] HCA 2](#). Please refer to these cases for the current approach to be taken in determining whether a worker is an independent contractor or employee.

### Overview

If there is no contract of employment, a person cannot be considered an employee. A contract does not have to be in writing. It may, for example, be completely oral, completely written or a combination of the two.

There are several groups of people in the workforce who do not have a contract of employment with an employer, and are therefore not considered to be employees, for example, independent contractors. These workers are excluded from the national workplace relations system



Employers and employees not covered by the national workplace relations system are covered by the applicable State industrial relations system.

However, through Australia's adherence to International Labour Organization (ILO) conventions, national entitlements to unpaid parental leave and notice of termination or payment in lieu of notice; as well as protection from unlawful termination of employment, are extended to employees covered by a State industrial relations system.



#### Legal advice

If you would like free legal advice or other advisory services there are [Community Legal Centres](#) in each state and territory who may be able to assist.

The law institute or law society in your state or territory may be able to refer you to a private solicitor who specialises in workplace law.

Employee and employer organisations may also be able to provide advice and assistance.

#### Workplace Advice Service

The Commission has a free legal assistance service available to **eligible** employees and employers. The Commission coordinates the Service in collaboration with lawyers from our network of partner organisations. You can check your eligibility and fill in the [Workplace Advice Service](#) request form online.



#### Related information

- What is a contract?
- Independent contractors
- Labour hire workers
- Vocational placements
- Volunteers

- Public sector employment
- State referral laws – [Consolidated list](#) of exclusions

## What is a contract?

The law holds that before any simple contract [including a contract of employment and a contract for services] is enforceable it must be formed so as to contain various elements. These are:

1. There must be an “intention” between the parties to create a legal relationship, the terms of which are enforceable.
2. There must be an offer by one party and its acceptance by the other.
3. The contract must be supported by valuable consideration.
4. The parties must be legally capable of making a contract.
5. The parties must genuinely consent to the terms of the contract.
6. The contract must not be entered into for any purpose which is illegal.<sup>10</sup>



**Valuable consideration** can be the payment of money or the promise to perform certain duties.

The contract is to be interpreted objectively according to its terms and not on the basis of the subjective beliefs of the parties.<sup>11</sup>

## Independent contractors



**Contains issues that may form the basis of a jurisdictional issue**

In some cases, even though a person has agreed to be an independent contractor, that person may actually be an employee because the relationship is an employment relationship. Similarly, some people, who were considered to be employees, may not be.

### ***What is an employment relationship?***

The employment relationship involves two parties:

- the worker who provides labour, and
- an entity that receives the benefit of that labour.<sup>12</sup>

<sup>10</sup> *Re Advanced Australian Workplace Solutions Pty Ltd* [Print S0253](#) (AIRCFCB, Giudice J, McIntyre VP and Redmond C, 25 October 1999) at para. 49; citing Macken, O’Grady and Sappideen, *Macken’s Law of Employment* (4<sup>th</sup> ed, 1997) at p. 74.

<sup>11</sup> *Akee v Link-Up (Queensland) Aboriginal Corporation* [\[2015\] FWC 555](#) (Hatcher VP, 9 February 2015) at para. 8; citing *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [\[2004\] HCA 52](#) (11 November 2004) at para. 40, [(2004) 219 CLR 165].

<sup>12</sup> *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [\[2011\] FCA 366](#) (13 April 2011) at para. 201, [(2011) 206 IR 252].

### **What is the difference between an employee and an independent contractor?**

In an employment relationship, labour (being a combination of time, skill and effort) is traded for remuneration.<sup>13</sup> There is a provider, a purchaser, an exchange and a contract containing terms and conditions that regulate the exchange.<sup>14</sup>

The ‘label’ the parties have expressly given to their legal relationship is an important consideration.<sup>15</sup> However ‘[t]he parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck’.<sup>16</sup>

In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not.<sup>17</sup>

Courts will look to the ‘real substance of the relationship in question.’<sup>18</sup>

There have been many detailed discussions by courts and tribunals about the distinction between an employee and an independent contractor, including what issues should be considered and the way the issues should be decided.

In *Hollis v Vabu Pty Ltd*<sup>19</sup> it was held that ‘the distinction between an employee and an independent contractor is rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own’.<sup>20</sup>



In simple terms, the issue is whether a person works for an employer or works for themselves.

### **How to determine if a person is an employee or an independent contractor**

To help determine whether a person is an employee or an independent contractor, there are a series of factors, referred to as ‘indicia’, which generally help decide what a person is.

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<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* [PR927971](#) (AIRCFCB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215]; citing *Stevens v Brodribb Sawmilling Company Pty Ltd* [\[1986\] HCA 1](#) (13 February 1986), [(1986) 160 CLR 16, at p. 37].

<sup>16</sup> *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* [PR927971](#) (AIRCFCB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215]; citing *Re Porter* [\[1989\] FCA 226](#) (23 June 1989) at para. 13, [(1989) 34 IR 179, at p. 184]; *Massey v Crown Life Insurance Company* [\[1977\] EWCA civ 12](#) (4 November 1977), [(1978) 2 All ER 576, at p. 579]; approved in *AMP v Chaplin* [\[1978\] UKPC 7](#) (14 March 1978), [(1978) 18 ALR 385, at p. 389].

<sup>17</sup> *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* [PR927971](#) (AIRCFCB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215]; citing *AMP v Chaplin* [\[1978\] UKPC 7](#) (14 March 1978), [(1978) 18 ALR 385, at p. 389]; and *Hollis v Vabu Pty Ltd* [\[2001\] HCA 44](#) (9 August 2001) at para. 57, [(2001) 207 CLR 21].

<sup>18</sup> *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [\[2011\] FCA 366](#) (13 April 2011) at para. 189, [(2011) 206 IR 252].

<sup>19</sup> *Hollis v Vabu Pty Ltd* [\[2001\] HCA 44](#) (9 August 2001), [(2001) 207 CLR 21].

<sup>20</sup> *ibid.*, at para. 40; citing *Marshall v Whittaker's Building Supply Co* [\[1963\] HCA 26](#) (7 August 1963), [(1963) 109 CLR 210, at p. 217].

There are no rules as to the weighting given to the indicia in the decision making process.<sup>21</sup> The indicia are just a guide, with the ultimate question being whether the worker is acting for another or on their own behalf.<sup>22</sup>

In considering the criteria, it is necessary to consider the following questions (posed by Bromberg J) in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*:<sup>23</sup>

*‘Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:*

*Viewed as a “practical matter”:*

- (i) is the person performing the work an entrepreneur who owns and operates a business; and,*
- (ii) in performing the work, is that person working in and for that person’s business as a representative of that business and not of the business receiving the work?*

*If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.’*

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<sup>21</sup> *Sammartino v Mayne Nickless Express t/a Wards Skyroad* [Print S6212](#) (AIRCFB, Munro J, Duncan DP, Jones C, 23 May 2000) at para. 58, [(2000) 98 IR 168].

<sup>22</sup> *Stevens v Brodribb Sawmilling Company Pty Ltd* [\[1986\] HCA 1](#) (13 February 1986), [(1986) 160 CLR 16, at p. 37].

<sup>23</sup> *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* [\[2011\] FCA 366](#) (13 April 2011) at para. 208, [(2011) 206 IR 252].

The following table is adapted from the summary of indicia originally provided in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel*<sup>24</sup> and updated in *Jiang Shen Cai trading as French Accent v Do Rozario*.<sup>25</sup>

To be generally considered an employee	To be generally considered an independent contractor
Employer exercises, or has the right to exercise, control over the manner in which work is performed, the location and the hours of work etc.	Worker controls how work is performed.
Employee works solely for the employer.*	Worker performs work for others, or is genuinely entitled to do so.
Employer advertises the goods or services of its business.	Worker has a separate place of work and or advertises his or her services to the world at large.
Employer provides and maintains significant tools or equipment.	Worker provides and maintains significant tools or equipment.
Employer can determine what work can be delegated or sub-contracted out and to whom.	Worker can delegate or sub-contract any work to other persons to complete.
Employer has the right to suspend or dismiss the worker.	Contract may be terminated for breach.
Employer provides a uniform or business cards.	Worker wears their own uniform or other clothing of their choice. Worker has own business cards.
Employer deducts income tax from remuneration paid.	Worker responsible for own tax affairs.
Employee is paid by periodic wage or salary.	Worker provides invoices after the completion of tasks.
Employer provides paid holidays or sick leave to employees.	Worker does not receive paid holidays or sick leave.
The work does not involve a profession, trade or distinct calling on the part of the employee.	The work involves a profession, trade or distinct calling on the part of the worker.
The work of the employee creates goodwill or saleable assets for the employer's business.	The worker creates goodwill or saleable assets for their own business.
The employee does not spend a significant portion of their pay on business expenses.	The worker spends a significant portion of their remuneration on business expenses.

\* Generally referring to full-time employment – some employees may choose to work additional jobs.

<sup>24</sup> *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* [PR927971](#) (AIRCFB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215].

<sup>25</sup> *Jiang Shen Cai trading as French Accent v Do Rozario* [\[2011\] FWAFB 8307](#) (Lawler VP, O'Callaghan SDP, McKenna C, 2 December 2011) at para. 30, [(2011) 215 IR 235].



The table above is not exhaustive and whether a worker is an employee or contractor may be determined by a factor other than those listed above.<sup>26</sup>

Case example: **Independent Contractor**

***Abdalla v Viewdaze Pty Ltd t/a Malta Travel*** [PR927971](#) (AIRCFB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003), [(2003) 122 IR 215].

A travel consultant who occupying business space in the respondent's premises, was paid by commission, and controlled the hours and manner of his work, was found to be conducting his own business and not to be an employee of the respondent.

Case example: **NOT an Independent Contractor**

***Rabba v PeleGuy Pty Ltd T/A PeleGuy*** [\[2013\] FWC 70](#) (Gooley C, 10 January 2013).

The applicant was a salesperson who worked exclusively for the respondent, was not able to engage others to perform his work, was subject to the respondent's supervision and control, and sold goods as an integral part of the respondent's business. The applicant submitted invoices for payment, was paid by commission, was not subject to PAYG taxation, did not receive leave entitlements, and determined his own hours of work. The applicant was held to be an employee of the respondent.

Case example: **NOT an Independent Contractor**

***Stanley v Jiarong Lin (Kim) T/A IGA Liquor Plus (SPQR Gourmet Groceries); Carty v Jiarong Lin (Kim) T/A IGA Xpress (SPQR Gourmet Groceries)***; [\[2012\] FWA 2943](#) (Ryan C, 4 April 2012).

The two applicants had been shop managers who shortly before dismissal had been moved from employee status to independent contractor status. They were found to be employees at the time of dismissal on the basis that the independent contractor arrangement was a sham not genuinely intended by the applicants or the respondent.

Case example: **NOT an Independent Contractor**

***Bellia v Assisi Centre Inc*** [\[2010\] FWA 2904](#) (Hamilton DP, 1 June 2010).

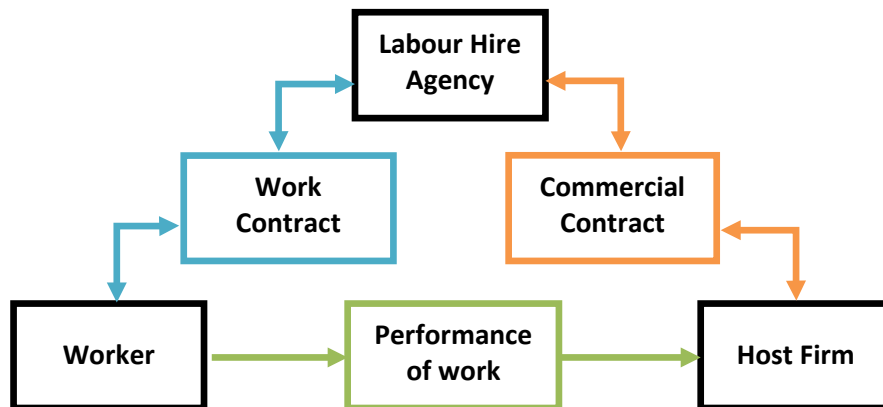
A priest who performed religious duties together with considerable pastoral work for the respondent community organisation under its direction and control, and was paid a regular income and provided with other benefits, was found to be an employee.

<sup>26</sup> *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* [PR927971](#) (AIRCFB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215].

## Labour hire workers

A labour hire worker is someone who enters into a work contract with a labour hire agency. The labour hire agency has a commercial contract to supply labour with a host firm. The worker performs work for the host firm. The host firm pays the labour hire agency, and the labour hire agency then pays the worker. The worker has no contract with the host firm and as a result cannot make an unfair dismissal claim against the host firm. An example of this is a nurse working for a nursing agency.

This arrangement is set out in the diagram below, adapted from Stewart’s Guide to Employment Law:<sup>27</sup>



Australian Courts have found that the interposition of a labour hiring agency between the agency’s clients and the workers the agency hires out to them does not result in an employee-employer relationship between the client and the worker. In those cases, in general, the hiring agency interviewed and selected the workers, and determined their remuneration, without reference to the client. Usually, a client requesting a worker with particular skills was provided with one, who may or may not have been ‘on the books’ of the hiring agency at the time the order was placed. The workers of such hiring agencies were usually meant to keep the agency informed of their availability to work, and in many cases were not to agree to undertake work for the client which had not been arranged or directed by the hiring agency. Equipment was either supplied by the worker themselves, or by the hiring agency, except for specialist safety equipment which the client often supplied. Dismissal of a worker was only able to be effected by the hiring agency. The client can only advise the hiring agency that the particular worker is no longer required by it.<sup>28</sup>

In some situations the labour hire agency and the host employer may be related entities. If this is the case, the host employer may be found to be the employer, regardless of the contract for work with the labour hire agency.

### **Powers of the host firm**

A number of cases have considered the manner in which the matters in s.387 of the Fair Work Act are considered in circumstances where an employer provides labour to a client and the client directs the employer to remove the employee from a site.<sup>29</sup> Labour hire arrangements in which a host employer has the right to exclude a labour hire employee from its workplace, are becoming a

<sup>27</sup> A Stewart, *Stewart’s Guide to Employment Law* (4<sup>th</sup> ed, 2013) at p. 69.

<sup>28</sup> *Damevski v Giudice* [2003] FCAFC 252 (13 November 2003) at paras 173–174, [(2003) 133 FCR 438].

<sup>29</sup> *Stevens v ISS Property Services Pty Ltd T/A ISS Property Services* [2020] FWC 1340 (Asbury DP, 12 March 2020) at para. 12.

common part of the employment landscape in Australia.<sup>30</sup> The reality for companies in the business of supplying labour is that they frequently have little if any control in the workplaces at which their employees are placed and the rights of such companies in circumstances where a client seeks the removal of an employee are limited. However, this is not a basis upon which companies in the business of supplying labour to clients can ignore their own responsibility for treating employees fairly when dismissal is the result of removal from a particular site, and the fairness of the dismissal is considered with reference to the matters in s.387 of the Fair Work Act.<sup>31</sup> The refusal of a client to have an employee of a labour hire company returned to a particular site may form the basis of a valid reason for dismissal (based on capacity), however consideration would also need to be given to whether the employee could work at another site where labour is supplied by the employer.

### ***Powers of the Commission to compel documents***

Under the Fair Work Act the Commission has the power to conduct inquiries and compel the production of documents.<sup>32</sup> This power can be used by the Commission to consider the terms of a contract to help determine the legal status of an applicant.<sup>33</sup>



**Compel** means to force or drive, especially to a course of action.<sup>34</sup>



#### **Related information**

- Evidence

### **Case example: Employee of Respondent**

***Damevski v Giudice*** [2003] FCAFC 252 (13 November 2003), [(2003) 133 FCR 438].

The applicant had been employed as a cleaner by Endoxos. Endoxos then restructured its operations so that the applicant and other employees would become contractors under a labour hire arrangement with another company. The applicant continued to perform the same work for Endoxos as a cleaner under its direction and control, using its equipment and in its uniform. The applicant was held to be the employee of Endoxos.

<sup>30</sup> *Stevens v ISS Property Services Pty Ltd T/A ISS Property Services* [2020] FWC 1340 (Asbury DP, 12 March 2020) at para. 12; citing *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 (O’Callaghan SDP, Binet DP, Hampton C, 22 August 2016) at para. 19.

<sup>31</sup> *Stevens v ISS Property Services Pty Ltd T/A ISS Property Services* [2020] FWC 1340 (Asbury DP, 12 March 2020) at para. 12.

<sup>32</sup> Fair Work Act s.590(c) and (f).

<sup>33</sup> See for example *CUB Pty Ltd T/A Carlton & United Brewers v Johnson; Chelgrave Contracting Australia Pty Ltd* [2021] FWCFB 411 (Catanzariti VP, Anderson DP, Bissett C, 8 February 2021) at para. 19.

<sup>34</sup> The Macquarie Dictionary Online.

Case example: **NOT Employee of Respondent**

***Re Advanced Australian Workplace Solutions Pty Ltd*** [Print S0253](#) (AIRC FB, Giudice J, McIntyre VP, Redmond C, 25 October 1999).

The Full Bench overturned a finding that the applicant, who had entered into a contract with a labour hire company, was in fact the employee of the host employer to which the applicant had been assigned to perform work. The Full Bench found that there was no contractual relationship between the applicant and the host employer.

Case example: **Employee dismissed by respondent as a result of contract with host employer**

***Pettifer v MODEC Management Services Pty Ltd*** [\[2016\] FWCFB 5243](#) (O'Callaghan SDP, Binet DP, Hampton C, 22 August 2016).

The appellant in this matter was employed by MODEC Management Services, a labour hire company, to work at a BHP Billiton Petroleum Inc (BHPB) site. He was dismissed after BHPB exercised a contractual right to direct MODEC to remove the appellant from its site. At first instance the Commission held that the dismissal was not harsh, unjust or unreasonable.

The appeal was made on grounds that the Commission erred in finding the question of valid reason did not arise on the facts. The Full Bench granted permission to appeal as the appeal raised broader question regarding the obligations of a labour hire employer.

The Full Bench found that BHPB's instruction to MODEC that the appellant was not permitted to work on site represented a matter going to the employee's capacity to work. The issue required consideration under s.378(a) of the Fair Work Act to determine whether there was a valid reason for dismissal. The Full Bench held that the Commission erred in finding the circumstances of the dismissal did not give rise to a consideration of valid reason. The appeal was upheld and the matter redetermined. To be a valid reason the reason must be defensible or justifiable on an objective analysis of the facts. The Full Bench was satisfied that MODEC had a valid reason relating to the employee's capacity and only exercised the reason because it was genuinely unable to find suitable alternate employment for him. Having considered the s.387 factors the Full Bench held that the dismissal was not harsh, unjust or unreasonable and confirmed the Commission order dismissing the unfair dismissal application.

Case example: **Employee dismissed by respondent when host employer removed access to site**

***Star v WorkPac Pty Ltd T/A WorkPac Group*** [2018] FWC 4991 (Asbury DP, 28 August 2018).

The applicant in this unfair dismissal application worked as a casual Machinery Operator at the Goonyella Riverside Mine for WorkPac, a labour hire company. WorkPac was directed by its client, BHP Billiton Mitsubishi Alliance (BMA), to remove the applicant from their site. When the applicant asked WorkPac why this was occurring, a WorkPac representative said that she did not know the reason, but that the ‘demobilisation’ was not related to the applicant’s performance. The representative also said that she would email a termination letter to the applicant. The applicant understood from this conversation that her employment was terminated. The applicant had no ongoing employment or income from WorkPac after that point.

The Commission found that the applicant was dismissed when WorkPac complied with BMA’s direction to remove her from their site. The Commission considered whether WorkPac had a valid reason for the dismissal related to the applicant’s capacity or conduct. The Commission found that there was an inference that a conduct issue related to the direction to remove the applicant from the site existed, however WorkPac failed to make any enquiry of BMA to establish the reasons. On the balance of probabilities the Commission found the reason for the direction to remove the applicant from the site was related to conduct.

The Commission found there was no valid reason for the removal of the applicant from the site leading up to the dismissal, and that WorkPac failed to consider alternative assignments before terminating the applicant’s employment. The Commission found that the dismissal was unfair. The Commission held the provisional view, with some reservations, that reinstatement was an appropriate remedy. The Commission provided an opportunity for the parties to consider their positions in relation to reinstatement.

## Vocational placements

A person serving a placement with an employer for which no entitlement to remuneration arises as a requirement of an education or training course authorised under a law or administrative arrangement of the Commonwealth, State or Territory is not an employee within the meaning of s.13 of the Fair Work Act.

## Volunteers



### Contains issues that may form the basis of a jurisdictional issue

A volunteer is ‘someone who enters into any service of their own free will, or who offers to perform a service or undertaking for no financial gain’.<sup>35</sup>

The Commission considers volunteerism as an arrangement generally motivated by altruism, rather than for remuneration or private gain. Therefore, the commitments shared between the parties are usually considered moral in nature, rather than legal.<sup>36</sup> Payment unrelated to hours of work or the

<sup>35</sup> The Macquarie Dictionary Online.

<sup>36</sup> *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (Steel C, 21 February 2011) at para. 42.

actual performance of work does not of itself imply that a worker is an employee.<sup>37</sup> In these circumstances, the payment can more aptly be described as an ‘honorary’ or gift.<sup>38</sup>

For example, a worker may receive board and lodgings<sup>39</sup> or reimbursements for expenses<sup>40</sup> and still be considered a volunteer. In other situations, a worker who performs work for non-monetary benefits, such as rent free accommodation, can be considered to be an employee rather than a volunteer.<sup>41</sup>

#### Case example: **Volunteer**

***Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club*** [\[2011\] FWA 1143](#) (Steel C, 21 February 2011).


The applicant acted as a bingo caller in a club and was paid \$50 per week. She was found not to be an employee of the club, since there was no mutual intention of the parties to enter into a legally enforceable arrangement or contract.

#### Case example: **NOT Volunteer**

***Daniels v Bentleigh Calisthenics Incorporated*** [Print N9259](#) (AIRC, Whelan C, 4 March 1997).

The applicant performed work as an instructor for a non-profit voluntary sporting association. The association submitted that the applicant was a volunteer, and the payments to her were an honorary. The applicant was held to be an employee of the association, being paid \$15 per hour at the time of dismissal.

## Public sector employment

 See Fair Work Act s.795

Some public sector employees are covered by the national system and others are specifically excluded.

The Fair Work Act sets the meaning of public sector employment as employment of, or service by, a person in any capacity (including but not limited to):

- under the Public Service Act 1999 (Cth) or the Parliamentary Service Act 1999 (Cth)
- by or in the service of a Commonwealth authority
- under a law of the Australian Capital Territory relating to employment by that Territory, including a law relating to the Australian Capital Territory Government Service, or

<sup>37</sup> See *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [\[2011\] FWA 1143](#) (Steel C, 21 February 2011) at para. 43.

<sup>38</sup> *ibid.*

<sup>39</sup> *Teen Ranch v Brown* (1995) 11 NSWCCR 197, [\(1995\) 87 IR 308](#) at pp. 310–311.

<sup>40</sup> *Frattini v Mission Imports* [\[2000\] SAIRComm 20](#) (16 May 2000).

<sup>41</sup> *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [\[2011\] FWA 1143](#) (Steel C, 21 February 2011) at para. 34; referring to *Cudgegong Soaring Pty Ltd v Harris* [\(1996\) 13 NSWCCR 92](#).

- under a law of the Northern Territory relating to the Public Service of the Northern Territory or by or in the service of a Northern Territory authority.<sup>42</sup>

### **Exclusions**

The following people are excluded from the national system (including but not limited to):

- a member of the Defence Force<sup>43</sup>
- a member of the Police Force of the Northern Territory<sup>44</sup>

Referred states can also exclude persons from the national system.<sup>45</sup>

- [Consolidated list of exclusions](#) for all referred states.

### **Northern Territory**

A member of the Northern Territory Police Force who has been dismissed may appeal to a Disciplinary Appeal Board against the action.<sup>46</sup>

### **Victoria**

Victoria has referred most of its State public sector and local government employees to the national system.<sup>47</sup> However, it has excluded the referral of matters related to persons employed as ‘executives’ and ‘Ministerial officers’ within the meaning of the *Public Administration Act 2004* (Vic) ‘or persons employed at higher managerial levels in the public sector.’<sup>48</sup>

Victoria has also excluded the referral of matters related to the ‘termination of employment of law enforcement officers’.<sup>49</sup> A law enforcement officer means:

- a member of the Police Force
- a Police Reservist
- a Protective Service Officer, or
- a Police Recruit.<sup>50</sup>

A member of the Victorian Police Force who has been dismissed by the Chief Commissioner may apply to an Appeals Board for review of the dismissal order.<sup>51</sup>

### **Other states**

The following public sector employees have not been referred to (and are therefore excluded from) the national system:

- Western Australia – State public sector employees (also local government employees employed by non-constitutional corporations)

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<sup>42</sup> Fair Work Act s.795(4).

<sup>43</sup> Fair Work Regulations reg 6.08(2).

<sup>44</sup> Fair Work Regulations reg 6.08(3).

<sup>45</sup> Fair Work Act s.14(2)(b).

<sup>46</sup> *Police Administration Act* (NT) s.94.

<sup>47</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic).

<sup>48</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic) s.5(1).

<sup>49</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic) s.5(2).

<sup>50</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic) s.3.

<sup>51</sup> *Police Regulation Act 1958* (Vic) s.68B.

- New South Wales,<sup>52</sup> Queensland<sup>53</sup> and South Australia<sup>54</sup> – State public sector employees and local government employees, and
- Tasmania<sup>55</sup> – State public sector employees.

Like Victoria, Tasmania has referred most of its local government employees to the national system.

### **Officers and enlisted members in the Australian Defence Force (Army, Navy & RAAF)**

 See *Fair Work Regulations 2009* (Cth) reg 6.08(2)

No civil contract of any kind is created with the Crown or the Commonwealth<sup>56</sup> as a result of:

- the appointment of an officer, or
- the enlistment of an enlisted member.

An officer or enlisted member can make a complaint to their commanding officer regarding a termination decision.<sup>57</sup> An officer or enlisted member cannot make a complaint regarding the issue of a termination notice under Part VIIIA of the *Defence Act 1903* (Cth) or under Part 2 of Chapter 9 of the *Defence (Personnel) Regulations 2002* (Cth).<sup>58</sup>

#### Case example: **NOT a national system employer – Enlisted member of RAAF**

***Williams v Commonwealth of Australia*** [Print T2042](#) (AIRC FB, Giudice J, McIntyre VP, Hodder C, 17 October 2000).

The applicant was a former enlisted member of the Australian Defence Force. Because he was not subject to any contract of employment in that capacity, the Full Bench held that his application for relief in respect of termination of employment was correctly dismissed as incompetent.

#### Case example: **NOT a national system employer – Victorian Police probationary constable**

***Anderson v Victoria Police*** [\[2012\] FWA 8524](#) (Roe C, 12 October 2012).

The applicant had been a probationary police officer in Victoria. She was held not to be entitled to apply for an unfair dismissal remedy because the *Fair Work (Commonwealth Powers) Act 2009* (Vic) excluded members of the Victorian Police Force from the unfair dismissal jurisdiction of the Commission.

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<sup>52</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).

<sup>53</sup> *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

<sup>54</sup> *Statutes Amendment (National Industrial Relations System) Act 2009* (SA).

<sup>55</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (Tas).

<sup>56</sup> *Defence (Personnel) Regulations 2002* (Cth) reg 117; see for example *C v Commonwealth of Australia* [\[2015\] FCAFC 113](#) (21 August 2015).

<sup>57</sup> *Defence Force Regulations 1952* (Cth) reg 75.

<sup>58</sup> *Defence Force Regulations 1952* (Cth) reg 75(2)(c).



## What is a constitutional corporation?

The Fair Work Act defines constitutional corporations as ‘a corporation to which paragraph 51(xx) of the Constitution applies.’<sup>59</sup>

The *Australian Constitution* defines constitutional corporations as ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.<sup>60</sup>

This definition has two limbs that are ‘comprehensive alternatives’.<sup>61</sup> This means that constitutional corporations are either ‘foreign corporations’ or ‘trading or financial corporations formed within the limits of the Commonwealth’. Therefore, a foreign corporation does not need to be formed within the limits of the Commonwealth or be a trading or financial corporation to be classified as a constitutional corporation.<sup>62</sup>



Many incorporated employers in the private sector who sell goods or provide services for a fee will easily satisfy the criteria of a trading or financial corporation.<sup>63</sup>

The issue of whether an employer is a constitutional corporation usually arises where the employer is a not-for-profit organisation in industries such as health, education, local government and community services.<sup>64</sup>

### Foreign corporations

A foreign corporation is a corporation that has been formed outside of Australia.<sup>65</sup>

A corporation which is formed outside of Australia, which employs an employee to work in its business in Australia, is likely to be a national system employer and therefore fall within the jurisdiction of the Commission.<sup>66</sup>

#### ***Geographical application of the Fair Work Act***

Australia may include the Territory of Christmas Island and the Territory of the Cocos (Keeling) Island.<sup>67</sup> There may be instances where people employed on ships or fixed platforms (both within and outside of the Exclusive Economic Zone and the Continental shelf) will be deemed to be performing work within Australia.<sup>68</sup>

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<sup>59</sup> Fair Work Act s.12.

<sup>60</sup> *Australian Constitution* s.51(xx).

<sup>61</sup> *New South Wales v Commonwealth* [1990 HCA 2](#) (8 February 1990), [(1990) 169 CLR 482, at p. 504 (Deane J)].

<sup>62</sup> *ibid.*

<sup>63</sup> A Stewart, *Stewart’s Guide to Employment Law* (4<sup>th</sup> ed, 2013) at p. 36.

<sup>64</sup> *ibid.*, at p. 34.

<sup>65</sup> *New South Wales v Commonwealth* [1990 HCA 2](#) (8 February 1990), [(1990) 169 CLR 482, at p. 504 (Deane J)].

<sup>66</sup> See also *Gardner v Milka-Ware International Ltd* [\[2010\] FWA 1589](#) (Gooley C, 25 February 2010) at para. 24.

<sup>67</sup> Fair Work Act s.31.

<sup>68</sup> Fair Work Act ss.33–35.

Case example: **Foreign corporation – Employer company formed in New Zealand but applicant worked in Australia**

***Gardner v Milka-Ware International Ltd*** [2010] FWA 1589 (Gooley C, 25 February 2010).

The applicant alleged the termination of his employment was harsh, unjust or unreasonable. The respondent raised a jurisdictional objection as it was a New Zealand Registered, Directed and Owned company; traded in New Zealand only; employed the applicant in New Zealand and paid the applicant in New Zealand dollars into a New Zealand bank account. The applicant however worked in both New Zealand and Australia.

The Commission determined that the respondent was incorporated in New Zealand meaning that it was a foreign corporation within the meaning of s.51(xx) of the Australian Constitution and therefore, to the extent that it employed employees to perform work in Australia, it was a national system employer. The Commission had jurisdiction to deal with the application.

Throughout his employment with the respondent, the applicant performed work in Australia at the respondent's direction, and at the date of his termination, all of his work was performed in Australia.

### Trading or financial corporation formed within the limits of the Commonwealth

Trading denotes the activity of, providing for reward, goods or services.<sup>69</sup>

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed.<sup>70</sup>

It does not matter if trading activities are a corporation's 'dominant' activity or whether they are merely an 'incidental' activity, or entered into in the course of pursuing other activities.<sup>71</sup>

A corporation will be a trading corporation if the trading engaged in is 'a sufficiently significant proportion of its overall activities'.<sup>72</sup>

A corporation can be a trading corporation even if it was not originally formed to trade.<sup>73</sup>

One factor that may be considered is the commercial nature of the activity.<sup>74</sup> When considering the commercial nature of a corporation's activity, the Commission will look at a number of factors, including:

- whether it is involved in a commercial enterprise; that is, business activities carried on with a view to earning revenue
- what proportion of its income the corporation earns from its commercial enterprises

<sup>69</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50 (18 December 1978), [(1978) 36 FLR 134, at p. 139].

<sup>70</sup> *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 (27 February 1979), [(1979) 143 CLR 190, at p. 208 (Mason J)].

<sup>71</sup> *ibid.*, [(1979) 143 CLR 190, at p. 239].

<sup>72</sup> *ibid.*, [(1979) 143 CLR 190, at p. 233].

<sup>73</sup> *Garvey v Institute of General Practice Education Incorporated* [2007] NSWIRComm 159 (28 June 2007) at para. 30, [(2007) 165 IR 62].

<sup>74</sup> *University of Western Australia v National Tertiary Education Industry Union* Print P1962 (AIRC, O'Connor C, 20 June 1997) at p. 3; citing *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 (27 February 1979), [(1979) 143 CLR 190, at p. 209].

- whether the commercial enterprises are substantial or peripheral,
- whether the activities of the corporation advance the trading interests of its members.<sup>75</sup>

A **financial corporation** is one ‘which borrows and lends or otherwise deals in finance as its principal or characteristic activity...’<sup>76</sup>

The approach taken in deciding whether the activities of a corporation are such that the corporation should be considered to be a financial corporation is the same as the approach taken in deciding whether a corporation is a trading corporation.<sup>77</sup>

Case example: **Trading or financial corporation – Professional sporting organisation and club**

***R v Federal Court of Australia; Ex parte WA National Football League*** [1979] HCA 6 (27 February 1979), [(1979) 143 CLR 190].

The High Court, by majority, held that a football club and the league to which it belonged in Western Australia were trading corporations. Their central activity was the organisation and presentation of football matches in which players were paid to play and spectators charged for admission, and television, advertising and other rights were sold in connection with such matches. This constituted trading activity.

Case example: **Trading or financial corporation – Charitable organisation**

***Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)*** [2002] FCA 860 (5 July 2002), [(2002) 120 FCR 191].

The RSPCA, a charitable organisation, was found to be a trading corporation on the basis that it earned substantial income from trading activities. It did not matter that this income was used for charitable purposes rather to create a profit.

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<sup>75</sup> *University of Western Australia v National Tertiary Education Industry Union* [Print P1962](#) (AIRC, O’Connor C, 20 June 1997) at p. 3; citing *Re Australian Beauty Trade Suppliers Limited v Conference and Exhibition Organisers Pty Limited* [1991] FCA 154 (18 April 1991) at para. 11, [(1991) 29 FCR 68, at p. 72].

<sup>76</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50 (18 December 1978), [(1978) 36 FLR 134, at p. 138].

<sup>77</sup> *State Superannuation Board v Trade Practices Commission* [1982] HCA 72 (14 December 1982) at para. 19 (Mason, Murphy and Deane JJ), [(1982) 150 CLR 282, at p. 303].

Case example: **Trading or financial corporation – Not-for-profit organisation and hospital**

***Re E v Australian Red Cross Society; Australian Red Cross Society New South Wales Division and Central Sydney Area Health Service*** [1991] FCA 20 (8 February 1991), [(1991) 27 FCR 310].

The Australian Red Cross Society and the Royal Prince Alfred Hospital were held to be trading corporations, on the basis that they both generated substantial income from trading activities, even though that income was only a minority proportion of total income. The motive for which that trading income was earned was not relevant.

Case example: **Trading or financial corporation – Metropolitan Fire and Emergency Services Board**

***United Firefighters' Union of Australia & Ors v Metropolitan Fire and Emergency Services Board*** [1998] FCA 551 (20 May 1988), [(1988) 83 FCR 346].

The Court found that the trading activities of the Metropolitan Fire and Emergency Services Board (the Board) generate substantial income and are sufficient to constitute the Board as a trading corporation. The principal activity of the Board, established as a statutory corporation, was to respond to fire and other emergencies, an activity which it undertook without charge to the public. The Board's Fire Equipment Services activities, which involved the commercial servicing of fire equipment for commerce, industry and the domestic market generated 5.11% of the Board's revenue.

Case example: **Trading or financial corporation – Building society**

***Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd*** [1978] FCA 50 (18 December 1978), [(1978) 36 FLR 134].

Two co-operative incorporated building societies, were to be financial corporations, on the basis that they lent money at interest and were therefore engaged in commercial dealing in finance. The fact that his activity was not for profit and involved the performance of an important social function was not determinative.

Case example: **Trading or financial corporation – Trustee of Superannuation fund**

***State Superannuation Board v Trade Practices Commission*** [1982] HCA 72 (14 December 1982), [(1982) 150 CLR 282].

A statutory corporation formed to provide superannuation benefits for state public servants was determined to be a financial corporation, on the basis that it engaged in financial activities on a very substantial scale. The fact that this activity was engaged in for the purpose of providing superannuation benefits to contributors was no obstacle to the conclusion that it was a financial corporation.

Case example: **Trading or financial corporation – Not for profit organisation**

***Ms Pasalskyj*** [\[2015\] FWC 7309](#) (Hampton C, 13 November 2015).

A provider of rehabilitation services to offenders and former prisoners was held to be a trading corporation. The Commission found that the provider's funding contracts, individual contracts for some activities and its youth housing renovation program, should be treated as trading activities because they generated about \$1.2 million a year for the organisation, 11 per cent of its annual activities. It was also held that activities associated with the direct provision of accommodation services were trading activities. The combined level of trading activities (in excess of 15 per cent of income) was held to be not insubstantial.

Case example: **NOT a trading or financial corporation – District or amateur sporting organisation**

***Re Kimberley John Hughes v Western Australian Cricket Association (Inc) and Ors*** [\[1986\] FCA 357](#) (27 October 1986), [(1986) 19 FCR 10].

Incorporated cricket clubs were found not to be trading corporations (although the Western Australian Cricket Association with which they were associated was found to be a trading corporation). The clubs were basically amateur bodies which did not charge for admission to matches and generally did not pay players. Although they engaged in some trading activities, this was not of sufficient significance to allow them to be characterised as trading corporations.

Case example: **NOT a trading or financial corporation – Charitable organisation**

***Hardeman v Children's Medical Research Institute*** [\[2007\] NSWIRComm 189](#) (24 September 2007), [(2007) 166 IR 196].

The respondent was found not to be a trading corporation. The trading activities it did engage in were insubstantial and peripheral to the central activity of medical research.

Case example: **NOT a trading or financial corporation – State Government**

***Re A.B.*** [\[2014\] FWC 6723](#) (Hampton C, 30 September 2014).

The Department of Education in New South Wales and/or State of New South Wales were found not to be corporations within the meaning of the Constitution.

**Note:** The above case was an application under the anti-bullying provisions of the Fair Work Act

## Partnerships – Western Australia

In Western Australia, a company which is not a constitutional corporation is generally not a national system employer and therefore not covered by the national unfair dismissal laws.

However, if one of the partners of a partnership is a trading corporation (such as a Pty Ltd company), the partnership **can** be a national system employer.<sup>78</sup>

### ***What is a partnership?***

A **partnership** is the relationship that exists between persons carrying on a business in common with a view to profit.<sup>79</sup>

A partnership is not a separate entity from its constituent parts. Each partner is jointly and severally liable for the partnership's obligations.<sup>80</sup>

### ***Meaning of person***

A **person** can be defined as a separate legal entity, recognised by the law as having rights and obligations.

There are two categories of person:

- a natural person (a human being), and
- an artificial person (an entity to which the law attributes personality – such as a body corporate).<sup>81</sup>

Case example: **Partnership a trading or financial corporation – Partnership including Pty Ltd company**

***McInnes v North Perth Vet Centre*** [2015] FWC 2720 (Gooley DP, 21 April 2015).

The respondent, P.B. Hodgen, Medivet Trust and the Murray Family Trust were a partnership which carried on a business. Medivet (WA) Pty Ltd as trustee of the Medivet Trust, was also a partner in the partnership. As one of the partners was a trading corporation, the Commission found that the employer was a national system employer.

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<sup>78</sup> *McInnes v North Perth Vet Centre* [2015] FWC 2720 (Gooley DP, 21 April 2015) at para. 16.

<sup>79</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 851.

<sup>80</sup> *McInnes v North Perth Vet Centre* [2015] FWC 2720 (Gooley DP, 21 April 2015) at para. 13.

<sup>81</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 870.

Case example: **Partnership NOT a trading or financial corporation – Partnership including Pty Ltd company**

***Williams v Goldendays Pty Ltd & D Kolichev & L Kolichev T/A Stirling Aluminium and Glass*** [2015] FWC 4200 (Bissett C, 24 June 2015).

The respondent was a partnership made up of two individuals and a Pty Ltd company. If the Pty Ltd company was a trading corporation then the partnership would take on the characteristic of a trading corporation and therefore be a national system employer.

The respondent submitted that the Pty Ltd company:

- did not have an ABN
- was not registered for GST
- did not have a bank account
- had not been involved in any form of trade, and
- had no income except that received as a partner pursuant to the partnership distribution arrangement.

The Commission found there was nothing in the tax returns to indicate that the Pty Ltd company was engaged in any buying or selling of goods or services or that it generated any revenue. The Commission was satisfied that the Pty Ltd company was not a trading corporation.

## What do I do if I am outside the national workplace relations system?

If you think your employer is part of a State workplace relations system you should contact the industrial relations body in your state:

- Industrial Relations Commission of New South Wales – [www.irc.justice.nsw.gov.au](http://www.irc.justice.nsw.gov.au)
- Queensland Industrial Relations Commission – [www.qirc.qld.gov.au](http://www.qirc.qld.gov.au)
- South Australian Employment Tribunal – [www.saet.sa.gov.au](http://www.saet.sa.gov.au)
- Western Australian Industrial Relations Commission – [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au)
- Tasmanian Industrial Commission – [www.tic.tas.gov.au](http://www.tic.tas.gov.au)

## High income threshold



Contains issues that may form the basis of a jurisdictional issue



See Fair Work Act s.382

The high income threshold operates as a limit to an employee's eligibility to be protected from unfair dismissal under the terms of the Fair Work Act. If an employee is not covered by a modern award, or if an enterprise agreement does not apply to them, they must have an **annual rate of earnings** of less than the high income threshold.



The high income threshold is currently **\$167,500**.<sup>82</sup> This figure is adjusted annually on 1 July.<sup>83</sup>

For a dismissal which took effect on or before 30 June 2022 the high income threshold was **\$162,000**.<sup>84</sup>

## What are earnings?

 See Fair Work Act s.332

Earnings include:

- wages
- such other amounts (if any) worked out in accordance with the Regulations
- amounts dealt with on the employee's behalf or as the employee directs, and
- the agreed money value of non-monetary benefits.



**Non-monetary benefits** are benefits other than an entitlement to a payment of money:

- to which the employee is entitled in return for working, and
- for which a reasonable money value has been agreed by the employee and the employer.

The Commission has a discretion to include a benefit that is not a payment of money and that is not a 'non-monetary benefit' (within the meaning of s.332(3) of the Fair Work Act). It may do so where it is satisfied that it is appropriate to take it into account, and it can attribute a 'real or notional' value to the benefit, in default of any agreement between the parties.<sup>85</sup>

Earnings do **not** include:

- payments the amount of which cannot be determined in advance such as:
  - commissions
  - incentive-based payments and bonuses, or
  - overtime (except guaranteed overtime);<sup>86</sup>
- reimbursements (such as per diem payments),<sup>87</sup> and
- compulsory contributions to a superannuation fund (superannuation guarantee).

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<sup>82</sup> This figure applies from 1 July 2023.

<sup>83</sup> For more information on the high income threshold please see Fair Work Act s.333; Fair Work Regulations reg 2.13.

<sup>84</sup> High income threshold for period 1 July 2022–30 June 2023.

<sup>85</sup> Fair Work Regulations reg 3.05(6).

<sup>86</sup> See note in Fair Work Act s.332; incentive bonuses discussed in *Jenny Craig Weight Loss Centres Pty Ltd v Margolina* [2011] FWA 9137 (Giudice J, Hamilton DP, Roberts C, 23 December 2011) at para. 19.

<sup>87</sup> See for example *Schreuders v Freelancer International Pty Ltd* [2015] FWC 3286 (Booth DP, 15 May 2015).





**Per diem** means ‘by the day’ – a sum of money paid to an employee every day, such as a meal allowance or accommodation allowance.

### **Superannuation**

Compulsory superannuation contributions are not included in the calculation of an employee’s earnings.<sup>88</sup> Any superannuation paid in excess of compulsory contributions may be included in the calculations of the employee’s earnings.

### **Vehicles**

Where an employer provides an employee with a fully maintained vehicle the value of the *private use* of the vehicle can be included in the annual rate of earnings.<sup>89</sup> Use for business purposes is excluded and only the proportion of *private usage* can be counted as remuneration.<sup>90</sup>

Where there is no agreed monetary value of the benefit of the private use of a motor vehicle, the Commission will generally apply the following formula:<sup>91</sup>

1. Determine the annual distance travelled by the vehicle in question.
2. Determine the percentage of that distance that was for private use.
3. Multiply the above two figures to obtain the annual distance travelled for private purposes.
4. Estimate the cost per kilometre for a vehicle of that type (may be obtained from RACV, NRMA or other similar motoring association).
5. Multiply the annual distance travelled for private purpose (obtained at step 3) by the estimated cost per kilometre.

The figure obtained is the value of the vehicle to the employee and is added to remuneration.<sup>92</sup>

Where an employer provides an employee with a car allowance, the allowance should be treated in the following way for the purpose of calculating an employee’s ‘annual rate of earnings’:

- If a car allowance is paid to an employee in circumstances in which there is no requirement or expectation that the employee will have to use his or her car for work purposes, then the whole of the car allowance is, in reality, part of the employee’s wages and is therefore included in their ‘earnings’.
- If a car allowance is paid to an employee at the time of their dismissal in circumstances in which there is a requirement or expectation that the employee will have to use his or her car for work

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<sup>88</sup> Fair Work Act s.332(2)(c); discussed in *Ablett v Gemco Rail Pty Ltd* [2010] FWA 8124 (Williams C, 22 October 2010) at paras 31–32.

<sup>89</sup> *Rofin Australia Pty Ltd v Newton* Print P6855 (AIRC FB, Williams SDP, Acton DP, Eames C, 21 November 1997), [(1997) 78 IR 78 at p. 82]; citing *Condon v G James Extrusion Company* Print N9963 (AIRC, Watson DP, 4 April 1997), [(1997) 74 IR 283 at p. 288]; cited in *Slavin v Horizon Holdings Pty Ltd* [2012] FWA 2424 (Bissett C, 23 March 2012) at para. 11.

<sup>90</sup> *ibid.*

<sup>91</sup> *Kunbarllanjja Community Government Council v Fewings* Print Q0675 (AIRC FB, Ross VP, Watson SDP, Bacon C, 7 May 1998); cited in *Chang v Ntscorp Ltd* [2010] FWA 1952 (Hamberger SDP, 9 March 2010); see *McIlwraith v Toowong Mitsubishi Pty Ltd* [2012] FWA 3614 (Cribb C, 30 April 2012) at para. 34.

<sup>92</sup> *Kunbarllanjja Community Government Council v Fewings* Print Q0675 (AIRC FB, Ross VP, Watson SDP, Bacon C, 7 May 1998).

purposes, then it will be necessary to determine and calculate the private benefit, if any, derived by the employee from the car allowance.<sup>93</sup>

### **Fringe benefit tax**

Fringe benefit tax is a tax that is imposed on an employer when they provide a benefit to an employee,<sup>94</sup> such as personal use of a company owned vehicle.

Fringe benefit tax may or may not be counted as earnings depending on whether the amount is found to be an amount dealt with as the employee directs.

- Where the employer is ‘free to choose whether to provide a particular benefit to an employee’ it cannot be said to be an amount dealt with on the employee’s behalf.<sup>95</sup>
- Fringe benefit tax may be an amount dealt with at the employee’s direction, in a genuine salary sacrifice situation when an employee has forgone wages in return for a benefit.<sup>96</sup> In this situation fringe benefit tax will be included in the employee’s earnings.<sup>97</sup>

#### Case example: **Earnings – Tax deductible work related expense**

***Read v Universal Store Pty Ltd T/A Universal Store*** [\[2010\] FWA 5772](#) (McKenna C, 23 August 2010).

The employee claimed that tax-deductible work-related expenses should be deducted from his wages for the purpose of calculating whether the high income threshold had been exceeded. This submission was not accepted.

#### Case example: **Earnings – Pre-determined overtime**

***Foster v CBI Constructors Pty Ltd*** [\[2014\] FWC FB 1976](#) (Catanzariti VP, Lawler VP, Lewin C, 24 March 2014).

The employee was required to attend 30 minute pre-start meeting every work day which was paid as overtime. It was found the overtime payments could be determined in advance so the 2.5 hours of overtime per week could be included in the calculation of his earnings.

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<sup>93</sup> *Sam Technology Engineers Pty Ltd v Bernadou* [\[2018\] FWC FB 1767](#) (Gostencnik DP, Clancy DP, Saunders C, 27 March 2018) at para. 72.

<sup>94</sup> *Rofin Australia Pty Ltd v Newton* [Print P6855](#) (AIRC FB, Williams SDP, Acton DP, Eames C, 21 November 1997), [(1997) 78 IR 78 at p. 82].

<sup>95</sup> *ibid.*

<sup>96</sup> *Chang v Ntscorp Ltd* [\[2010\] FWA 1952](#) (Hamberger SDP, 9 March 2010) at para. 21.

<sup>97</sup> *ibid.*

Case example: **Earnings – Guaranteed overtime**

***Cross v Bechtel Construction (Australia) Pty Ltd*** [\[2015\] FWC 3639](#) (Catanzariti VP, 29 June 2015).

The employee was contractually obliged to work a 58 hour Extended Work Week (EWW) which was comprised of 40 hours ordinary work and 18 hours overtime.

The Commission found that the overtime was guaranteed as the required 58 hour EWW could clearly be determined in advance and therefore should be used as the basis for calculating the annual rate of earnings.

Case example: **Earnings – Vehicle**

***Zappia v Universal Music Australia Pty Ltd T/A Universal Music Australia*** [\[2012\] FWA 3208](#) (Hamberger SDP, 18 April 2012).

The employee argued that the provision of a company car was a tool of the trade and should not be considered part of his earnings. It was found that the vehicle was primarily used for private purposes and was a significant part of the employee's remuneration package.

Case example: **Earnings – Private use of company provided iPhone and iPad**

***Dart v Trade Coast Investments Pty Ltd*** [\[2015\] FWC 4355](#) (Sams DP, 29 June 2015)

The employee was provided with an iPhone and iPad at the commencement of his employment with permission for personal use 'within reason'.

The employee accepted that he had used the phone for personal calls, but, as with the vehicle, he argued that this was 'incidental' to the phone's primary business purpose. The phone records disclosed that of 659 national direct calls, it appeared that 412 were direct personal calls (62.5%). When the phone and iPad were returned on termination, there were 610 personal photos on the iPad, and eight videos, as distinct from 21 work related entries.

The calculated benefit from the employee's private use of the phone and iPad resulted in his earnings exceeding the salary cap threshold.

Case example: **Earnings – Life insurance policy**

***Savannah Nickel Mines Pty Ltd v Crowley*** [\[2016\] FWCFCB 2630](#) (Hamberger SDP, Hamilton DP, Saunders C, 27 April 2016).

The cost of the premium for a life insurance policy, which was paid for by the employer, was found to be an amount applied or dealt with on the employee's behalf and was included in calculating the employee's income.

Case example: **NOT Earnings – Travel allowance**

**Davidson v Adecco Australia Pty Ltd T/A Adecco** [2012] FWA 8393 (Booth C, 4 October 2012).

The employee was in receipt of an annual travel allowance of \$16,000 for the use of his own vehicle for work travel. It was held that the business use component of the allowance was to be excluded from the ‘earnings’. Only the personal use could be included in ‘earnings’.

Case example: **NOT Earnings – Bonuses**

**Jenny Craig Weight Loss Centres v Margolina** [2011] FWAFB 9137 (Giudice J, Hamilton DP, Robert C, 23 December 2011).

In the previous financial year the employee had received a base salary of \$60,000, a 5 year bonus of \$100,000 and an annual performance bonus of \$42,000. It was found that the 5 year bonus could not be ‘determined in advance’ because the employer reserved the right to alter or discontinue the bonus plan, and it was likely that the same applied to the annual performance bonus. The employee therefore earned less than the high income threshold.

Case example: **NOT Earnings – Fringe benefit tax**

**Rofin Australia Pty Ltd v Newton** Print P6855 (AIRCFB, Williams SDP, Acton DP, Eames C, 21 November 1997), [(1997) 78 IR 78].


Fringe benefit tax on the provision of a motor vehicle was found not to be part of the employee’s earnings as it was the employer’s taxation liability. This was distinguished from a genuine salary sacrifice situation where it can be said that fringe benefit tax is an amount paid at the direction of and by arrangement with the employee which would otherwise be part of the employee’s salary package.

Case example: **NOT Earnings – Mobile broadband – Personal use**

**Maturu v Leica Geosystems Pty Ltd** [2014] FWCFB 6735 (Catanzariti VP, Asbury DP, Spencer C, 29 September 2014).

The personal use of a mobile broadband service, on a laptop computer supplied for work purposes, was found not to be a ‘non-monetary benefit’. This was because the mobile broadband service was provided as a piece of equipment that was essential to the performance of the job and there was no evidence of any agreement in relation to the private use of the mobile broadband service.

## Modern award coverage

 Contains issues that may form the basis of a jurisdictional issue

 See Fair Work Act s.382(b)(i)

The Fair Work Act provides that a person may be protected from unfair dismissal if they have met the minimum period of employment AND they are covered by a modern award.

### Coverage

 See Fair Work Act s.48

A modern award covers an employee if the modern award is expressed to cover the employee.

Each modern award contains a coverage clause (usually at clause 4) that defines who is covered by the award.



If a person's employment is covered by a modern award or award-based transitional instrument, then the person can have an annual rate of earnings of more than the high income threshold and still be within the jurisdiction of the Commission.

For information on modern award coverage, contact the Fair Work Ombudsman on 13 13 94 or visit [www.fairwork.gov.au/awards-and-agreements/awards](http://www.fairwork.gov.au/awards-and-agreements/awards).

### Principal purpose test

To determine whether an employee is employed under a classification within a modern award the Commission must assess the nature of the work and ascertain the principal purpose for which the employee was employed.<sup>98</sup>

The Commission must make more than a 'mere quantitative assessment' of the time the person spends performing certain types of duties.<sup>99</sup>

This test is applied to the work performed at the time of the dismissal, not at some earlier time as an employee may prefer performing certain duties, which are not necessarily the ones directed to be performed by the employer.<sup>100</sup>

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<sup>98</sup> *Carpenter v Corona Manufacturing Pty Ltd* [PR925731](#) (AIRCFCB, Williams SDP, Lacy SDP, Tolley C, 17 December 2002) at para. 9, [(2002) 122 IR 387]; cited in *McMenemy v Thomas Duryea Consulting Pty Ltd T/A Thomas Duryea Consulting* [\[2012\] FWAFB 7184](#) (Richards SDP, Harrison DP, Cambridge C, 28 August 2012) at para. 11, [(2012) 223 IR 125].

<sup>99</sup> *ibid.*

<sup>100</sup> *McMenemy v Thomas Duryea Consulting Pty Ltd T/A Thomas Duryea Consulting* [\[2012\] FWAFB 7184](#) (Richards SDP, Harrison DP, Cambridge C, 28 August 2012) at para. 37, [(2012) 223 IR 125].

## Interpreting coverage clauses

The words of award clauses are to be given their ordinary general meaning.<sup>101</sup>

The award's history and subject matter may be considered to resolve ambiguity.<sup>102</sup>

Courts and tribunals should avoid an overly literal or technical approach. They should attempt to give the terms of the award meaning that is consistent with the intentions of the parties.<sup>103</sup>

Interpreting awards involves looking at the meaning intended when drafting the document. This may involve going to effort to give an interpretation that avoids inconvenience or injustice. This does not mean disregarding the words of the instrument. Where simple or common words are used they must be given their ordinary meaning.<sup>104</sup>

### Case example: **Covered by a modern award**

***Cubillo v North Australian Aboriginal Family Violence Legal Service*** [2011] FWA 6818 (Deegan C, 5 October 2011), [(2011) 211 IR 394].

The employee was the Chief Executive Officer of a not-for-profit community legal centre. She argued that she was covered by the *Social, Community, Home Care and Disability Services Industry Award 2010*. The employer argued that the employee's role was too senior to fall under a classification of the award. The Commission found that the award made provisions in a number of classifications for employees at a managerial level, and therefore that it covered the employee. Because the award applied, it didn't matter that the employee exceeded the high income threshold.

### Case example: **NOT covered by a modern award**

***McMillan v Northern Project Contracting T/A NPC; Norman v Northern Project Contracting T/A NPC*** [2012] FWA 7049 (Gay C, 17 August 2012).

The employees' contract included a term that stated that the employee was covered by the *Mining Industry Award 2010*. However, it was held that the award on its terms did not actually apply to the employees. A contractual term cannot change the coverage of a modern award.

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<sup>101</sup> *The Clothing Trades Award* (1950) 68 CAR 597 (Australian Industrial Court, Full Court, Foster, Kirby and Dunphy JJ, 27 October 1950); cited in *City of Wanneroo v Holmes* [1989] FCA 369 (12 September 1989) at para. 43.

<sup>102</sup> *Pickard v John Heine & Son Ltd* [1924] HCA 38 (20 August 1924), [(1924) 35 CLR 1 at p. 9]; cited in *City of Wanneroo v Holmes* [1989] FCA 369 (12 September 1989) at para. 43.

<sup>103</sup> *Geo. A. Bond & Co. Ltd (in liq.) v McKenzie* [1929] AR (NSW) 498 at p. 503; cited in *City of Wanneroo v Holmes* [1989] FCA 369 (12 September 1989) at para. 43.

<sup>104</sup> *Kucks v CSR Ltd* [1996] IRCA 166 (19 April 1996), [(1996) 66 IR 182 at p. 184]; cited in *The Australian Workers' Union - West Australia Branch v Co-operative Bulk Handling Limited* [2010] FWA 4801 (Kaufman SDP, Richards SDP, Roberts C, 9 July 2010) at para. 12, [(2010) 197 IR 53].

Case example: **NOT covered by a modern award**

***Oehme v Nilsen Resources Pty Ltd*** [2012] FWA 1864 (Cloghan C, 8 March 2012).


The employee argued that he was a qualified electrical tradesperson and thus fell under the electrical tradesperson classification in the *Electrical, Electronic and Communications Contracting Award 2010*. It was found that the principal purpose of his employment was to work as a manager, not as an electrical worker, so he was outside the coverage of the award.

Case example: **NOT covered by a modern award**

***Halasagi v George Weston Foods Limited*** [2010] FWA 6503 (Lawler VP, 24 August 2010).

The employee argued that his university qualification brought him within a classification in the *Professional Employees Award 2010*. It was found that his degree related to a different field of engineering than the role he was employed to do, and that the employee was not performing professional engineering duties within the meaning of the award.

## Application of an enterprise agreement

 **Contains issues that may form the basis of a jurisdictional issue**

 See Fair Work Act s.52

### ‘Covers’

An enterprise agreement covers an employee if it is expressed to do so.<sup>105</sup>

Many enterprise agreements contain a coverage clause that specifies the parties who are bound by that instrument.



You can search for an agreement on the Commission website by visiting [www.fwc.gov.au/awards-and-agreements/agreements/find-agreement](http://www.fwc.gov.au/awards-and-agreements/agreements/find-agreement).

### ‘Applies’

An enterprise agreement applies to an employee if:

- the agreement is in operation
- the agreement covers the employee, and
- no provision of the Fair Work Act provides or has the effect that the agreement does not apply to the person.

<sup>105</sup> Fair Work Act s.53.

## Effect of an enterprise agreement applying

 See Fair Work Act s.51

The effect of an agreement applying to a person is that it confers entitlements and imposes obligations on them.

### Individual agreements

A provision of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) extends the reference of ‘enterprise agreement’ in section 382 of the Fair Work Act to include an agreement-based transitional instrument.<sup>106</sup>

An individual agreement such as an Australian Workplace Agreement (AWA) or Individual Transitional Enterprise Agreement (ITEA) is an agreement-based transitional instrument.<sup>107</sup>



If the work performed by a person is provided for in an enterprise agreement or agreement-based transitional instrument, then the person can have an annual rate of earnings of more than the high income threshold and still be within the jurisdiction of the Commission.

For information about enterprise agreement coverage, contact the Fair Work Ombudsman on 13 13 94 or visit [www.fairwork.gov.au/awards-and-agreements/agreements](http://www.fairwork.gov.au/awards-and-agreements/agreements).

#### Case example: **Enterprise agreement applied – Employee under AWA**

**Coventry v Southern Gulf Catchments Ltd** [2011] FWA 7018 (Smith C, 19 October 2011).

The employee’s income exceeded the high income threshold and the employee was covered by an Australian Workplace Agreement (AWA). The Commission found that the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* defined ‘enterprise agreement’ as including agreement-based transitional instruments. As an AWA is an agreement-based transitional instrument, the employee was protected from unfair dismissal.

#### Case example: **Enterprise Agreement does NOT apply – Employee did not fall under enterprise agreement classifications**

**Taylor-Hunt v Downer EDI Works Pty Ltd** [2010] FWA 4626 (Hampton C, 5 July 2010).


The employee argued that he was covered by an enterprise agreement which applied to employees ‘employed in classifications contained in the enterprise agreement ... on road construction and maintenance civil construction’. It was held by that although the employee did work in connection with road construction and maintenance, he did not fall within any of the classifications of the agreement, and was therefore not covered.

<sup>106</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 3 item 36.

<sup>107</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 3 item 2.



## What is the minimum period of employment?

 Contains issues that may form the basis of a jurisdictional issue

 See Fair Work Act s.383

An employee may make an application for an unfair dismissal remedy if they have completed a minimum employment period of:

- six months, or
- one year – where the employer is a ‘small business’.

Periods of service as a casual employee may or may not count.



### Related information

- Periods of service as a casual employee

## What is a small business?

 See Fair Work Act s.23

A small business is a business that employs fewer than 15 employees. The number of employees is determined by a head count of all full-time and part-time employees. Regular casual employees are also included in the count.

Associated entities of the business are taken to be one entity.<sup>108</sup>

To avoid doubt, in determining whether a business is a small business at a particular time in relation to the dismissal of an employee, or termination of an employee’s employment, the employees that are to be counted include:

- the employee who is being dismissed or whose employment is being terminated, and
- any other employee of the employer who is also being dismissed or whose employment is also being terminated.



### Related information

- What is employment on a regular and systematic basis?
- What is an associated entity?

## How do you calculate the minimum period of employment?

 See Fair Work Act s.383

The minimum period of employment is:

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<sup>108</sup> See for example *Pretorius v Gardens of Italy Pty Ltd* [2016] FWC 2503 (O’Callaghan SDP, 22 April 2016).

- one year continuous service for employees of small business employers, or
- six months continuous service for all other employees.

The period of employment starts on the date the employment commences. The period finishes on either the date the employee is notified of the dismissal or immediately before the dismissal, whichever is earlier.

### **What does 'month' mean?**

A month means a calendar month.<sup>109</sup> A calendar month begins on a date and finishes immediately before the corresponding date in the next month.<sup>110</sup> For example, a period of 6 months commencing on 26 February 2009 would finish at midnight of 25 August 2009.<sup>111</sup> If there is no corresponding date then it finishes at the end of the next month.<sup>112</sup>

An employee's period of employment commences on the employee's first day at work.<sup>113</sup>

### **What is continuous service?**

 See Fair Work Act s.22

**Service** is a period during which an employee is employed by an employer, but does not include certain excluded periods (see below).

**Continuous service** is a period of unbroken service with an employer by an employee.<sup>114</sup>

As continuous service was not clearly defined in the Fair Work Act the Commission has decided that the term should be given its ordinary meaning.<sup>115</sup>

Periods of unauthorised absence, certain types of unpaid leave and certain types of unpaid authorised absence do not count as service and are considered to be excluded periods.

An excluded period does not **break** an employee's continuous service with their employer. However, it **does not count towards the length** of the employee's continuous service.

In other words, section 22(3) of the Fair Work Act deems that in some circumstances, service that is not continuous can be considered continuous depending on the reasons for the periods of absence.<sup>116</sup>



#### **Related information**

- What is an excluded period?

<sup>109</sup> *Wilkinson v Skippers Aviation Pty Ltd* [PR903635](#) (AIRCFCB, McIntyre VP, Cartwright SDP, Harrison C, 30 April 2001) at para. 31; citing the *Acts Interpretation Act 1901* (Cth); applied in *Prigge v Manheim Fowles Pty Ltd* [\[2010\] FWA 28](#) (Richards SDP, 7 January 2010) at para. 10.

<sup>110</sup> See *Prigge v Manheim Fowles Pty Ltd* [\[2010\] FWA 28](#) (Richards SDP, 7 January 2010) at para. 14.

<sup>111</sup> *ibid.*

<sup>112</sup> *Wilkinson v Skippers Aviation Pty Ltd* [PR903635](#) (AIRCFCB, McIntyre VP, Cartwright SDP, Harrison C, 30 April 2001) at para. 31; citing the *Acts Interpretation Act 1901* (Cth).

<sup>113</sup> *Corner v SkyCity Adelaide Pty Ltd* [\[2011\] FWAFB 955](#) (Cartwright SDP, Ives DP, Rafaelli C, 15 February 2011) at para.7, [(2011) 204 IR 63].

<sup>114</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 263.

<sup>115</sup> *Holland v UGL Resources Pty Ltd T/A UGL Resources* [\[2012\] FWA 3453](#) (McCarthy DP, 23 April 2012) at para. 20.

<sup>116</sup> *ibid.*

### **What will break a period of continuous service?**

The following periods will break an employee’s continuous service with their employer and may result in a new period of employment for re-engaged employees:

- resignation
- dismissal, or
- transfers of employment which do not meet the definition of a ‘transfer of employment’ in s.22(7) of the Fair Work Act.



#### **Related information**

- What is a transfer of employment?
- What does ‘dismissed’ mean?

#### **Case example: Continuous service – Transfer of employment**

*Kefer v Tattersall’s Holdings Pty Ltd* [2012] FWA 2375 (Cambridge C, 23 March 2012).

The employee was employed by a first employer, then left and within 3 months commenced work for the second employer, which was an ‘associated entity’ of the first employer. This was held to be a transfer of employment under s.22(7), so that there was no break in continuity of service. It did not matter whether the employee resigned from employment with the first employer or was terminated by the first employer.

#### **Case example: NOT continuous service – Resignation**

*Tebble v Rizmas Pty Ltd* [2011] FWA 6853 (Roe C, 5 October 2011).

The employee was found to have resigned her employment and then returned to work. Her resignation broke continuous service and she subsequently commenced a new period of employment.

### **What is an excluded period?**



See Fair Work Act s.22

An excluded period does not **break** an employee’s continuous service with their employer. However, it does not count towards the length of the employee’s continuous service. Periods of casual employment may affect the length of an employee’s continuous service for the purpose of an application for an unfair dismissal remedy.

The following are periods that are excluded from the definition of ‘service’ and therefore for the purpose of calculating the minimum employment period:

- any period of unauthorised absence, and
- certain periods of unpaid leave or unpaid authorised absence (there are exceptions for community service leave, certain stand downs and prescribed leave or absences).

The following are examples of unauthorised absence:

- periods of industrial action engaged in by employees, and
- other absence from work contrary to the direction of the employer.

The following are examples of unpaid authorised absence:

- unpaid parental leave, and
- unpaid personal/carer's leave.

The above periods do not break service however they are **not** counted in the calculation of the minimum period of employment.

### ***What is included in the minimum period of employment?***

The following are examples of unpaid authorised absence for which the period of absence **is** counted as service:

- community service leave (eg jury service), and
- certain stand downs.



The Fair Work Act includes provisions that the 'regulations may prescribe different periods' however the Fair Work Regulations do not currently do so.



#### **Related information**

- Periods of service as a casual employee

#### **Case example: Excluded periods – Unpaid personal leave**

***Wales v 3 Point Motors Pty Ltd T/A 3 Point Motors*** [\[2012\] FWA 3817](#) (Jones C, 22 May 2012).

The employee had been employed for exactly 6 months. However it was found that a part of 1 days' sick leave was without pay. With that period of leave deducted the employee had not met the minimum period of employment.

#### **Case example: Excluded periods – Unpaid personal leave – Employee on Transport Accident Commission payments**

***Webster v Toni and Guy Port Melbourne Pty Ltd T/A Toni and Guy Port Melbourne*** [\[2010\] FWA 4540](#) (Roe C, 18 June 2010).

The employee had been on authorised leave during his employment due to a motor accident injury. The employee did not receive any payment from his employer during this period but was in receipt of payments from the Transport Accident Commission. It was held that this period was an excluded period because it was unpaid leave.

Case example: **Excluded periods – Unpaid personal leave – Income protection payments – Paid by superannuation fund**

*L.M. v Standard & Poor's (Australia) Pty Ltd* [2012] FWA 9634 (Roe C, 12 November 2012).

The employee was absent from work for about 5 weeks because of illness, and was paid income protection insurance payments by a private insurer through his superannuation fund. It was held that because the employer was under no legal obligation to provide income protection insurance, the employee was on unpaid leave. This was distinguished from workers' compensation payments which arise from a legal obligation on the employer.

Case example: **Not excluded periods – Workers' compensation**

*Workpac Pty Ltd v Bambach* [2012] FWA 3206 (Ross J, Sams DP, Booth C, 31 May 2012).

The employee was in receipt of workers' compensation and accident pay during a period of leave. It was found that the payments, even though they were being made by insurers, were made on behalf of the employer pursuant to a legal obligation imposed directly on the employer. Therefore the absence was not an unpaid authorised absence and was not an excluded period.

## Bankruptcy

Bankruptcy is a process where people who cannot pay their debts give up their assets and control of their finances, either by agreement or court order, in exchange for protection from legal action by their creditors.<sup>117</sup>

Bankruptcy can affect the Commission's ability to deal with an application for unfair dismissal. The *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) contains provisions which may have the effect of preventing an undischarged bankrupt from commencing or continuing litigation.<sup>118</sup>



An **undischarged bankrupt** is a person who has been declared bankrupt and has not been released from their status as bankrupt.

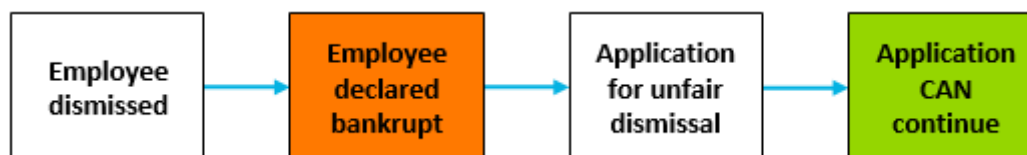
### Effect of bankruptcy on making an unfair dismissal application

In *Millington v Traders International*<sup>119</sup> a Full Bench of the Commission held that the Commission could deal with an application for unfair dismissal made by an employee **after** they were declared an undischarged bankrupt.

<sup>117</sup> Federal Court of Australia, *Bankruptcy Guide*.

<sup>118</sup> *Millington v Traders International Pty Ltd* [2014] FWCFB 888 (Hatcher VP, Asbury DP, Simpson C, 23 April 2015) at para. 3.

<sup>119</sup> *ibid.*, at paras 69–81.



The Full Bench also observed that had the employee’s application been made **before** she was declared an undischarged bankrupt, then it was ‘highly likely’ that her application would have been stayed by operation of s.60(2) of the Bankruptcy Act and not been heard by the Commission.<sup>120</sup>



## Insolvency

A company is solvent if, and only if, the company is able to pay all of the company's debts, as and when they become due and payable. A company that is not solvent is insolvent.<sup>121</sup>



A company becomes **insolvent** if it commences to be wound up, ceases to carry on business, or when a receiver is appointed.<sup>122</sup>

The three most common types of corporate insolvency are voluntary administration, liquidation and receivership.<sup>123</sup>

### Voluntary administration

Voluntary administration is a process where an administrator is appointed to a company in financial difficulties (but which could possibly be saved). During this time the administrator investigates the company’s affairs to be able to make a recommendation to creditors as to whether the company should come under administration, be wound up or revert to normal operation.<sup>124</sup>



A **creditor** is a person to whom a debt must be paid.<sup>125</sup>

<sup>120</sup> *ibid.*, at para. 80.

<sup>121</sup> *Corporations Act 2001* (Cth) s.95A.

<sup>122</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 604.

<sup>123</sup> Australian Securities & Investments Commission, *Types of Insolvency*.

<sup>124</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 1250.

<sup>125</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 302.

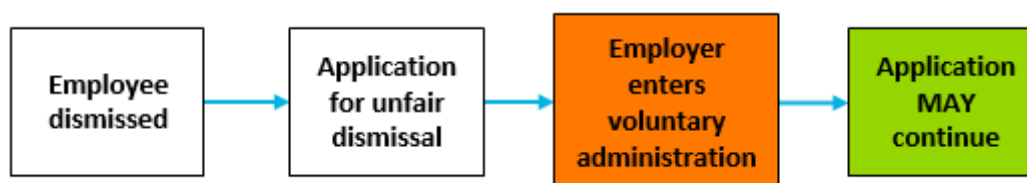
Where a company is in voluntary administration s.440D of the *Corporations Act 2001* (Cth) (Corporations Act) applies.

The Corporations Act, s 440D provides:

**Stay of proceedings**

- (1) *During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:*
  - (a) *with the administrator's written consent; or*
  - (b) *with the leave of the Court and in accordance with such terms (if any) as the Court imposes.*
- (2) Subsection (1) does not apply to:
  - (a) *a criminal proceeding; or*
  - (b) *a prescribed proceeding.*

The Commission is not a 'Court' and is therefore the stay prescribed in s.440D of the Corporations Act does not stop an employee from making or proceeding with an application for unfair dismissal.<sup>126</sup> The Member hearing a matter has a discretion as to whether that application will proceed for determination or be adjourned.<sup>127</sup>



**Receivership**

Receivership is the process by which a receiver is appointed to a company to collect or protect property for the benefit of either the person who appointed the receiver, or the persons who are ultimately found to be entitled to that property. Receivership is typically instituted where a company is at or near insolvency.<sup>128</sup>



<sup>126</sup> *Smith v Trollope Silverwood & Beck Pty Ltd* [PR940508](#) (AIRCFCB, Giudice J, Ross VP, Whelan C, 17 November 2003), [(2003) 142 IR 137].

<sup>127</sup> See for example *Krebs v Pika Wiya Health Service Aboriginal Corporation (Administrators Appointed and under Special Administration)* [\[2015\] FWC 1232](#) (Hampton C, 6 March 2015).

<sup>128</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 987.

## Liquidation

The orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders.<sup>129</sup>



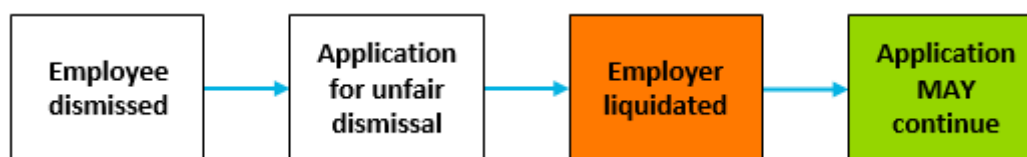
To **realise** means to convert assets into cash, often by selling them.<sup>130</sup>

A company liquidation is the corporate equivalent of bankruptcy proceedings against an individual who becomes insolvent.<sup>131</sup>

The three types of liquidation are:

- court
- creditors' voluntary, and
- members' voluntary.

An unfair dismissal application lodged against an employer who is declared insolvent by a Court or a provisional liquidator can proceed in the Commission.<sup>132</sup>



### Exception

Section 500(2) of the Corporations Act applies to a creditors' voluntary winding up where the company is insolvent.

The Corporations Act provides:

#### ***Execution and civil proceedings***

...

- (2) *After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.*<sup>133</sup>

The Commission has found that an unfair dismissal application falls within the meaning of 'civil proceedings' in s.500(2) of the Corporations Act.<sup>134</sup>

<sup>129</sup> *Insolvency: a glossary of terms*, Australian Securities & Investments Commission, December 2008, at p. 4.

<sup>130</sup> *Insolvency: a glossary of terms*, Australian Securities & Investments Commission, December 2008, at p. 5.

<sup>131</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 697.

<sup>132</sup> *Smith v Trollope Silverwood & Beck Pty Ltd* [PR940508](#) (AIRCFCB, Giudice J, Ross VP, Whelan C, 17 November 2003), [(2003) 142 IR 137].

<sup>133</sup> *Corporations Act 2001* (Cth), s.500(2).

<sup>134</sup> *Grujevski v Queens Wharf Brewery* [\[2014\] FWC 3725](#) (Gooley DP, 5 June 2014) at para. 11; citing *Silalahi v CMI Industrial (Forge)* [\[2012\] FWA 7275](#) (Jones C, 31 August 2012) at paras 11–16.



The Commission is not a ‘Court’ and is therefore unable to grant leave as prescribed in s.500(2) of the Corporations Act.<sup>135</sup>

However, s.500(2) of the Corporations Act does not apply a members’ voluntary winding up where the company is solvent (at the time of making a special resolution under s.491 of the Corporations Act) and the decision to wind up is made by a majority of the directors.<sup>136</sup>

### Unpaid entitlements

The Australian Government provides financial assistance to cover certain unpaid employment entitlements to eligible employees. This help is available to an employee after losing their job because their employer went bankrupt or into liquidation through the Fair Entitlements Guarantee (FEG). For more information about FEG visit the [Department of Employment's FEG webpage](#), or call the FEG Hotline on 1300 135 040.


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<sup>135</sup> *Grujevski v Queens Wharf Brewery* [2014] FWC 3725 (Gooley DP, 5 June 2014) at para. 10; citing *Smith v Trollope Silverwood & Beck Pty Ltd* PR940508 (AIRCFB, Giudice J, Ross VP, Whelan C, 17 November 2003), [(2003) 142 IR 137].

<sup>136</sup> *Woolley v Glenjac Pty Ltd t/a Aussie Farmers Direct* [2014] FWC 7833 (Hatcher VP, 4 November 2014) at para. 16; citing *Catto & Ors v Hampton Aust Ltd (In Liq) & Anor* [1998] SASC 6594 (16 October 1998), [(1998) 29 ACSR 225]; *Awada v Linknarf* [2002] NSWSC 873 (26 September 2002), [(2002) 55 NSWLR 745].

## Part 4 – What is dismissal?

### What does ‘dismissed’ mean?

 See Fair Work Act s.386

The term **dismissed** is defined in the Fair Work Act as a situation where:

- a person’s employment has been terminated at the employer’s initiative, or
- a person was forced to resign because of the conduct or course of conduct engaged in by the employer.

A dismissal does NOT include where:

- a person is demoted in his or her employment without a significant reduction in duties or remuneration and remains employed by the employer,
- a person was employed under a contract for a specified period of time, specified task or for the duration of a specified season and the employment comes to an end at the end of that period, or
- a person had a training arrangement with their employer which:
  - specified that the employment was limited to the duration of the training arrangement, and
  - whose employment ends at the end of that training arrangement.

### Exception

A person employed under a contract for a specified period of time, specified task or for the duration of a specified season and the employment comes to an end at the end of that period, could be considered to have been dismissed if a substantial purpose of the employment of the person under a contract of that kind was so that the employer could avoid their obligations under the unfair dismissal provisions of the Fair Work Act.<sup>137</sup>

### Notification of dismissal

Notification of dismissal should not be made by text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where text message or other electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation.<sup>138</sup>

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<sup>137</sup> Fair Work Act s.386(3); see also *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWC 4092 (Ross J, Colman DP, Cirkovic C, 16 August 2017).

<sup>138</sup> *Wallace v AFS Security 24/7 Pty Ltd* [2019] FWC 4292 (Cambridge C, 28 June 2019) at para. 51; see also *Cachia v Scobel Pty Ltd ATF the S & I Trust t/a Emerse Skin & Laser* [2018] FWC 2648 (Sams DP, 21 May 2018) at para. 88.

## When does a dismissal take effect?

A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed.<sup>139</sup>

An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).<sup>140</sup>

In certain circumstances a dismissal can be communicated orally.<sup>141</sup> This includes:

- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct
- a casual employee
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
- a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures)
- a daily hire employee working in the meat industry in connection with the slaughter of livestock
- a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors, or
- an employee prescribed by the regulations as an employee to whom this Division does not apply.<sup>142</sup>

Where the communication is in writing only, the communication must be received by the employee in order for the termination to be effective.<sup>143</sup>



### Important

A notice of termination which does not comply with s.117 of the Fair Work Act may be effective to bring about the termination of the employment relationship and may constitute 'notice of the dismissal' within the meaning of s.383(a)(i) of the Fair Work Act.<sup>144</sup>

<sup>139</sup> *Burns v Aboriginal Legal Service of Western Australia (Inc)* [Print T3496](#) (AIRC FB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) at para. 24.

<sup>140</sup> Fair Work Act s.117(1).

<sup>141</sup> *Plaksa v Rail Corporation NSW* [\[2007\] AIRC 333](#) (Cartwright SDP, 26 April 2007) at para. 8; citing *Barolo v Centra Hotel Melbourne* [Print Q9605](#) (AIRC, Whelan C, 10 December 1998).

<sup>142</sup> Fair Work Act s.123.

<sup>143</sup> *Ayub v NSW Trains* [\[2016\] FWCFB 5500](#) (Hatcher VP, Wells DP, Johns C, 30 September 2016) at para. 17.

<sup>144</sup> *Metropolitan Fire and Emergency Services Board v Duggan* [\[2017\] FWCFB 4878](#) (Gostencnik DP, Clancy DP, Saunders C, 25 September 2017) at para. 33.

A notice of termination may still be valid even if it is stated to take effect subject to a condition, such as a future date, provided that:

- the notice clearly expresses the condition
- the condition has been satisfied, and
- the employee is in a position to know that the condition has been satisfied.<sup>145</sup>

Where payment in lieu of notice is made the dismissal usually takes effect immediately.<sup>146</sup>

#### Example

If an employee is given four weeks' notice that they will be dismissed, and they work through the four week period – then the date that the dismissal takes effect will generally be at the end of that four week notice period.

HOWEVER, if an employee receives four weeks' pay in advance in lieu of working and is **NOT** required to work through the four week notice period – then the date that the dismissal takes effect will generally be the last day worked unless the employer specifies a different date of dismissal.

**Note:** The example above provides a general guide, however this may not always be the case – issues such as the terms of a contract may affect the date a dismissal takes effect.<sup>147</sup>

#### Premature applications

In *Mihajlovic v Lifeline Macarthur* the Full Bench of the Commission found that an application which is filed prematurely should be considered to be an application which was not made in accordance with s.394(1) of the Fair Work Act. However, that an application is premature does not make the application invalid and of no effect, because the Commission has discretion under the Fair Work Act to:

- dismiss a premature application under s.587(1)(a) on its own initiative or upon application, or
- to waive any irregularity in the form or manner in which an application is made under s.586(b), which can include the premature filing of an application.<sup>148</sup>



#### Related information

- 
- What is a contract?
- When can the Commission dismiss an application?

<sup>145</sup> *ibid.*, at para. 18.

<sup>146</sup> *Siagian v Sanel Pty Limited* [1994] IRCA 2 (27 May 1994), [(1994) 122 ALR 333 at p. 355].

<sup>147</sup> See for example *Mihajlovic v Lifeline Macarthur* [2013] FWC 9804 (Hatcher VP, 16 December 2013); *Akee v Link-Up (Queensland) Aboriginal Corporation* [2015] FWC 555 (Hatcher VP, 9 February 2015).

<sup>148</sup> *Mihajlovic v Lifeline Macarthur* [2014] FWCFB 1070 (Ross J, Hatcher VP, Bull C, 5 March 2014) at para. 42.

Case example: **Dismissal not clearly communicated**

***Ayub v NSW Trains*** [2016] FWCFB 5500 (Hatcher VP, Wells DP, Johns C, 30 September 2016).

After a disciplinary process the applicant was advised that he would be dismissed, but that he had a right to seek a review of this decision within 14 days. In a letter on 23 November 2015 the respondent advised that if no request for a review was made within the 14-day time period, the dismissal would take effect on 7 December 2015, but if a review was requested and the outcome of the review was that the decision to dismiss was confirmed, the dismissal would be 'effective from 7 December 2015 or from the date of the outcome letter whichever one is of the latter date'.

The applicant requested a review on 7 December 2015. On 13 January 2016 the review panel determined that dismissal was the appropriate outcome. Various steps were taken to attempt to inform the applicant of the outcome including:

- By letter dated 14 January 2016 (the Outcome Letter) which confirmed the dismissal but did not advise the date of the dismissal. The letter contained the words 'Delivered by Hand' however the letter was never personally served on the applicant.
- By letter dated 15 January 2016 (the Dismissal Letter) but signed on 18 January 2016 which confirmed that the applicant was dismissed and that his last day on the payroll would be 14 January 2016. The Dismissal Letter and a copy of the Outcome Letter were attached to an email sent to the applicant's email contact address (which was his wife's email address) on 18 January 2016. The applicant did not see and open the email until 19 January 2016.

The applicant's unfair dismissal application was lodged on 8 February 2016. At first instance the Commission was satisfied that the date of dismissal was 14 January 2016 and as a result the application was lodged 4 days out of time. The Commission did not extend time for lodgment.

The applicant appealed on the basis that his application was not in fact lodged outside the 21-day period. A dismissal takes effect only when it is communicated to the employee, which occurred on 19 January 2016 when he opened and read the email attaching the Outcome Letter and the Dismissal Letter. NSW Trains submitted that its letter of 23 November 2015 constituted notice of the dismissal.

The Full Bench held that the 21-day period to lodge an application for an unfair dismissal remedy could not begin to run before an employee who has been dismissed at the initiative of the employer became aware that he or she had been dismissed, or at least had a reasonable opportunity to become aware of this. The Full Bench found that NSW Trains' email to the applicant of 18 January 2016 can only have effected the dismissal on that day. The NSW Trains letter of 23 November 2015, which stated that the dismissal would be 'effective from 7 December 2015 or from the date of the outcome letter whichever one is of the latter date', did not express the second date with sufficient certainty. The second date was not capable of being identified in advance by the applicant, and could not therefore constitute the proper provision of notice to him.

The Full Bench held that the dismissal could not have taken effect earlier than 18 January 2016, therefore the applicant's unfair dismissal application was lodged within the 21-day period prescribed by s.394(2)(a), and no extension of time under s.394(3) was required.

## Terminated at the employer's initiative



Contains issues that may form the basis of a jurisdictional issue



See Fair Work Act s.386(1)(a)

The expression 'termination at the initiative of the employer' is a reference to a termination that is brought about by an employer and which is not agreed to by the employee.<sup>149</sup>

The analysis of whether there has been a termination at the initiative of the employer for the purpose of s.386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment.<sup>150</sup>

The termination of a contract of employment does not necessarily result in the termination of the employment relationship between the parties to that contract of employment: if the parties enter, or are taken to have entered, a new contract of employment, the employment relationship continues notwithstanding the termination of a prior contract of employment.<sup>151</sup>

Termination of employment may be 'at the initiative of' the employer even though it occurs in circumstances where the parties have agreed to a time-limited contract expiring on a specified date. The facts of a particular case may establish some decision or act on the part of the employer that brought about the end of the employment relationship (as distinct from the employment ending by effluxion of time).<sup>152</sup>



### Related information

- Forced resignation
- Demotion
- Contract for a specified period of time
- Contract for a specified task
- Contract for a specified season
- Employment limited to the duration of a training arrangement

<sup>149</sup> *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017) at para. 75; see also *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200].

<sup>150</sup> *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017) at para. 75.

<sup>151</sup> *Department of Justice v Lunn* PR974185 (AIRCFCB, Lawler VP, Harrison SDP, Raffaelli C, 27 November 2006) at para. 27, [(2006) 158 IR 410]; citing *Brackenridge v Toyota Motor Corporation Australia* [1996] IRCA 163 (19 April 1996).

<sup>152</sup> *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017) at para. 75; see also *Mahony v White* [2016] FCAFC 160 (29 November 2016) at para. 20.

### ***The action of the employer must cause the termination***

A termination is at the employer's initiative when:

- the employer's action 'directly and consequentially' results in the termination of employment, and
- had the employer not taken this action, the employee would have remained employed.<sup>153</sup>

There must be action by the employer that either intends to bring the relationship to an end or has that probable result.<sup>154</sup>

The question of whether the act of an employer results 'directly or consequentially' in the termination of employment is an important consideration but it is not the only consideration.<sup>155</sup> It is important to examine all of the circumstances including the conduct of the employer and the employee.<sup>156</sup>

### ***Repudiation***

The test for repudiation by the employer is whether the conduct of the employer, when judged objectively, showed an intention to no longer be bound by a contract.<sup>157</sup> The employer's actual or subjective intention is not relevant.<sup>158</sup>

A repudiation of the contract does not bring the contract to an automatic end but gives the affected party the right to terminate the contract.<sup>159</sup> If the affected party accepts the repudiation the contract will end.<sup>160</sup>

Where an employer has repudiated the contract, and an employee accepts the repudiation and exercises their right to terminate the contract, this will amount to a termination at the employer's initiative.

An employee may engage in conduct amounting to a repudiation by seriously breaching the contract of employment.

The question of whether there has been a repudiation of the contract of employment is determined objectively. It is unnecessary to show a subjective intention to repudiate and is a question of fact not law.<sup>161</sup>

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<sup>153</sup> *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200 at p. 205].

<sup>154</sup> *Barkla v G4S Custodial Services Pty Ltd* [2011] FWA 3769 (Watson VP, O'Callaghan SDP, Cargill C, 8 July 2011) at para. 24, [(2011) 212 IR 248]; citing *O'Meara v Stanley Works Pty Ltd* PR973462 (AIRC FB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AIRL 100].

<sup>155</sup> *Pawel v Advanced Precast Pty Ltd* Print S5904 (AIRC FB, Polites SDP, Watson SDP, Gay C, 12 May 2000).

<sup>156</sup> *O'Meara v Stanley Works Pty Ltd* PR973462 (AIRC FB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AIRL 100].; citing *Pawel v Advanced Precast Pty Ltd* Print S5904 (AIRC FB, Polites SDP, Watson SDP, Gay C, 12 May 2000); *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200]; *ABB Engineering Construction Pty Ltd v Doumit* Print N6999 (AIRC FB, Munro J, Duncan DP, Merriman C, 9 December 1996).

<sup>157</sup> *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWA 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) at para. 13.

<sup>158</sup> *ibid.*

<sup>159</sup> *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].

<sup>160</sup> *ibid.*, see also *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 2670 (Lawler VP, Richards SDP, Larkin C, 9 April 2010) at para. 23, [(2010) 194 IR 22].

<sup>161</sup> *Simon v NGS Group Pty Ltd ATF NGS Discretionary Unit Trust* [2019] FWC 3442 (Wilson C, 5 June 2019) at para. 56.

Repudiation may exist where an employer reduces the wages of an employee without the employee's consent or where there is a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way which is not permitted by the contract. Similarly, if an employer seeks to bring about a change in the employee's duties or place of work which is not within the scope of the express or implied terms of the contract of employment, the conduct may evince an intention to no longer be bound by those terms. Therefore, in these circumstances if an employee does not agree to the change, which if agreed would amount to a variation of the contract, the employee may claim to have been constructively dismissed.<sup>162</sup>

### ***Abandonment of employment***

'Abandonment of employment' is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment, without proper excuse or explanation, and as a result shows an unwillingness or inability to substantially perform his or her obligations under the employment contract.<sup>163</sup>

This may be termed a 'renunciation' of the employment contract.



**Renunciation** is 'the formal abandoning of a right, title, etc' or 'a voluntary giving up, especially as a sacrifice'.<sup>164</sup>

The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.<sup>165</sup>

Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment *contract*, the employment *relationship* is ended by the employee's renunciation of the employment obligations.

### ***Employment contract may continue after employment relationship is terminated***

Termination at the employer's initiative requires the termination of the employment relationship, not the contract of employment.<sup>166</sup>

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<sup>162</sup> *ibid.*

<sup>163</sup> *Abandonment of Employment* [2018] FWCFB 139 (Hatcher VP, Gostencnik DP, Cribb C, 23 January 2018) at para. 21.

<sup>164</sup> The Macquarie Dictionary Online.

<sup>165</sup> *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 (13 December 2007) at para. 41; citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] HCA 23 (2 May 1989) at para. 16 (per Deane and Dawson JJ), [(1989) 166 CLR 623 at p. 659]; see for example *Thompson v Zadlea Pty Ltd T/A Atlas Steel* [2019] FWC 1687 (Gregory C, 15 March 2019) at paras 49–53.

<sup>166</sup> *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23 (Brennan CJ, Dawson and Toohey JJ), [(1995) 185 CLR 410 at p. 427].



Case example: **Terminated at the employer’s initiative – Employer claimed employee resigned her employment**

***Nohra v Target Australia Pty Ltd*** [2010] FWA 6857 (Roberts C, 22 October 2010), [(2010) 204 IR 389].

The applicant employee had submitted a letter of resignation which effectively gave 7 months’ notice. Her employer purported to accept the resignation but make it effective immediately. It was found that the termination of employment occurred at the employer’s initiative.

Case example: **Terminated at the employer’s initiative – Employer argued abandonment of employment**

***Sharpe v MCG Group Pty Ltd*** [2010] FWA 2357 (Asbury C, 22 March 2010).

An employee who had notified her employer that she would be unable to attend work due to medical reasons, and was then terminated, was found to have been terminated at the initiative of the employer. An argument that the employee had abandoned her employment by not attending for work as directed was rejected. It was held that the employer had terminated the employment.

Case example: **Terminated at the employer’s initiative – Employer proposed changed working conditions to accommodate employee’s pregnancy**

***Owens v Allied Express Transport Pty Ltd*** [2011] FWA 1058 (Hampton C, 28 February 2011).

Permission to appeal refused [2011] FWAFB 2929 (Boulton J, Kaufman SDP, Bissett C, 10 June 2011), [(2011) 210 IR 17].

The employer and employee agreed that the employee work in a less difficult role as the employee was pregnant. However, when the employer informed the employee that there would be significant reduction in salary for the new role, the employee refused to agree, and regarded herself as having been dismissed. This was found to constitute a termination of employment at the initiative of the employer.

Case example: **Terminated at the employer’s initiative – Employer claimed applicant left voluntarily and refused to return**

***Le Plastrier v Brons*** (*Northern Belle Pty Ltd*) [2012] FWA 4672 (Spencer C, 31 May 2012), [(2012) 222 IR 360].

The applicant disagreed with the employer regarding an allegedly non-compliant certificate for one of the workers. The applicant was concerned with her statutory obligations to the licensing authority. The employer over-ruled her saying the certificate was acceptable. When the applicant refused to work on the same shift as the worker she was told that her position would no longer be available as the day shift was finishing. The applicant was offered some work by another employee, however at no stage did the employer confirm the offer. This was found to constitute a termination of employment at the initiative of the employer.

Case example: **Terminated at the employer’s initiative – Employee absent for more than 3 days**

***Thompson v Zadlea Pty Ltd T/A Atlas Steel*** [2019] FWC 1687 (Gregory C, 15 March 2019).

This application was lodged by a Canadian national who had been employed as a welder/metal fabricator. The applicant originally came to Australia on a temporary working holiday visa, which expired in April 2018. He then entered into an employment contract with Atlas Steel whereby it agreed to be his approved nominee for a Temporary Skill Shortage Visa.

On 21 June 2018 the applicant had an altercation with another employee. The following day the applicant left the workplace after encountering the same employee. The applicant went to his doctor who provided him with a certificate of capacity regarding a work-related injury/condition, which indicated that it was necessary for him to be off work until 5 July 2018. During this period the respondent concluded that the applicant had abandoned his employment, given his absence from work for a continuous period of more than three days, and consequently decided to withdraw its visa nomination.

The Commission was not satisfied that the applicant abandoned his employment on the basis he ceased to attend his place of employment without a proper excuse or explanation. The Commission was satisfied that by withdrawing its visa nomination the respondent effectively acted to terminate applicant’s employment, and that its actions in doing so were harsh and unreasonable. The respondent made no attempt to contact the applicant after he left the workplace on 22 June 2018. The Commission found that the applicant was unfairly dismissed and ordered \$7,022.40 compensation, less deduction of tax as required by law.

Case example: **Terminated at the employer’s initiative – Contract NOT for specified period**

***Khayam v Navitas English Pty Ltd t/a Navitas English*** [2017] FWCFB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017).

The applicant was employed by Navitas as a casual employee to perform teaching services from 2005 to 2012. In April 2012 he was offered employment as a ‘fixed-term teacher’ until 30 June 2013. The letter of offer provided that either party could terminate the employment by giving four weeks’ written notice. The applicant accepted that offer. After the completion of that period of employment, he was offered and accepted employment on substantially the same terms for the period from 1 July 2013 to 30 June 2014. In June 2014, the employee was initially told his contract would not be ‘renewed’ because his administrative work had been unsatisfactory. However after further discussions he was then offered, and accepted, another employment contract for the period 1 July 2014 to 30 June 2016.

At the end of the term of the last contract on 30 June 2016 the applicant was not offered a further contract. On 31 May 2016 the employee had been informed that he would not be offered a further fixed-term contract based on an assessment of his performance and disciplinary record. His employment consequently ended on 30 June 2016. The employee contended this constituted a dismissal within the meaning of s.386(1)(a) of the Fair Work Act and that his employment was terminated at the initiative of the employer. The respondent contended that there was no dismissal, and that the employment had terminated through the effluxion of time.

At first instance, the Commission considered itself bound by *Lunn* and held there was no dismissal at the initiative of the employer. The applicant appealed on grounds including that the Commission erred in relying on *Lunn*. Permission to appeal was granted and the Full Bench considered whether the interpretation and application of s.386(1)(a) should continue to be guided by *Lunn*. The Full Bench majority ruled that *Lunn* did not correctly or completely state the proper approach to the interpretation of the expression ‘termination of employment at the initiative of the employer’ in s.170CD(1) of the *Workplace Relations Act 1996* (Cth) and its application to the circumstances of a person employed on a time-limited contract(s). The Full Bench majority held that because the Commission in first instance considered itself bound to follow *Lunn*, despite reservations about its correctness, its consideration of whether the employee was dismissed within meaning of s.386(1)(a) was ‘artificially constrained’, which constituted an appealable error.

The Full Bench majority then considered whether the exclusion in s.386(2)(a) applied in this case. They found that as the final contract of employment provided an unqualified right for either party to terminate contract on four weeks’ written notice, or four weeks’ pay in lieu of notice, the contract was not for specified period and so the exclusion in s.386(2)(a) did not apply.

The Full Bench majority upheld the appeal and quashed the decision at first instance. The matter was referred back to the Commission to determine whether the employee was dismissed by Navitas within the meaning of s.386(1)(a).

**Note:** The matter was settled prior to the hearing taking place.

Case example: **NOT terminated at the employer’s initiative – Apprenticeship contracts**

**Qantas Airways Limited v Fetz and others** [Print Q1482](#) (AIRCFB, Giudice J, Harrison SDP, Lawson C, 9 June 1998), [(1998) 84 IR 52].

On appeal, apprentices who were placed on apprenticeship contracts with a duration of four years but with an expectation that there would be an offer of permanent employment after that subject to performance and operational requirements were held to be subject to contracts for a specified period of time. Therefore when the apprenticeship contracts expired and the apprentices were not offered further employment, this was not a termination of employment at the initiative of the employer.

## Forced resignation



**Contains issues that may form the basis of a jurisdictional issue**

A forced resignation is when an employee has no real choice but to resign.<sup>167</sup>

The onus is on the employee to prove that they did not resign voluntarily.<sup>168</sup> The employee must prove that the employer forced their resignation.<sup>169</sup>

The employer must take action with the intent to bring the relationship to an end or that has that probable result.<sup>170</sup>

The line distinguishing conduct that leaves an employee no real choice but to resign, from an employee resigning at their own initiative is a narrow one.<sup>171</sup> The line, however, must be ‘closely drawn and rigorously observed’.<sup>172</sup>



**A forced resignation can also be referred to as constructive dismissal.**

<sup>167</sup> *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [\[1995\] IRCA 645](#) (29 November 1995), [(1995) 62 IR 200 at p. 206].

<sup>168</sup> *Australian Hearing v Peary* [\[2009\] AIRCFB 680](#) (Giudice J, Kaufman SDP, Larkin C, 28 July 2009) at para. 30, [(2009) 185 IR 359].

<sup>169</sup> *ibid.*

<sup>170</sup> *O’Meara v Stanley Works Pty Ltd* [PR973462](#) (AIRCFB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AIRL 100].

<sup>171</sup> *Doumit v ABB Engineering Construction Pty Ltd* [Print N6999](#) (AIRCFB, Munro J, Duncan DP, Merriman C, 9 December 1996).

<sup>172</sup> *ibid.*

### **Heat of the moment resignation**

An employer is generally able to treat a clear and unambiguous resignation as a resignation.<sup>173</sup>

Where a resignation is given in the heat of the moment or under extreme pressure, special circumstances may arise.<sup>174</sup> In special circumstances an employer may be required to allow a reasonable period of time to pass.<sup>175</sup> The employer may have a duty to confirm the intention to resign if, during that time, they are put on notice that the resignation was not intended.<sup>176</sup>

Case example: **Forced resignation – Employee notified employer of future intention to resign**

**Marks v Melbourne Health** [2011] FWA 4024 (Ives DP, 24 June 2011).

A letter from the employee to the employer indicating an intention to resign in the future, and sent at a time that the employee was distressed and unwell, was held not to be an effective notice of resignation. Accordingly, the employer's purported acceptance of the resignation was held to constitute a termination of employment at the employer's initiative.

Case example: **Forced resignation – Employer alleged employee resigned – Employee continued to present for work**

**Bender v Raplow Pty Ltd** [2011] FWA 3407 (Richards SDP, 8 June 2011).

After an angry discussion between an employee and her manager, the employee believed she had been dismissed and the employer believed the employee had resigned. The employee continued to attend for work afterwards in the belief she had to work out the notice period for her dismissal. The employee was found not to have resigned because she did not demonstrate an intention not to be bound by her contract of employment.

Case example: **Forced resignation – Failure to pay wages**

**Hobbs v Achilles Taxation Pty Ltd ATF the Achilles Taxation Trust; Achilles Accounting Pty Ltd ATF The Achilles Accounting Trust** [2012] FWA 2907 (Deegan C, 4 April 2012).

Permission to appeal refused [2012] FWA 5679 (Drake SDP, Richards SDP, Gregory C, 20 July 2012).

An employee gave notice of his resignation after having been paid under half of what he was owed in wages over a period of 4 months. This was held to be a forced resignation due to the conduct of the employer, and constituted a dismissal by the employer.

<sup>173</sup> *Ngo v Link Printing Pty Ltd* [Print R7005](#) (AIRC FB, McIntyre VP, Marsh SDP, Harrison C, 7 July 1999) at para. 12, [(1999) 94 IR 375]; citing *Minato v Palmer Corporation Ltd* [1995] IRCA 315 (30 June 1995), [(1995) 63 IR 357 at pp. 361–362]; citing *Sovereign House Security Services Ltd v Savage* [1989] IRLR 115, 116 (May LJ).

<sup>174</sup> *Ngo v Link Printing Pty Ltd* [Print R7005](#) (AIRC FB, McIntyre VP, Marsh SDP, Harrison C, 7 July 1999) at para. 12, [(1999) 94 IR 375]; citing *Kwik-Fit (GB) Ltd v Lineham* [1991] UKEAT 250 91 2410 (24 October 1991), [(1992) ICR 183 at p. 191].

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid.*

Case example: **NOT a forced resignation – Employee resigned before a disciplinary interview**

*Love v Alcoa of Australia Limited* [2012] FWA 6754 (Boulton J, Kaufman SDP, Lee C, 10 August 2012), [(2012) 224 IR 50].

An employee who admitted to police that he had taken company property without authorisation resigned rather than attend a scheduled meeting with his employer about the matter. This was held on the facts to be a voluntary and not a forced resignation.

Case example: **NOT a forced resignation – Resignation of employee while under suspension and investigation**

*Davidson v Commonwealth* [2011] FWA 3610 (Deegan C, 7 June 2011).

Permission to appeal refused [2011] FWA 6265 (Boulton J, Hamilton DP, Ryan C, 16 September 2011), [(2011) 213 IR 120].

The resignation of an employee who was barred from access to the workplace, and then suspended from work and subjected to a disciplinary investigation was held not to have been forced by the employer.

Case example: **NOT a forced resignation – Employee negotiating conditions following change in position**

*Blair v Kim Bainbridge Legal Service Pty Ltd T/as Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011).

The employee resigned in the belief that her employer required her to accept a lower rate of pay or resign. It was found that the employee had misunderstood the position and acted prematurely because the employer had made no final decision about the matter. The resignation was not therefore forced by the employer's conduct.

Case example: **NOT a forced resignation – Employee on performance management plan**

*Ashton v Consumer Action Law Centre* [2010] FWA 9356 (Bissett C, 20 December 2010).

An employee who resigned after having been placed on supervisory requirements was found not to have been forced by the employer.

Case example: **NOT a forced resignation – Employee resigned prior to a decision being made following a disciplinary process**

*Pacific National (NSW) Limited v Bell* [2008] AIRCFB 555 (Harrison SDP, Cartwright SDP, Larkin C, 20 August 2008), [(2008) 175 IR 208].

The employee was subject to a disciplinary procedure relating to falsification of timesheets. The employee acted on the advice of the union and resigned before the employer had come to a decision in relation to the disciplinary matter. This was held on appeal to be a voluntary, not a forced, resignation.

Case example: **NOT a forced resignation – Employee resigned over failure to pay wages on time**

*Bruce v Fingal Glen Pty Ltd (in liq)* [2013] FWC 3941 (O’Callaghan SDP, 19 June 2013).

Permission to appeal refused [2013] FWC 5279 (Boulton J, Gooley DP, Hampton C, 2 August 2013).

The employee resigned after the employer repeatedly paid her wages late and failed to pay superannuation. The lateness was commonly one to two days but had been more on occasion. The Commission found that whilst improper the circumstances did not leave the employee with no choice other than to resign. The resignation was not found to be forced by the employer’s conduct.

## Demotion

If a demotion involves a significant reduction in duties or remuneration, it may constitute a ‘dismissal’, even if the person demoted remains employed by the employer.<sup>177</sup>

The employment contract may be repudiated by the employer when an employee is demoted, without consent, and suffers a significant reduction in pay.<sup>178</sup> If the repudiation is accepted by the employee, either expressly or through conduct, the contract is terminated.<sup>179</sup> If the demoted employee remains in employment after accepting the repudiation they would be under a new contract of employment.<sup>180</sup>

However, a demoted employee may remain employed in the demoted position without agreeing to the demotion, that is, under protest or for financial or similar reasons.<sup>181</sup>

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<sup>177</sup> *A Gerrard v UPS Pty Ltd* [PR944681](#) (AIRC, Eames C, 19 March 2004); *Blair v Chubb Security Australia Pty Ltd* [PR936527](#) (AIRC, Whelan C, 19 August 2003).

<sup>178</sup> *Charlton v Eastern Australia Airlines Pty Limited* [PR972773](#) (AIRC, Lawler VP, Blain DP, Gay C, 7 July 2006) at para. 34, [(2006) 154 IR 239].

<sup>179</sup> *ibid.*

<sup>180</sup> *Charlton v Eastern Australia Airlines Pty Limited* [PR972773](#) (AIRC, Lawler VP, Blain DP, Gay C, 7 July 2006) at para. 34, [(2006) 154 IR 239]; citing *Advertiser Newspapers P/L v IRC of SA and Grivell* [\[1999\] SASC 300](#) (23 July 1999) at paras 37–38, [(1999) 90 IR 211]; and *Tokyo Network Computing Pty Ltd v Tanaka* [\[2004\] NSWCA 263](#) (2 August 2004) at para. 6.

<sup>181</sup> *Irvin v Group 4 Securitas Pty Ltd* [PR925901](#) (AIRC, Deegan C, 18 December 2002) at para. 17.

If the employee's contract or industrial instrument contains an express term allowing demotion without termination then any demotion will not amount to a termination.<sup>182</sup>

Case example: **Demotion a dismissal – Significant reduction in remuneration**

*Johnson v Zehut Pty Limited T/A URBRANDS* [2014] FWC 7496 (Boulton J, 10 November 2014).

The employee had worked for a clothing retailer for over 12 years, in a variety of roles including National Sales Manager and National Operations Manager. She was asked to manage a store that was performing poorly and agreed on the basis of the maintenance of her then current salary package.

Within a year the company sought to have the employee agree to a change in the terms of her contract of employment, equivalent to a reduction of over \$30,000 per year. When the employee did not accept the change, the company treated her refusal to accept the new terms and conditions of employment as a resignation.

The Commission concluded that the actions of the company brought the employment relationship to an end, and found that the applicant was dismissed at the initiative of the employer. It was found that there was no valid reason for the dismissal and the termination of the employee's employment was harsh, unjust or unreasonable.

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<sup>182</sup> *Hermann v Qantas Airways Ltd* [PR903096](#) (AIRC, Whelan C, 3 April 2001) at para. 88. See also *Boo Hwa v Christmas Island Administration* [Print S1443](#) (AIRC, Polites SDP, 2 December 1999) at para. 19 in relation to redeployment.



Case example: **Demotion a dismissal – Significant reduction in remuneration and duties**

*Harrison v FLSmith P/L t/a FLSmith P/L* [2018] FWC 6695 (Saunders C, 29 October 2018).

The applicant was demoted from his position of Service Supervisor to that of Mechanical Service Technician – Experienced. The applicant remained employed by the respondent but in a different role with reduced responsibilities and remuneration. The applicant made an application for unfair dismissal. The respondent made a jurisdictional objection to that application on the basis that the applicant had not been dismissed.

The demotion resulted in a reduction of \$4.05 per hour to the applicant’s base hourly rate of pay from \$43.50 to \$39.45, a reduction of 9.3%. In addition, the reduction in the base hourly rate of pay reduced the applicant’s hourly overtime rate of pay from \$53.50 to \$49.45 per hour, which is material in circumstances where the applicant performed about six hours of overtime a week. The reduction in the applicant’s rate of pay also reduced the superannuation contributions the respondent is required to make. The Commission was satisfied that the applicant’s demotion, which resulted in a 9.3% reduction in his base hourly rate of pay and other consequential reductions in his entitlements, has involved a significant reduction in his remuneration.

In his role of Service Supervisor the applicant’s duties were of a supervisory and organisational nature, he spent most of his time in the office or on site and was responsible for the supervision of about eight technicians. As a result of his demotion, the applicant was no longer responsible for the supervision of other FLS employees, he had no direct contact with clients and was now in the workshop working ‘on the tools’. The Commission was satisfied that the applicant’s demotion involved a significant reduction in his duties.

The Commission found that the applicant’s demotion in his employment with constituted a dismissal within the meaning of s.386 of the Fair Work Act. The respondent’s jurisdictional objection was rejected.

## Contract for a specified period of time



### Contains issues that may form the basis of a jurisdictional issue

A genuine contract for a specified period may terminate by the passing of time at the end of the period rather than by termination at the initiative of the employer.<sup>183</sup>

In order to be a contract for a specified period of time the dates of commencement and completion of the contract must be unambiguous.<sup>184</sup>

If the contract gives either party an unqualified right to terminate the contract on notice, or with payment in lieu of notice, it will not be a contract for a specified time.<sup>185</sup>

A contract giving either party the right to terminate for a breach of the contract may still be a contract for a specified period of time.<sup>186</sup>

<sup>183</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 1532.

<sup>184</sup> *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, at pp. 125–126 (von Doussa J).

<sup>185</sup> *ibid.*, at p. 126.

<sup>186</sup> *ibid.*, (in passing).

A contract may still be a contract for a specified period of time if it allows for review and extension by consent after a specified period of time.<sup>187</sup>

Where there has been a series of fixed-term contracts and renewal is a mere formality the Commission may look beyond the terms of the contract to the reality of the employment relationship.<sup>188</sup>

The mere fact that an employer has decided not to offer a new contract of employment at the end of a time-limited contract which represents a genuine agreement by the parties that the employment relationship should come to an end not later than a specified date will not by itself constitute a termination at the initiative of the employer.<sup>189</sup>

However where the employment contract has a defined contractual term but does not exhibit an agreement that the employment *relationship* will come to an end when the term expires (as in the *D’Lima*<sup>190</sup> situation of a series of short-term standard-form contracts), a decision by the employer not to offer a further contract may become a relevant consideration as to whether there has been a termination at the initiative of the employer.<sup>191</sup>

Case example: **Contract for a specified period of time**

***Peters v City of Stirling*** [2008] AIRC 1157 (Williams C, 29 July 2008).

The applicant was employed under an employment contract with a 5-year term, which was renewable by agreement. The contract contained a provision allowing for termination during the term of the contract on notice, but only upon instances of default by either party.

The commission held this not to be a broad or unconditional right of termination during the term, and accordingly the contract was one for a specified period of time.

Case example: **NOT a contract for a specified period of time – Unqualified right to terminate**

***White v Sydney College of English Pty Ltd*** [2010] FWA 7644 (Thatcher C, 30 September 2010).

The contract contained an unqualified right to terminate the employee’s employment. It was found that the contract was not a contract for a specified time.

<sup>187</sup> *Ogilvie v Warlukurlangu Artists Aboriginal Association Incorporated* [PR921908](#) (AIRC, Hampton DP, 28 August 2002) at para. 13; outlining the broad principles in *Grycan v Table Tennis Australia Incorporated* [Print R7452](#) (AIRC FB, Giudice J, Boulton J, Cribb C, 23 July 1999); *Trigar v La Trobe University* [Print T2860](#) (AIRC FB, Giudice J, Acton SDP, Gay C, 1 November 2000); and *Pacific Rim Employment Pty Ltd v Lloyd* [PR912882](#) (AIRC FB, Giudice J, Kaufman SDP, O’Connor C, 4 January 2002) at para. 20.

<sup>188</sup> *Smith v Mareeba RSLA Services Club Inc* [2013] FWC 351 (Spencer C, 15 March 2013) at paras 46–47; citing *Banchit v St Mina’s Global Restaurants Pty Ltd* [PR940477](#) (AIRC, Harrison C, 14 November 2003) at para. 39.

<sup>189</sup> *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWC FB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017) at para. 72; see also *Griffin v The Australian Postal Corporation* [1998] IRCA 15 (1 June 1998).

<sup>190</sup> *D’Lima v Princess Margaret Hospital* [1995] IRCA 446 (25 August 1995), [(1995) 64 IR 19].

<sup>191</sup> *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWC FB 5162 (Hatcher VP, Colman DP, Saunders C, 8 December 2017) at para. 74.

Case example: **NOT a contract for a specified period of time – Employment continued after contracts expired**

*D'Lima v Princess Margaret Hospital* [1995] IRCA 446 (25 August 1995), [(1995) 64 IR 19].

The employee was employed on a series of fixed term contracts. There was an acknowledged practice of continuing employment even if a contract expired. It was found that she was employed continuously and not for a specified time.

## Contract for a specified task



### Contains issues that may form the basis of a jurisdictional issue

The 'specified task' must be the employee's task not the employer's task or project.<sup>192</sup>

The term 'task' would 'normally apply to an identifiable project or job'.<sup>193</sup>

The phrase 'specified task' should be narrowly construed.<sup>194</sup> It only covers situations where an employee works under a contract for 'a project or job which is distinct or identifiable in its own right'.<sup>195</sup> It should 'not leave open the possibility' of the employee working on other tasks outside of the specific task for which the employee was employed.<sup>196</sup>

Any work performed by the employee outside the specified task will not alter the nature of the contract if that work is peripheral or 'part and parcel' of the specified task.<sup>197</sup>

A contract that contains a 'broad and effectively unconditional right to terminate' is not a contract for a specified task.<sup>198</sup>

Case example: **Contract for a specified task – Job was distinct and identifiable**

*Henderson v John Holland Pty Ltd* PR917230 (AIRC, Spencer C, 30 April 2002).

The employee was employed as a concrete finisher on a project. His employment concluded when the work as a concrete finisher was completed. It was found that the task that he was employed for was 'distinct and identifiable' and therefore a contract for a specified task.

<sup>192</sup> *Drury v BHP Refractories Pty Ltd* [1995] IRCA 293 (16 June 1995), [(1995) 62 IR 467 at pp. 471–472].

<sup>193</sup> *Qantas Airways Limited v Fetz and others* Print Q1482 (AIRC FB, Giudice J, Harrison SDP, Lawson C, 9 June 1998), [(1998) 84 IR 52 at p. 66].

<sup>194</sup> *Hewitt v ACTek Custom Engineering Pty Ltd* PR904665 (AIRC, Lacy SDP, 25 May 2001) at para. 24.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRC FB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 86; citing von Doussa J in *D'Ortenzio v Telstra Corporation* [1997] FCA 1422 (11 December 1997), [(1997) 78 IR 468]; confirmed on appeal in *D'Ortenzio v Telstra Corporation [No 2]* [1998] FCA 877 (22 July 1998), [(1997) 82 IR 52].

<sup>198</sup> *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRC FB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 86.

Case example: **NOT a contract for a specified task – Apprenticeship**

**Qantas Airways Limited v Fetz and others** [Print Q1482](#) (AIRCFCB, Giudice J, Harrison SDP, Lawson C, 9 June 1998), [(1998) 84 IR 52].

An apprenticeship involves the completion of training and the ‘provision of valuable work for the employer’. It was found that it was ‘straining language’ to bring an apprenticeship within the definition of a specified task.

Case example: **NOT a contract for a specified task – Traineeship**

**Appeal by Brisbane City Council** [\[2008\] AIRCFB 358](#) (Harrison SDP, Hamberger SDP, Smith C, 22 April 2008), (2008) 172 IR 37].

The employee was engaged as a trainee bus driver. It was found that a traineeship had similar characteristics to an apprenticeship. It did not fall within the definition of a specified task.

Case example: **NOT a contract for a specified task – Contract specifying tasks**

**Pasalic v Technometal Pty Ltd** [\[2012\] FWA 8136](#) (Sams DP, 9 October 2012).

The employee was employed to work as a designer/drawer on a number of projects over a period of six years. There was no evidence of a written contract of employment. It was held that the employee was not employed for a specified task.

Case example: **NOT a contract for a specified task – Contract specifying tasks**

**Hudson v Coonawarra Jack Winery Pty Ltd T/A Coonawarra Jack Winery** [\[2012\] FWA 9266](#) (O’Callaghan SDP, 30 October 2012).

The employee’s contract specified the duties or tasks he was to perform. It was found that this was insufficient to amount to employment for a ‘specified task’.

## Contract for a specified season



**Contains issues that may form the basis of a jurisdictional issue**

This applies where an employer intends to dismiss their employees towards the end of a season. For example, where an employer gradually dismisses employees as the workload ends or decreases with the end of a season.<sup>199</sup>

<sup>199</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 1535.

If the contract gives either party an unqualified right to terminate the contract on notice, or with payment in lieu of notice, it will not be a contract for a specified season.<sup>200</sup>



Seasonal work can include such things as planting or picking fruit and vegetables, or working in Australia's snowfields.

Case example: **NOT a contract for a specified season – Harvesting of sugar cane**

***Fensom v SCT Transport Services Pty Ltd*** [2008] AIRC 340 (Harrison C, 16 April 2008).

The employee was engaged to transport harvested sugar cane. It was accepted that the employer intended to engage the employee as a seasonal employee. However, because the employer had an unqualified right under the contract of employment and the applicable Australian Workplace Agreement to terminate the employee's employment before the end of the sugar harvesting season, it was held that he was not engaged on a seasonal basis.

Case example: **NOT a contract for a specified season – Harvesting of sugar cane**

***Galbraith v Wilmar Sugar Pty Ltd t/a Wilmar Sugar*** [2018] FWCFB 6713 (Sams DP, Binet DP, Harper-Greenwell C, 5 November 2018).

At first instance the Commission found that the appellant was not dismissed as they were a seasonal employee and had finished work when the particular season ended. The appellant appealed the decision on the grounds that the Commission did not distinguish between an employee contracted for a specified season and an employee engaged for multiple seasons. The Full Bench granted permission to appeal but dismissed the appeal.

## Employment limited to the duration of a training arrangement



Contains issues that may form the basis of a jurisdictional issue

The Commission cannot consider whether an employee's dismissal was unfair if the employee's employment was limited to the duration of a training arrangement and the employment ceased at the end of that arrangement.<sup>201</sup>

A training arrangement is defined by the Fair Work Act as 'a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees.'<sup>202</sup>

The Commission will consider whether the employee was employed under a training arrangement and whether the employment was limited to the duration of the training agreement.<sup>203</sup>

<sup>200</sup> *Andersen v Umbakumba Community Council* [1994] 126 ALR 121, 126 (von Doussa J).

<sup>201</sup> Fair Work Act s.386(2).

<sup>202</sup> Fair Work Act s.12.

<sup>203</sup> *Anderson v TDK Investment P/L ATF Frost Family Trust* PR968518 (AIRC, Thatcher C, 9 February 2006) at para. 6.

The employer has the responsibility to prove that the employee was employed under a training arrangement and the employee's employment was terminated at the end of that arrangement.<sup>204</sup>

If an employee is covered by an employment contract prior to being offered a training arrangement, the Commission will consider the employment contract separately to the training arrangement.<sup>205</sup> The employment relationship may continue even if the training arrangement has ended.<sup>206</sup>



Training arrangements can be distinguished from vocational placements. A **vocational placement** is a placement where the person is not entitled to be paid, is undertaken as a requirement of an education or training course and is authorised under a law or administrative arrangement.

Employees on a vocational placement are not covered by the federal industrial relations system as they are excluded from the definition of a national system employee.<sup>207</sup>

Case example: **Employment NOT limited to the duration of a training arrangement – Early termination**

*Turner v Mindar Holdings Pty Ltd T/A JTS Ladies & Mens Hairstylists* [2011] FWA 8087 (Williams C, 29 November 2011).

It was accepted that the applicant's employment was limited to the duration of a training arrangement, which was expressed to last 36 months from a specified date. However, because the training arrangement was terminated by the employer well before the 36 month period expired, the training arrangement exclusion was held not to be applicable.

Case example: **Employment NOT limited to the duration of a training arrangement – Pre-existing employment relationship**

*Anderson v TDK Investment P/L ATF Frost Family Trust* PR968518 (AIRC, Thatcher C, 9 February 2006).

The applicant was employed as a store manager before agreeing to a traineeship. Soon after commencing the traineeship, the employee was advised that she would be expected to pay \$500 in fees for the traineeship, and as a result the traineeship contract was cancelled. The employee ceased employment with the employer. It was held that the employment relationship was separate to and not limited in duration by the training contract, having commenced before the training contract and being intended to continue after it.

<sup>204</sup> *ibid.*, at para. 20.

<sup>205</sup> *Kinniburgh v Printers Press Pty Ltd T/A Print City* Print P6340 (AIRC, Watson SDP, 30 October 1997).

<sup>206</sup> *ibid.*

<sup>207</sup> Fair Work Act s.13. See also *Sharp v J.S. Plumbing Pty Ltd T/A Salmon Plumbing* [2011] FWA 7076 (Cribb C, 21 October 2011) at para. 28.

Case example: **Employment NOT limited to the duration of a training arrangement –  
Employment continues after traineeship**

*Merrett v Fairlane Pty Ltd t/as The Gourmet Bakehouse* [PR904455](#) (AIRC, Eames C, 22 May 2001).

Upon the completion of the traineeship, the employee continued to be employed and paid adult wages for some weeks prior to termination. . It was held that the termination of the employment occurred after the completion of the traineeship and therefore training arrangement exclusion did not apply.

## What is a transfer of employment?

Service with one employer will count as service with a second employer in different circumstances depending on the relationship between the two employers. In this regard, it is important to determine if the employers are associated entities or not.

### Transfer of employment between associated entities

Service with one employer (first or old employer) will count as service with another employer (second or new employer) if two conditions are met:

- the second employer is an associated entity of the first employer, and
- an employee becomes employed by the second employer within 3 months of their employment being terminated by the first employer.<sup>208</sup>

#### *What is an associated entity?*

An **associated entity** is defined in [s.50AAA of the Corporations Act](#).<sup>209</sup>

An entity (the associate) may be an associated entity of another entity (the principal) in the following circumstances:

- the associate and principal are related bodies corporate
- the principal controls the associate
- the associate controls the principal and the operations, resources or affairs of the principal are material to the associate
- the associate has a qualifying investment in the principal, has significant influence over the principal and the interest is material to the associate
- the principal has a qualifying investment in the associate, has significant influence over the associate and the interest is material to the principal, or
- a third entity controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the third entity.<sup>210</sup>

<sup>208</sup> Fair Work Act s.22(7)(a).

<sup>209</sup> Fair Work Act s.12.

<sup>210</sup> Corporations Act s.50AAA(2)–(7).

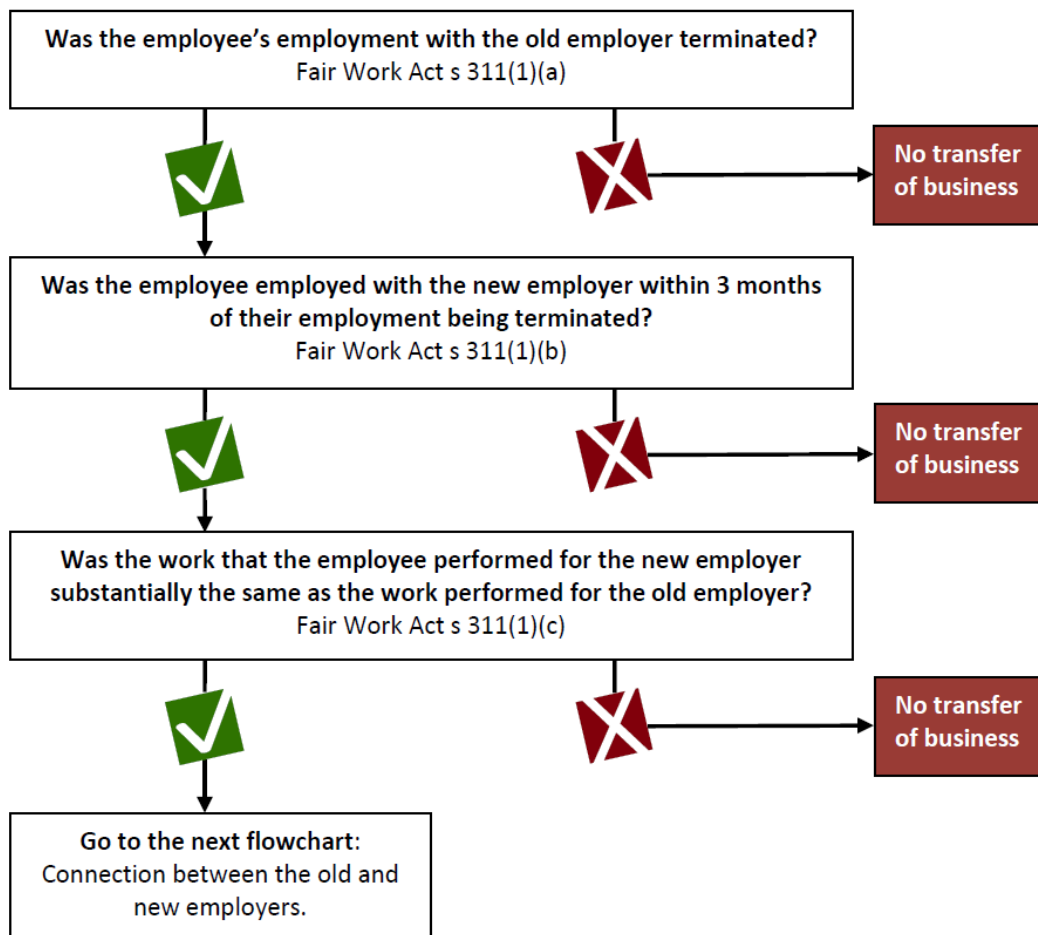
### Control

The word **control** is defined in [s.50AA of the Corporations Act](#). One entity controls another when the first entity can make decisions that determine the financial and operating policies of the second entity.

### Transfer of employment between non-associated entities

Service with one employer (first or old employer) will count as service with another employer (second or new employer) that is **NOT** an associated entity of the first employer, if the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer.<sup>211</sup> The following flow chart will assist in determining whether the employee is a transferring employee.

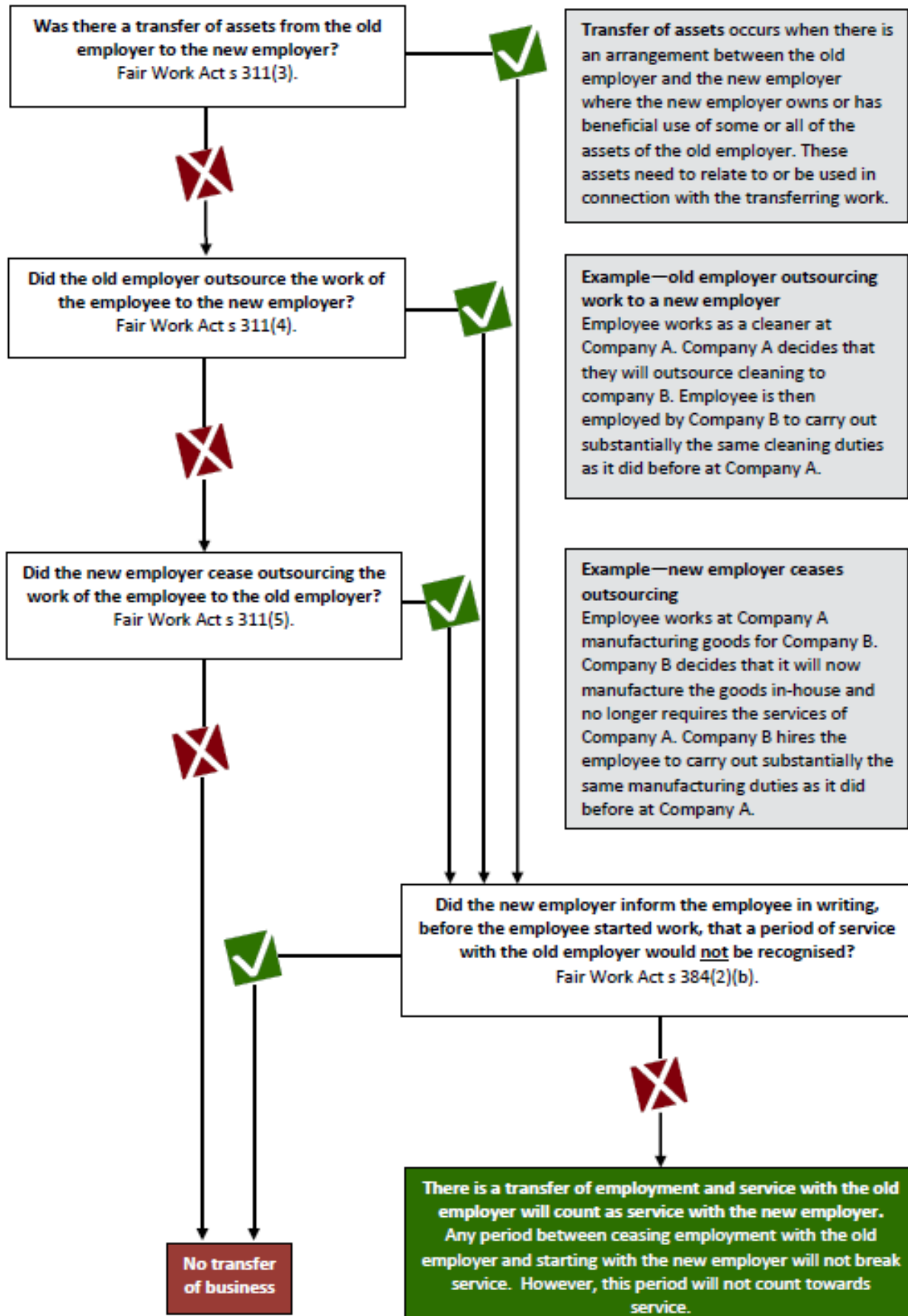
### Transfer of business between non-associated entities



<sup>211</sup> Fair Work Act s.22(7)(b).



**Connection between the old and new employers**



Case example: **Transfer of employment – Non-associated entities – Transfer of assets**

**Hill v Sahir T/A Cafe Moderno at Fountain Gate** [2013] FWC 668 (Roe C, 30 January 2013).

The employee worked for the old employer in a cafe. The business was purchased by the new employer. The employee worked 3 shifts for the new employer doing the same work before he was dismissed.

It was held that there was a transfer of employment, because there was a transfer of business between the old employer and the new employer. There was a connection between the old employer and the new employer as the transfer of business involved a transfer of assets. Further, as the new employer had not informed the employee in writing that his previous service would not be recognised, the employee's service with the old employer counted as service with the new employer.

Case example: **Transfer of employment – Non-associated entities – New employer ceased to outsource work to old employer**

**Thorne v Jura Australia Espresso Pty Ltd** [2012] FWA 4954 (Cargill C, 14 June 2012).

The employee worked for the old employer, which provided labour to the new employer. After two years, the new employer ceased to outsource work to the old employer. The old employer terminated the employee's employment, and she was employed by the new employer, but dismissed after about 3 weeks.

The employee was found to be a transferring employee in relation to a transfer of business. There was a connection between the old employer and the new employer because the new employer had ceased outsourcing work to the old employer. The employee was not informed in writing by new employer that previous service with the old employer would not count as service with the new employer, and therefore it did count.

Case example: **NOT a transfer of employment – Non-associated entity – No relevant connection between employers**

**Szybkowski v Monjon Australia Pty Ltd** [2010] FWA 7321 (Roe C, 17 September 2010).

The employee worked as a security guard for the old employer, which provided site security under contract. A tender process resulted in the new employer being awarded the contract. The employee was offered employment with the new employer but was dismissed the following month. It was held that there no connection between the employers, and therefore no transfer of business. As such, service with the old employer did not count as service with the new employer.

Case example: **NOT a transfer of employment – Non-associated entity – No relevant connection between employers**

*John Lucas Hotel Management v Hillie* [2013] FWCFB 1198 (Drake SDP, Hamberger SDP, Bull C, 22 February 2013), [(2013) 224 IR 260].

Decision at first instance [2012] FWA 6806 (Cambridge C, 10 August 2012).

The employee had been employed by the old employer to work at a pub. The old employer operated the pub under a lease with the owners. The old employer abandoned the lease, and the owners leased it to the new employer. The new employer employed the employee to perform the same duties, later dismissed her. On appeal, it was found that there was no connection between the old employer and the new employer, because there was no evidence of a transfer of assets in accordance with any arrangement between the employers.

Case example: **NOT a transfer of employment – Non-associated entity – No relevant connection between employers**

*Watson v Oliver-Ramsay Group Pty Ltd* [2015] FWC 221 (Watson VP, 12 January 2015).

The employee had been working as a security guard for a contractor (the previous contractor) at Federation University in Ballarat for nearly eight years. A new contractor was successful in tendering for the provision of security services and offered a job to the employee. After working for almost three months, the new contractor advised the employee that they had decided not to continue his employment beyond the probationary period.

The employee lodged an application for unfair dismissal. The new contractor objected on the basis that the employee's continuous service at the time of the dismissal was less than the minimum period prescribed by the Fair Work Act.

The Commission found that the previous contractor and the new contractor were not associated entities. There was also no transfer of business as there was no connection between the two employers. As a result, the employee's service with the previous contractor could not be considered. As his period of service with the new contractor was approximately three months, the employee was not protected from unfair dismissal. The application was dismissed.

Case example: **Associated entities – Employer was part of a franchise group – Trustee company**

*Salagras v Fingal Glen Pty Ltd atf the Adelaide Riviera Trust T/A Comfort Hotel Adelaide Riviera* [2011] FWA 1401 (Steel C, 3 March 2011).

The employer was one of three different businesses owned by separate unit trusts with separate trustee companies. Each trustee company had the same single director and each trust had the same financial manager, who were both employees of a single accountancy firm. It was held that they were associated entities. Employees of the associated entities therefore counted for the purpose of determining whether the employer was a small business.

Case example: **NOT associated entities – Employer had funding arrangements with other organisations**

***Adams v Condamine Catchment Natural Resource Management Corporation Limited T/A Condamine Alliance*** [2010] FWA 5374 (Richards SDP, 22 July 2010), [(2010) 205 IR 230].

An employer was held not to be associated with other entities to which it provided funds under contract for the performance of project work, because this relationship was not such as to give the employer control over the other entities. Accordingly, the employees of the other entities did not count for the purpose of determining whether the employer was a small business.

## Periods of service as a casual employee

 See Fair Work Act s.384(2)

Periods of service as a casual employee do not count towards the minimum employment period unless **both** of the following conditions are satisfied:

- the employee was a regular casual employee, and
- the employee had a reasonable expectation of ongoing employment on a regular and systematic basis.<sup>212</sup>

## Who is a casual employee?

 See Fair Work Act s.15A

A person is a casual employee if they are employed as a result of accepting an employment offer on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.

A regular pattern of hours does not mean that there is a firm advance commitment to continuing and indefinite work. To determine whether there is no firm advance commitment to continuing and indefinite work, only the following factors are relevant:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work
- whether the person will work only as required
- whether the employment is described as casual employment, and
- whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument such as a modern award or enterprise agreement.

The above factors are assessed on the basis of the offer of employment, not on subsequent conduct by the employer or employee.

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<sup>212</sup> See for example *Bronze Hospitality Pty Ltd v Hansson* [2019] FWCFB 1099 (Gostencnik DP, Colman DP, Saunders DP, 20 February 2019).

## Who is a regular casual employee?



See Fair Work Act s.12

An employee is a regular casual employee at a particular time if, at that time, the employee is a casual employee, and the employee has been employed on a regular and systematic basis.

## What is employment on a regular and systematic basis?

The Fair Work Act does not define employment on a ‘regular and systematic basis’.

It is the employment that must be on a regular and systematic basis, not the hours worked.<sup>213</sup> However, a clear pattern or roster of hours is strong evidence of regular and systematic employment.<sup>214</sup>

The term ‘regular’ implies a repetitive pattern and does not mean frequent, often, uniform or constant.<sup>215</sup>

The term ‘systematic’ requires that the engagement be ‘something that could fairly be called a system, method or plan’.<sup>216</sup>

Where there is no clear pattern or roster, evidence of regular and systematic employment can be established where:

- the employer offered suitable work when it was available at times that the employee had generally made themselves available, and
- work was offered and accepted regularly enough that it could no longer be regarded as occasional or irregular.<sup>217</sup>

## What is a reasonable expectation of continuing employment?

The Fair Work Act does not define the term ‘reasonable expectation of continuing employment’, this will depend on the particular circumstances.

One test that has been applied is ‘whether or not during a period of at least six months prior to the dismissal ... the employee had ... a reasonable expectation of continuing employment on a regular and systematic basis’.<sup>218</sup>

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<sup>213</sup> *Yaraka Holdings Pty Limited v Giljevic* [2006] ACTCA 6 (30 March 2006) at para. 65, [(2006) 149 IR 399]; cited in *Ponce v DJT Staff Management Services Pty Ltd T/A Daly’s Traffic* [2010] FWA 2078 (Roe C, 15 March 2010) at para. 70.

<sup>214</sup> *Ponce v DJT Staff Management Services Pty Ltd T/A Daly’s Traffic* [2010] FWA 2078 (Roe C, 15 March 2010) at para. 75.

<sup>215</sup> *Yaraka Holdings Pty Limited v Giljevic* [2006] ACTCA 6 (30 March 2006) at para. 68, [(2006) 149 IR 399]; cited in *Grives v Aura Sports Pty Ltd* [2012] FWA 5552 (Jones C, 9 July 2012) at para. 32.

<sup>216</sup> *Yaraka Holdings Pty Limited v Giljevic* [2006] ACTCA 6 (30 March 2006) at para. 91, [(2006) 149 IR 399].

<sup>217</sup> *Ponce v DJT Staff Management Services Pty Ltd T/A Daly’s Traffic* [2010] FWA 2078 (Roe C, 15 March 2010) at para. 76.

<sup>218</sup> *ibid.*, at para. 64.

Case example: **Reasonable expectation of continuing employment – Prior resignation strong indicator of a reasonable expectation**

*Tilbrook v Willall Industries Pty Ltd* [2011] FWA 6300 (Hampton C, 5 October 2011).

A casual was employed over a total period of 32 months, which included an 11 week period in which the casual did not make himself available for work. It was held that the 11 week period interrupted or concluded continuous service. However the casual employment since that period, although there were some weeks in which no work was performed, was held to be regular and systematic and gave rise to a reasonable expectation of continuing employment. This was sufficient to meet the statutory requirement for continuous service.

Case example: **NO reasonable expectation of continuing employment – Infrequent engagements**

*Harrison v Imperial Management Queensland Pty Ltd T/A Pacific Red Produce* [2011] FWA 8099 (Richards SDP, 30 November 2011).

Because the frequency of engagement of the applicant employee was erratic, with the ultimate engagement being 7 months after the penultimate engagement, the applicant could not have had a reasonable expectation of continuing employment.

Case example: **NO reasonable expectation of continuing employment – Employer made casual arrangement clear**

*Leslie Holland v UGL Resources Pty Ltd T.A UGL Resources* [2012] FWA 3453 (McCarthy SDP, 23 April 2012).

The applicant employee was engaged for discrete periods of differing duration not forming any pattern, and there were extensive absences between each period of employment. The employer made it clear on each engagement that there should be no expectation of continuing employment. It was held that applicant should not have had a reasonable expectation of continuing employment.

## What is a 'period of service' for a casual employee?

*Shortland v Smiths Snackfood Co Ltd*<sup>219</sup> explained the following principles:

- Each occasion a casual employee is engaged is a separate contract of employment.<sup>220</sup> These contracts may be week to week, shift to shift, hour to hour or for any other agreed short

<sup>219</sup> *Shortland v Smiths Snackfood Co Ltd* [2010] FWA 5709 (Lawler VP, Drake SDP, Lewin C, 16 September 2010), [(2010) 198 IR 237].

<sup>220</sup> *ibid.*, at para. 10.

period.<sup>221</sup> In this sense no casual employee has a continuous period of employment beyond any single engagement.<sup>222</sup>

- For the purpose of unfair dismissal it is the period of service rather than the period of employment that is relevant.<sup>223</sup> If the conditions of s.384(2)(a) are satisfied, then a period of service by a casual employee will count towards the period of continuous service.<sup>224</sup>
- Once continuous service is established, the employer or employee may only break continuous service by making it clear to the other party that there will be no further engagements.<sup>225</sup>
- For casual employees it is possible that some periods of service will meet the conditions of s.384(2)(a) and others will not.<sup>226</sup>
- Absence for illness or injury does not break a period of continuous service.<sup>227</sup>

### Transferring employees

If:

- the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer, and
- the old employer and the new employer are not associated entities when the employee becomes employed by the new employer, and
- the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.<sup>228</sup>

Where there is a transfer of business the employer is obliged to make it clear to the transferring employee whether service with the old employer will be recognised. This is important for two reasons. One, the employee will know that he or she will not be protected from unfair dismissal for the qualifying period and secondly, it will assist the employee to determine if he or she refuses the job offer whether he or she is entitled to redundancy pay under s.122(3). For these reasons the written advice to employees should be clear.<sup>229</sup>

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<sup>221</sup> *ibid.*, citing *Andison v Woolworths Limited* [1995] IRCA 390 (8 August 1995).

<sup>222</sup> *Shortland v Smiths Snackfood Co Ltd* [2010] FWAFB 5709 (Lawler VP, Drake SDP, Lewin C, 16 September 2010), [(2010) 198 IR 237].

<sup>223</sup> *ibid.*, at para. 12.

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*, at para. 13.

<sup>226</sup> *ibid.*, at para. 12.

<sup>227</sup> *ibid.*, at para. 13.

<sup>228</sup> Fair Work Act s.384(2)(b).


<sup>229</sup> *Gregory v Shaver Shop Pty Ltd* [2016] FWC 1323 (Gooley DP, 1 March 2016) at para. 18.

Case example: **Transferring employee – Transferring work**

***Taulapapa v Toll Personnel Pty Limited*** [2018] FWC 6242 (Cambridge C, 16 October 2018).

The Commission found that the minimum employment period was satisfied for the applicant in this matter because there was a connection between his old employer (Staff Australia) and his new employer (Toll Personnel). The connection was established as a result of the transferring work the applicant performed for the old employer (Staff Australia) being outsourced by an associated entity of the new employer (Toll Transport). As a result the transferring work of the applicant was performed by him as an employee of the new employer (Toll Personnel).

## What is a genuine redundancy?

 **Contains issues that may form the basis of a jurisdictional issue**

 See Fair Work Act s.389

An unfair dismissal application cannot be made if the dismissal was a case of genuine redundancy.

A dismissal is a case of genuine redundancy when:

- the employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise, AND
- the employer has complied with any obligation imposed by an applicable modern award or enterprise agreement to consult about the redundancy.


A dismissal is NOT a case of genuine redundancy if it would have been reasonable in all of the circumstances to redeploy the person within:

- the employer's enterprise, or
- the enterprise of an associated entity of the employer.

If an employer believes that an employee's dismissal was a genuine redundancy, and the employee has made an application for an unfair dismissal remedy, the employer may make a jurisdictional objection to that application. If an employer can prove that the requirements of s.389 of the Fair Work Act have been met, the Commission will have no jurisdiction to hear the unfair dismissal claim. However, if the requirements of s.389 of the Fair Work Act have not been met, the Commission must determine if the dismissal was unfair.



## Job no longer required due to changes in operational requirements

 See Fair Work Act s.389(1)(a)

### **Job no longer required**

A job involves ‘a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer’s organisation, to a particular employee’.<sup>230</sup>

Where there has been a reorganisation or redistribution of duties, the question is whether the employee has ‘any duties left to discharge’.<sup>231</sup> If there is no longer any function or duty to be performed by that person, his or her position becomes redundant.<sup>232</sup>

An employee may still be genuinely made redundant when there are aspects of the employee’s duties still being performed by other employees.<sup>233</sup>

The test is whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form.<sup>234</sup>

The reference to ‘a job no longer being performed by anyone’ refers to anyone employed by the business.<sup>235</sup> Therefore, the position can be performed by independent contractors supplying services.<sup>236</sup>

It should be noted that it is the employee’s ‘job’ that is no longer required to be performed, rather than the employee’s ‘duties’.<sup>237</sup>

### **Changes in operational requirements**

The Fair Work Act does not define the term ‘operational requirements’. It is a broad term that permits consideration of many matters including:

- the past and present performance of the business
- the state of the market in which the business operates
- steps that may be taken to improve efficiency by installing new processes, equipment or skills, or by arranging labour to be used more productively, and
- the application of good management to the business.<sup>238</sup>

Some examples of changes in operational requirements are:

- a machine is now available to do the job performed by the employee

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<sup>230</sup> *Jones v Department of Energy and Minerals* [1995] IRCA 292 (16 June 1995), [(1995) 60 IR 304 at p. 308 (Ryan J)]; cited in *Ulan Coal Mines Limited v Howarth and others* [2010] FWA 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32].

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

<sup>233</sup> *Dibb v Commissioner of Taxation* [2004] FCAFC 126 (13 May 2004) at paras 43–44, [(2004) 136 FCR 388].

<sup>234</sup> *Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt* [2010] FWA 674 (Hamberger SDP, 19 February 2010) at para. 27.

<sup>235</sup> *Suridge v Boral Window Systems Pty Ltd T/A Dowell Windows* [2012] FWA 3126 (Hampton C, 6 July 2012) at paras 73–75.

<sup>236</sup> *ibid.*

<sup>237</sup> *Ulan Coal Mines Limited v Howarth and others* [2010] FWA 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32].

<sup>238</sup> *Nettlefold v Kym Smoker Pty Ltd* [1996] IRCA 496 (4 October 1996), [(1996) 69 IR 370 at p. 373].

- a downturn in trade has reduced the number of employees required
- the employer restructures their business to improve efficiency and redistributes the tasks done by a particular person between several other employees, therefore the person's job no longer exists<sup>239</sup>
- a site or business closure
- the completion of a project, or
- outsourcing.

The onus is on the employer to prove that, on the balance of probabilities, the redundancy was due to changes in operational requirements.<sup>240</sup>

Case example: **Job was no longer performed by anyone because of changes in the operational requirements – Downturn in business**

*UES (Int'l) Pty Ltd v Harvey* [2012] FWA 5241 (Acton SDP, Kaufman SDP, Bissett C, 14 August 2012), [(2012) 215 IR 263].

A warehouse manager's position was selected to be made redundant. There was a decline in business and therefore the employer no longer required the job to be performed by anyone because of changes in the operational requirements of the enterprise.

**Note:** Due to the employer's failure to consult, it was found not to be a genuine redundancy.

Case example: **Job was no longer performed by anyone because of changes in the operational requirements – Restructure**

*Kekeris v A. Hartrodt Australia Pty Ltd* [2010] FWA 674 (Hamberger SDP, 19 February 2010).

The employer reduced its number of supervisors from 4 to 3. It was held that it can still be a 'genuine redundancy' if the duties of a redundant job are still required to be performed, but are redistributed to other positions.

Case example: **Job was no longer performed by anyone because of changes in the operational requirements – Restructure**

*Markac v CSR Limited* [2010] FWA 4548 (Hamilton DP, 2 July 2010).

The employer required fewer process worker positions due to the projected future needs of the firm. The employer ranked its employees based on a skills assessment. The employee scored poorly in a number of areas in the skills assessment and was consequently made redundant. It was held that it was a genuine redundancy.

<sup>239</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 1548; see for example *Mackay Taxi Holdings Ltd T/A Mackay Whitsunday Taxis v Wilson* [2014] FWC 1043 (Richards SDP, Spencer C, Simpson C, 12 February 2014) at para. 43, [(2014) 240 IR 409].

<sup>240</sup> *Kieselbach v Amity Group Pty Ltd* PR973864 (AIRC, Hamilton DP, 9 October 2006) at para. 34.

Case example: **Job was no longer performed by anyone because of changes in the operational requirements**

***Solari v RLA Polymers Pty Ltd*** [2010] FWA 5676 (Sams DP, 30 July 2010).

The employer closed one of its two plants. The employee was the only person to be made redundant. It was found that while some of the employee's duties still existed, the job was no longer required. This was found to be a genuine redundancy.

Case example: **Job was no longer performed by anyone because of changes in the operational requirements**

***Deeney & Others v Patrick Projects Pty Ltd*** [2019] FWC 1772 (Bull DP, 19 March 2019).

Four applicants contended that their terminations, as full-time permanent employees, were not genuine redundancies and as a result they believed they had been unfairly dismissed. The applicants were initially employed as casual employees in July 2012. They were all appointed to full-time permanent positions in August 2012. On 19 February 2014 the respondent wrote to 43 employees, including each of the applicants, notifying them of their redundancy and advising that their employment would come to an end on 20 March 2014. The respondent offered each applicant employment as a casual employee. This offer of casual employment was not taken up by any of the applicants. The respondent also provided the applicants with a list of available positions at Asciano, an associated entity. None of the applicants expressed any interest in the available positions.

The Commission was satisfied that the respondent no longer required the applicants' jobs to be performed by anyone due to changes in the operational requirements of the respondent's enterprise following a direction from its client. The Commission found that the fact that casual opportunities remained did not detract from the need for the respondent to reduce the full-time permanent workforce. The Commission was satisfied that the consultation requirements set out in s.389(1)(b) of the Fair Work Act had been met, and that it was not reasonable in all the circumstances for the applicants to be redeployed within the respondent's enterprise or an associated entity. The Commission was satisfied that the applicants' redundancies were genuine redundancies. The Commission held that on this basis the applications cannot succeed and must be dismissed.

Case example: **Termination was found NOT to be a case of genuine redundancy – Job performed by someone**

***McIlwraith v Toowong Mitsubishi Pty Ltd*** [2012] FWA 9662 (Cribb C, 22 November 2012).

The employee's position as a Financial Controller was made redundant. The employer then hired a qualified accountant to a position titled Dealership Accountant. The duties identified in the job advertisement for the new position were identical to those of the position made redundant. The employer placed considerable emphasis on the requirement of a tertiary qualification in accounting; however the job advertisement did not specify this requirement. It was found that this was not a case of genuine redundancy.

Case example: **Termination was found NOT to be a case of genuine redundancy – Job performed by someone**

***Rosenfeld v United Petroleum Pty Ltd T/A United Petroleum*** [2012] FWA 2445 (Ryan C, 22 March 2012).

The applicant was dismissed following a restructure of the business. The employer then assigned all of the applicant's former duties to another employee (the second employee). Most of the duties previously performed by the second employee were then given to a third, newly hired, employee. The employer argued that having the second employee perform all of the applicant's former duties was consistent with the concept of redistribution and was therefore a genuine redundancy.. It was held that it was not a case where an applicant's duties were distributed among other employees as the applicant's job still existed after his dismissal this was not a case of genuine redundancy.

Case example: **Termination was found NOT to be a case of genuine redundancy – Job performed by someone**

***Miller v Central Gippsland Water Authority*** [1997] FCA 1081 (2 October 1997), [(1997) 76 IR 186].


The employee was the General Manager of the human resources department. The employer hired consultants to conduct a review of its operations. The employer retained the consultants beyond the period of time initially agreed to and the consultants began performing duties previously performed by the employee. The employer noted this and retrenched the employee without notice, consultation or proper consideration of alternatives. It was held that this was not a case of genuine redundancy.

Case example: **Termination was found NOT to be a case of genuine redundancy – Job performed by someone**

***Amcors Limited v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10 (9 March 2005), [(2005) 222 CLR 241].

A packaging and paper company sold its paper business to a wholly owned subsidiary. As part of a demerger, the employer gave notice to its employees that their employment was terminated. At the same time, the subsidiary offered employment to the same employees on the same terms with continued service. Although the CFMEU argued that these employees should have been paid redundancy payments the High Court held that the employees were not entitled to redundancy payments as in the context of a demerger, the employees' positions were not redundant.

## Consultation obligations

 See Fair Work Act s.389(1)(b)

The obligation on an employer to consult about redundancy only arises when a modern award or enterprise agreement applies to an employee and that modern award or enterprise agreement contains requirements (which they often do) to consult about redundancy.

### ***When does a modern award apply?***

 See Fair Work Act s.47

A modern award applies to an employee when it:

- covers the employee
- is in operation, and
- there is no provision in the Fair Work Act which provides or has the effect that the modern award does not apply.



A modern award does **NOT** apply to an employee at a time when the employee is a high income employee. As a result, modern award consultation obligations do not apply to high income employees.

This does not affect eligibility for an unfair dismissal remedy.



#### **Related information**

- Modern award coverage
- High income threshold

### **When does an enterprise agreement apply?**

 See Fair Work Act s.52

An enterprise agreement applies to an employee when it:

- covers the employee
- is in operation, and
- there is no provision in the Fair Work Act which provides or has the effect that the modern award does not apply.



#### **Related information**

- Application of an enterprise agreement

### **What if there is no modern award or enterprise agreement that applies?**

There is no legislative requirement to consult about the redundancy before a decision is made to make an employee redundant.



The Fair Work Ombudsman can assist you with inquiries about the application of modern awards and enterprise agreements. For assistance, contact the Fair Work Ombudsman on 13 13 94 or [www.fairwork.gov.au](http://www.fairwork.gov.au).

### **Consultation provisions**

It will not be case of genuine redundancy if an employer does not comply with any relevant obligation in a modern award or enterprise agreement to consult about the redundancy. This does not impose an absolute obligation on an employer to consult about the redundancy but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy.<sup>241</sup>

If an employer was obliged to consult and fails to do so, there cannot be a genuine redundancy.<sup>242</sup>

The process for selecting employees for redundancy is not relevant to whether the dismissal was a genuine redundancy or whether there was a valid reason for dismissal based on capacity. However an unlawful selection process may be relevant to a claim under the general protections provisions of the Fair Work Act or under state or federal anti-discrimination laws.<sup>243</sup>

Criteria in s.389 of the Fair Work Act which have not been met, such as the requirement to consult, can be taken into account in the Commission's consideration as to whether the dismissal was harsh, unjust or unreasonable as part of s.387(h) of the Fair Work Act, being 'any other matters that FWC considers relevant'.<sup>244</sup>

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<sup>241</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 1550.

<sup>242</sup> See for example *UES (Int'l) Pty Ltd v Harvey* [2012] FWA 5241 (Acton SDP, Kaufman SDP, Bissett C, 14 August 2012), [(2012) 215 IR 263].

<sup>243</sup> *UES (Int'l) Pty Ltd v Harvey* [2012] FWA 5241 (Acton SDP, Kaufman SDP, Bissett C, 14 August 2012) at paras 26–27, [(2012) 215 IR 263].

<sup>244</sup> *ibid.*

A failure to consult with employees about redundancy can mean that the Commission may find that it was not a case of genuine redundancy.<sup>245</sup> However, in circumstances where ‘consultation was highly unlikely to have negated the operational reasons for the dismissal or lead to any other substantive change’, the failure to consult may not be so strongly considered by the Commission in determining whether it was an unfair dismissal.<sup>246</sup>

### ***Consultation must be genuine and not perfunctory***

Consultations should be meaningful and should be engaged in before an irreversible decision to terminate has been made.<sup>247</sup>

‘Consultation is not perfunctory advice on what is about to happen ... [c]onsultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker.’<sup>248</sup>

‘The purpose of a consultation clause is to facilitate change where that is necessary, but to do that in a humane way which also takes into account and derives benefit from an interchange between worker and manager.’<sup>249</sup>

The following was observed by Sachs LJ in *Sinfield v London Transport Executive*:<sup>250</sup>

*Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. Any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals – before the mind of the executive becomes unduly fixed.*<sup>251</sup>

### **Case example: Consultation requirements met – Evidence of meetings and emails exchanged regarding redundancy**

***Patti v Vincent Chrisp & Partners P/L t/a Vincent Chrisp Architects*** [2012] FWA 8677 (Hamilton DP, 11 October 2012).

The employer experienced a reduction in business and consequently made a number of positions redundant. The employer met with the affected employees to discuss the need for redundancies and sent letters explaining the need for redundancies. The employee sought further information regarding the redundancy and requested recognition of an additional year of service. The employer provided all of the additional information sought by the employee and granted the additional year.

It was found that the consultation obligations were met by the employer.

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<sup>245</sup> *ibid.*, at paras 47–48.

<sup>246</sup> See *Maswan v Escada Textilvertrieb T/A ESCADA* [2011] FWA 4239 (Watson VP, 8 July 2011) at para. 39.

<sup>247</sup> *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company* Print R0234 (AIRC FB, Ross VP, MacBean SDP, Deegan C, 21 December 1998) at paras 78–80, [(1998) 88 IR 202]; cited in *Steele v Ennesty Energy Pty Ltd T/A Ennesty Energy* [2012] FWA 4917 (Jones C, 21 June 2012) at para. 20.

<sup>248</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Vodafone Network Pty Ltd* PR911257 (AIRC, Smith C, 14 November 2001) at para. 25.

<sup>249</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd (No 2)* [2010] FCA 652 (22 June 2010) at para. 49.

<sup>250</sup> *Sinfield v London Transport Executive* [1970] Ch 550.

<sup>251</sup> *ibid.*, 558.

Case example: **Consultation requirements met – Employee’s role amalgamated**

***Purdon v The Ascent Group Australia Ltd t/a The Ascent Group*** [2012] FWA 2495 (Watson VP, 27 March 2012).

The employer had to consider redundancies after experiencing a large budget deficit. The employer communicated its intention to initiate redundancies to the employee on a number of occasions, including discussions regarding restructuring the departments which would result in merging the roles of 2 managers into 1. The employer invited input from the affected employees regarding the proposals. The employee was offered to be redeployed into another position as a Manager, however the employee rejected this offer. It was held that the employer met their consultation obligations.

Case example: **Consultation requirements met – Evidence in writing of changes**

***Lindsay v Department of Finance and Deregulation*** [2011] FWA 4078 (Williams C, 14 July 2011).

Employer notified employees of proposed redundancies in writing and then met with the employees to discuss the changes. The meeting with the applicant was brief due to the hostility she showed towards the employer. However meetings held with the other employees involved an extended discussion about the proposed redundancies. It was held that consultation with the employee was truncated as a result of her attitude and actions, rather than by any refusal by the employer to consult. The consultation obligations in the modern award were satisfied.

**Note:** The dismissal was found not to be a genuine redundancy because it would have been reasonable for the employee to be redeployed.

Case example: **Consultation requirements met**

***Tyszka v Sun Health Foods Pty Ltd*** [2010] FWA 1781 (Foggo C, 19 March 2010).

The employer made 16 positions redundant. The employer consulted with the union and had meetings with affected employees, to discuss the need for redundancies. The union also held meetings with the employees to discuss the changes. Although the employer did not follow the requirement to consult in writing, it was found that, in totality, the employer complied with the requirement to consult.



Case example: **Consultation requirements NOT met – Employee on annual leave during consultation**

**UES (Int'l) Pty Ltd v Harvey** [2012] FWA 5241 (Acton SDP, Kaufman SDP, Bissett C, 14 August 2012), [(2012) 215 IR 263].

A warehouse manager's position was selected for redundancy due to a decline in business. However, it was found that the employer failed to properly consult with the employee regarding the termination of his employment. The failure to consult was the only reason the dismissal was not found to be a genuine redundancy and the termination of the employee's employment was found to be unfair, notwithstanding the fact that there was a valid reason for the dismissal.

Case example: **Consultation requirements NOT met – Meeting took place after the decision to make employee redundant**

**Monks v John Holland Group Pty Ltd** [2012] FWA 6453 (Gooley C, 1 August 2012).

The employer did not consult with the employee regarding the decision to make her position redundant until after a definite decision had been made about the redundancy, and about the creation of a new position and who would fill it. The employee had no opportunity to convince her employer she could fill the new position.

**Note:** Although it was found that the dismissal was not a case of genuine redundancy, it found that the employee declining the employer's offer to remain employed while looking at redeployment options was a valid reason to terminate the employee's employment. Therefore the dismissal was not harsh, unjust or unreasonable and the employee's application was dismissed.

Case example: **Consultation requirements NOT met – Employees made redundant with no opportunity for input**

**Wang v Specialty Fashion Group Ltd** [2011] FWA 6872 (Watson VP, 20 October 2011), [(2011) 213 IR 203].

After the employer decided to make positions redundant, the employer held one-on-one meetings with the employees to discuss the redundancies. However, the employees had no input into issues such as who was selected, redeployment, payments and alternatives to redundancy. It was held that the dismissal was not a genuine redundancy.

Case example: **Consultation requirements NOT met**

**Maswan v Escada Textilvertrieb t/a ESCADA** [2011] FWA 4239 (Watson VP, 8 July 2011).

The employer had been experiencing financial difficulties and decided to restructure their operations. The employer failed to notify and consult with the employee in accordance with the award.

**Note:** Although the termination was not a case of genuine redundancy due to a failure to consult, it was found that the same conclusion would likely have been reached whether or not there was a failure to consult. Therefore, the dismissal was not unfair.

Case example: **Consultation requirements NOT met**

**Kaysal v DBM Handrails Pty Ltd** [2010] FWA 8426 (Blair C, 3 October 2010).

The employer issued a notice advising employees of a considerable reduction in available work and therefore a need to reduce staff numbers. It was found that the notice did not constitute adequate consultation.

Case example: **Consultation requirements NOT met**

**Chamia v Quikfund Australia** [2012] FWA 7637 (Macdonald C, 13 June 2012).

The employer claimed that the employee had been advised of the closure of the warehouse in which she worked. It was found that even if the alleged telephone conversation occurred, the employer did not inform the employee that her role would no longer exist.

As the employee was neither given an opportunity to influence the decision, nor was she considered for redeployment into another role, it was found that consultation did not occur and the dismissal was not a case of genuine redundancy.

## Redeployment

 See Fair Work Act s.389(2)

A person's dismissal will not be a case of genuine redundancy if it would have been reasonable in all of the circumstances for the person to be redeployed within:

- the employer's enterprise, or
- the enterprise of an associated entity of the employer.

### ***‘Reasonable in the circumstances’***

Whether redeployment of an employee is considered reasonable will depend on the circumstances that exist at the time of the dismissal.<sup>252</sup>

In determining whether redeployment was reasonable a number of matters may be relevant, including:

- whether there exists a job or a position or other work to which the employee can be redeployed<sup>253</sup>
- the nature of any available position
- the qualifications required to perform the job
- the employee’s skills, qualifications and experience, and
- the location of the job in relation to the employee’s residence and the remuneration (pay and entitlements) which is offered.<sup>254</sup>

An employer must consider whether it is reasonable to redeploy an employee to an associated entity.<sup>255</sup> The degree of managerial integration between the different entities is likely to be a relevant consideration.<sup>256</sup>

### ***Alternative job, position or work must be identified***

The Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer’s enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee. There must be an appropriate evidentiary basis for such a finding.<sup>257</sup>

Evidence in relation to whether there was a job or a position or other work would usually include canvassing the steps taken by the employer to identify other work which could be performed by the dismissed employee.<sup>258</sup>

### ***The job must be suitable***

‘[T]he job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or within a reasonable period of retraining.’<sup>259</sup>

Other considerations may be relevant such as:

- the location of the job, and

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<sup>252</sup> *Ulan Coal Mines Limited v Honeysett* [2010] FWA FB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010) at para. 26, [(2010) 199 IR 363].

<sup>253</sup> *Technical and Further Education Commission T/A TAFE NSW v Pykett* [2014] FWC FB 714 (Ross J, Booth DP, Bissett C, 29 January 2014) at para. 36, [(2014) 240 IR 130].

<sup>254</sup> *Ulan Coal Mines Limited v Honeysett* [2010] FWA FB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010) at para. 28, [(2010) 199 IR 363].

<sup>255</sup> *ibid.*, at para. 27.

<sup>256</sup> *ibid.*

<sup>257</sup> *Technical and Further Education Commission T/A TAFE NSW v Pykett* [2014] FWC FB 714 (Ross J, Booth DP, Bissett C, 29 January 2014) at para. 36, [(2014) 240 IR 130].

<sup>258</sup> *ibid.*, at para. 37.

<sup>259</sup> *Ulan Coal Mines Limited v Honeysett* [2010] FWA FB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010) at para. 34, [(2010) 199 IR 363].

- the level of remuneration.<sup>260</sup>

### **Roles with lower income and less responsibility to be considered**

If an employer has other positions available, even at a lower level, that the redundant employee has the skills to perform, the employer should not presume that the employee will refuse the position.<sup>261</sup>

An employee may well be prepared to consider a role with less responsibility and have no objection to the location of the role being different to the current one and accept less remuneration.<sup>262</sup> A finding, based on the evidence of the employee, may be open to the Commission that it would have been reasonable in all the circumstances for an employee to have been redeployed into a vacancy with lower income and less responsibility.<sup>263</sup>

### **Open selection process may impact on whether redundancy is genuine**

Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other employees, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy.<sup>264</sup>

Subjecting an employee to a competitive recruitment process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely made redundant.<sup>265</sup>

### **Associated entity of the employer**

 See Fair Work Act s.389(2)(b)



#### **Related information**

- What is an associated entity?

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<sup>260</sup> *ibid.*

<sup>261</sup> *Margolina v Jenny Craig Weight Loss Centres Pty Ltd* [2011] FWA 5215 (Ryan C, 8 August 2011) at paras 36, 40; confirmed on appeal in [2011] FWA 9137 (Giudice J, Hamilton DP, Roberts C, 23 December 2011) at para. 29.

<sup>262</sup> *Margolina v Jenny Craig Weight Loss Centres Pty Ltd* [2011] FWA 5215 (Ryan C, 8 August 2011) at paras 39–43.

<sup>263</sup> *ibid.*

<sup>264</sup> *Ulan Coal Mines Limited v Honeysett* [2010] FWA 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010) at para. 34, [(2010) 199 IR 363].

<sup>265</sup> *Howarth v Ulan Coal Mines Limited* [2010] FWA 4817 (Raffaelli C, 12 July 2010) at para. 41–47; affirmed in *Ulan Coal Mines Limited v Honeysett* [2010] FWA 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010) at para. 31, [(2010) 199 IR 363].

Case example: **Redeployment obligations met – Employee did not have requisite skills for alternative position**

*Patti v Vincent Chrisp & Partners P/L t/a Vincent Chrisp Architects* [2012] FWA 8677 (Hamilton DP, 11 October 2012).

The employer made the employee's position redundant due to a downturn in business. The employer argued that the employee had been employed as a drafter. The employee argued that she performed the duties of a contract administrator and that she should have been redeployed in an available contract administrator position.

It was found that the employee's job was as a drafter and that her job was no longer required. The employee did not have the skills to work as a contract administrator and therefore redeployment was not reasonable.

Case example: **Redeployment obligations met – Employee did not have requisite skills for alternative positions**

*Steele v Ennesty Energy Pty Ltd t/a Ennesty Energy* [2012] FWA 4917 (Jones C, 21 June 2012).

The employee was employed as an Estimator/Bids Manager. The employee argued that the employer failed to consider redeploying her to either the position of Unit Manager or the position of Electrical Trades Assistant.

It was found that neither of these roles would have been suitable for the employee. The role of Unit Manager was not suitable due to the employee's lack of managerial experience. The Electrical Trades Assistant was not suitable because it involved a significant reduction in pay (around \$37,000 per annum) and it involved a vastly different working environment. It was held that the lack of consideration for redeployment was not unreasonable in the circumstances.

Case example: **Redeployment obligations met – Redeployment to management position not reasonable – Alternative position refused by employee**

*Wilson v North Rockhampton Bowls Club Inc* [2011] FWA 1928 (Simpson C, 31 March 2011).

The employee was the manager of the club before being made redundant. The employer created and advertised for a new management position. The employee was interviewed but was unsuccessful in obtaining the position. The employer offered the employee a position in the bar but the employee rejected the offer.

It was found that the new role was sufficiently different from the old role. It was found that the new role required such different skills that the employer was entitled to conduct a new interview process for the position. It was held that it was reasonable not to redeploy the employee to the new position.

Case example: **Redeployment obligations NOT met – Redeployment options not fully explored by employer**

***Aldred v Hutchinson Pty Ltd*** [2012] FWA 8289 (Lewin C, 26 October 2012).

In considering redeployment, the employer limited its enquiries to the Victorian division of its enterprise. It was found that the words ‘in the employer’s enterprise or an associated entity’ should be given the full and beneficial meaning. This means that the employer should not confine its consideration to a particular geographic zone or division of an employer’s enterprise.

It was held that had broader enquiries been made, it was probable that redeployment opportunities would have been identified. It was therefore held that the employee’s dismissal was not a case of genuine redundancy.

Case example: **Redeployment obligations NOT met – Employer failed to consider all ongoing vacancies**

***Suridge v Boral Window Systems Pty Ltd T/A Dowell Windows*** [2012] FWA 3126 (Hampton C, 6 July 2012).

The employee was engaged to perform maintenance functions. In an attempt to save costs, the employer outsourced these functions to a labour hire agency. The employee argued that redeployment was not properly considered and he could have been redeployed within the same factory or elsewhere. The employer argued that at the time of dismissal, there were no positions reasonably available that the employee could be offered, or would accept.

It was found that the redeployment of the employee could have been accommodated at the time of dismissal. The employer failed to properly explore redeployment options as suitable vacancies existed at the time of dismissal. It was held that the dismissal was not a genuine redundancy.

Case example: **Redeployment obligations NOT met – Lack of consultation meant that redeployment was not properly considered**


***Harrison v Queensland University of Technology*** [2010] FWA 8789 (Asbury C, 12 November 2010).

The employee was dismissed when the units or subjects he taught at the university were discontinued. It was found that the employer failed to adequately consult with the employee regarding the redundancy and, in particular, the issue of redeployment.

The Commissioner found great difficulty in accepting that there could be any real consideration of options for redeployment in circumstances where there has been no consultation or discussion with the employee concerned before the decision to terminate the employee’s employment was made. It was concluded that it was not a genuine redundancy.

**Note:** However, the dismissal was not harsh, unjust or unreasonable in all of the circumstances.

## What is the Small Business Fair Dismissal Code?

 See Fair Work Act ss.385; 388(1) and the [Small Business Fair Dismissal Code](#)

In the case of dismissal by a small business employer, a person has **not** been unfairly dismissed if the Commission is satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code (the Code).

### What is a small business employer?

 See Fair Work Act s.23

An employer is a small business employer if it employs fewer than 15 employees (by head count) at the relevant time. All employees employed by the employer at the time (including the dismissed employee, any other employees dismissed at the same time and those employed by associated entities), are to be counted. Casual employees are not counted, unless they are regular casual employees.

For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.<sup>266</sup>

### The Code

A person's dismissal is consistent with the Code if:

- immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happens first), the person's employer was a small business employer, and
- the employer complied with the Code in relation to the dismissal.

### Summary Dismissal

The Code states that:

'It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.'<sup>267</sup>

The Code defines serious misconduct as including 'theft, fraud, violence and serious breaches of occupational health and safety procedures'.<sup>268</sup>

The Commission does not have to make a finding, on the evidence, whether the conduct occurred.<sup>269</sup> The Commission needs to find whether the employer had a reasonable belief that the

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<sup>266</sup> See also s.50AAA of the [Corporations Act 2001](#) (Cth).

<sup>267</sup> [Small Business Fair Dismissal Code](#).

<sup>268</sup> *ibid.* See also reg 1.07 of the Fair Work Regulations.

<sup>269</sup> *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* [2010] FWA 7891 (Bartel DP, 14 October 2010) at para. 60, [(2010) 204 IR 39]; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 (Watson VP, Richards SDP, Cloghan C, 21 March 2012) at paras 27, 29, [(2012) 219 IR 128]; *Steri-Flow Filtration (Aust) Pty Ltd v Erskine* [2013] FWCFB 1943 (Acton SDP, Smith DP, Roe C, 24 April 2013).

conduct of the employee was serious enough to warrant immediate dismissal.<sup>270</sup> It is not necessary for the Commission to determine whether the employer was correct in the belief that it held.<sup>271</sup>

For an employer to believe on reasonable grounds that the conduct of the employee was serious enough to justify immediate dismissal, the employer must establish that they did in fact hold the belief that:

- the conduct was by the employee
- the conduct was serious, and
- the conduct justified immediate dismissal.<sup>272</sup>

The employer must establish that they had reasonable grounds to hold the belief, which could be established by providing evidence of inquiries or investigations the employer undertook to establish their belief.<sup>273</sup>

### **Other dismissal**

In non-summary dismissal cases, the employee must be warned that if there is no improvement to their conduct or capacity, they could be dismissed.<sup>274</sup>

The employee must be given a reason as to why their employment is at risk and the reason must be a valid reason based on their conduct or capacity to do the job.<sup>275</sup>

The employer must give the employee an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.<sup>276</sup>

### **Procedural matters**

During discussions between the employer and employee about matters where dismissal is possible, the employer must allow the employee to have another person present to assist them. However, this person cannot be a lawyer acting in a professional capacity.<sup>277</sup>

If an employee claims to the Commission that they have been unfairly dismissed, the employer will have to prove that they have complied with the Code.<sup>278</sup>

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<sup>270</sup> *ibid.*

<sup>271</sup> *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWA 1359 (Watson VP, Richards SDP, Cloghan C, 21 March 2012) at para. 29, [(2012) 219 IR 128];

<sup>272</sup> *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* [2011] FWA 3922 (McCarthy DP, 21 June 2011) at para. 8; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWA 1359 (Watson VP, Richards SDP, Cloghan C, 21 March 2012) at paras 28–29, [(2012) 219 IR 128].

<sup>273</sup> *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* [2011] FWA 3922 (McCarthy DP, 21 June 2011) at para. 9; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWA 1359 (Watson VP, Richards SDP, Cloghan C, 21 March 2012) at paras 28–29, [(2012) 219 IR 128].

<sup>274</sup> [Small Business Fair Dismissal Code](#).

<sup>275</sup> *ibid.*

<sup>276</sup> *ibid.*

<sup>277</sup> *ibid.*

<sup>278</sup> *ibid.*



Case example: **Small business complied with the Code – Summary dismissal**

***McKenna v Home Theatre Group Pty Ltd T/A Home Theatre Group*** [2012] FWA 9309 (Roe C, 30 October 2012).

The employee's employment was terminated by a small business employer for serious misconduct. The employer alleged that the employee sent emails that disparaged the Managing Director to another staff member and a business contact of her employer. It was held that there was a reasonable basis to conclude the emails caused serious and imminent risk to the reputation of the employer's business and that this amounted to serious misconduct. It was further held that the employer had complied with the Code and the dismissal was not unfair.

Case example: **Small business complied with the Code – Summary dismissal**

***Steri-Flow Filtration (Aust) Pty Ltd v Erskine*** [2013] FWA 1943 (Acton SDP, Smith DP, Roe C, 24 April 2013).

The employee's employment was terminated for serious misconduct. The employer alleged that the employee had used the employer's property for his own benefit and was not honest with his employer when confronted with the allegation.

At first instance the Commission concluded that the employer did not carry out a reasonable investigation into the employee's conduct and so did not comply with the Code. This decision was overturned on appeal and the Full Bench held that the employee's dismissal was consistent with the Code and so he had not been unfairly dismissed.

Case example: **Small business complied with the Code – Other dismissal – Warnings**

***Puri v Sydney Strata Pty Limited*** [2012] FWA 7317 (Watson VP, 27 August 2012).

The employer claimed that the employee had received a number of formal and informal warnings about poor performance. The employee disputed some of the warnings.

It was held that the employer had complied with the Code and that the dismissal was not unfair.

Case example: **Small business complied with the Code – Summary dismissal – Reasonable belief**

***Pinawin T/A RoseVi.Hair.Face.Body v Domingo*** [2012] FWA 1359 (Watson VP, Richards SDP, Cloghan C, 21 March 2012), [(2012) 219 IR 128].

The original decision that the employee was unfairly dismissed was appealed. The Full Bench held that the original decision did not consider whether the termination was consistent with the Code. It was found that where the Code is applicable, different considerations are to be taken into account.

In this case the employee had been dismissed because of his erratic behaviour and drug-taking outside of work. The Full Bench was satisfied that the employer's belief was based on reasonable grounds. It was found that due to the specific circumstances of this case, the termination was consistent with the Code.

Case example: **Small business did NOT comply with the Code – Other dismissal – Not warned**

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***Shaw v Pat Thomas Memorial Community House Inc*** [2012] FWA 8303 (Williams C, 10 October 2012).


The employee was dismissed for contacting the Department of Child Protection contrary to a written direction and warning.

It was found that there was no evidence that there was a written direction. It also found that the warning letter the employee had received made no mention of this issue. It was also found that the employer failed in their obligations to afford the employee an opportunity to respond to the allegations and an opportunity to be heard on the employer's intention to dismiss her before the decision was final. It was held that the dismissal was not consistent with the Code.

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## Part 5 – What makes a dismissal unfair?

### Overview

 See Fair Work Act s.385(b)

Only after determining that an employee is protected from unfair dismissal, and that the employee has been dismissed, can the Commission determine whether the dismissal was unfair within the meaning of the Fair Work Act.


In doing so the Commission must consider whether the dismissal was harsh, unjust or unreasonable. This is also called determining the merits of the unfair dismissal claim.

There are three substantive elements of an unfair dismissal (apart from the fact of the dismissal itself) that the Commission must be satisfied of:

1. the dismissal must be harsh, unjust or unreasonable
2. the dismissal must not be consistent with the Small Business Fair Dismissal Code (where the Code applies), and
3. the dismissal must not be a case of genuine redundancy.<sup>279</sup>

The power to grant a remedy cannot be exercised without the Commission being satisfied about these three matters.<sup>280</sup>

### What is harsh, unjust or unreasonable?

 See Fair Work Act s.387

It may be that the dismissal is:

- harsh but not unjust or unreasonable
- unjust but not harsh or unreasonable, or
- unreasonable but not harsh or unjust.<sup>281</sup>

The concepts of harsh, unjust or unreasonable may overlap.<sup>282</sup>

A dismissal may be:

- unjust because the employee was not guilty of the alleged misconduct
- unreasonable because the evidence or material before the employer did not support the conclusion
- harsh on the employee due to the economic and personal consequences resulting from being dismissed, or

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<sup>279</sup> Fair Work Act s.385.

<sup>280</sup> *McKerlie v Ratelt Australia Pty Ltd t/a Ratelt* [2020] FWCFB 5131 (Hatcher VP, Anderson DP, Johns C, 24 September 2020) at para. 57.

<sup>281</sup> *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 128 (McHugh and Gummow JJ), [(1995) 185 CLR 410 at p. 465].

<sup>282</sup> *ibid.*

- harsh because the outcome is disproportionate to the gravity of the misconduct (the punishment does not fit the crime).<sup>283</sup>

## Criteria for considering harshness etc.

In considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)
- whether the person was notified of that reason
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal
- the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal
- 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 the Commission considers relevant.<sup>284</sup>

## What does ‘must take into account’ mean?

The phrase ‘must take into account’ means that each of the above criteria are mandatory and must be considered in determining whether a dismissal is harsh, unjust or unreasonable.<sup>285</sup>

The criteria need only be taken into account to the extent that they are relevant.<sup>286</sup>

Failure to take account of each of the criteria is a significant error of law<sup>287</sup> (and may provide a basis for appeal).

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<sup>283</sup> *ibid.* See also *Australia Meat Holdings Pty Ltd v McLauchlan* [Print Q1625](#) (AIRC FB, Ross VP, Polites SDP, Hoffman C, 5 June 1998), [(1998) 84 IR 1 at p. 10].

<sup>284</sup> Fair Work Act s.387.

<sup>285</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWA FB 7498](#) (Giudice J, McCarthy DP, Simpson C, 22 November 2011) at para. 14.

<sup>286</sup> *Chubb Security Australia Pty Ltd v Thomas* [Print S2679](#) (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at paras 38–41. See also *King v Freshmore (Vic) Pty Ltd* [Print S4213](#) (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at para. 19; *Tenix Defence Systems Pty Ltd v Fearnley* [Print S6238](#) (AIRC FB, Ross VP, Polites SDP, Smith C, 22 May 2000) at para. 83; *Annetta v Ansett Australia Ltd* [Print S6824](#) (AIRC FB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 15, [(2000) 98 IR 233].

<sup>287</sup> *ibid.*

Whether a circumstance existed must then be taken into account, considered and given due weight as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>288</sup>

The Commission has ultimate discretion in weighing each matter carefully in arriving at a decision.<sup>289</sup>

### Facts acquired after dismissal

Facts justifying dismissal, which existed at the time of the dismissal, should be considered, even if the employer was unaware of those facts and did not rely on them at the time of dismissal.<sup>290</sup>

Facts which existed at the time of the dismissal, but came to light after the dismissal may:

- justify the dismissal when it would otherwise be harsh, unjust or unreasonable, or
- render the dismissal harsh, unjust or unreasonable.<sup>291</sup>

Ultimately, the Commission is bound to determine whether, on the evidence provided, facts existed at the time of termination that justified the dismissal.<sup>292</sup>

The reason for the termination need not be that which was given by the employer. It can be any reason underpinned by the evidence provided to the Commission.<sup>293</sup> If the employer seeks to rely on a reason for dismissal other than the reason given or relied upon at the time of the dismissal ‘they will have to contend with the consequences of not giving the employee an opportunity to respond to such reason’.<sup>294</sup>

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<sup>288</sup> *ALH Group Pty Ltd trading as the Royal Exchange Hotel v Mulhall* [PR919205](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Redmond C, 21 June 2002) at para. 51, [(2002) 117 IR 357]. See also *Smith and others v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at para. 92; *Edwards v Justice Giudice* [\[1999\] FCA 1836](#) (23 December 1999) at paras 6–7, [(1999) 94 FCR 561].

<sup>289</sup> *R v Hunt; Ex parte Sean Investments Pty Ltd* [\[1979\] HCA 32](#) (19 July 1979) at para. 6 (Murphy J), [(1979) 180 CLR 322]; cited in *Chubb Security Australia Pty Ltd v Thomas* [Print S2679](#) (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 37.

<sup>290</sup> *Shepherd v Felt & Textiles of Australia Ltd* [\[1931\] HCA 21](#) (4 June 1931), [(1931) 45 CLR 359 at pp. 373, 377–378].


<sup>291</sup> *Australia Meat Holdings Pty Ltd v McLauchlan* [Print Q1625](#) (AIRCFCB, Ross VP, Polites SDP, Hoffman C, 5 June 1998), [(1998) 84 IR 1 at p. 14]. See also *Dundovich v P & O Ports* [PR923358](#) (AIRCFCB, Ross VP, Hamilton DP, Eames C, 8 October 2002) at para. 79.

<sup>292</sup> *Lane v Arrowcrest* (1990) 27 FCR 427, 456; cited with approval in *Byrne v Australian Airlines Ltd* [\[1995\] HCA 24](#) (11 October 1995) at paras 131, 136 (McHugh and Gummow JJ), [(1995) 185 CLR 410 at pp. 467, 468].

<sup>293</sup> *MM Cables (A Division of Metal Manufacturers Limited) v Zammit* [Print S8106](#) (AIRCFCB, Ross VP, Drake SDP, Lawson C, 17 July 2000) at para. 42. See also *Fenton v Swan Hill Aboriginal Co-operative Ltd* [\[1998\] FCA 1613](#) (4 September 1998).

<sup>294</sup> Fair Work Act ss.387(b) and 387(c). See also *APS Group (Placements) Pty Ltd v O’Loughlin* [\[2011\] FWAFB 5230](#) (Lawler VP, O’Callaghan SDP, Roberts C, 8 August 2011) at para. 51, [(2011) 209 IR 351].

## Valid reason relating to capacity or conduct

 See Fair Work Act s.387(a)

### Valid reason

The reason must be ‘sound, defensible or well founded.’<sup>295</sup> A reason which is ‘capricious, fanciful, spiteful or prejudiced’ cannot be a valid reason.<sup>296</sup>

‘[T]he reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.’<sup>297</sup> It will not be enough for an employer to say that they acted in the belief that the termination was for a valid reason.<sup>298</sup>

The valid reason for termination is not to be judged by a legal entitlement to terminate an employee, ‘but [by] the existence of a reason for the exercise of that right’ related to the facts of the matter.<sup>299</sup>

The Commission does not ‘stand in the shoes’ of the employer but will need to be satisfied that the termination of the employee was for a valid reason.<sup>300</sup>

### Workplace investigations

It would be harsh, unjust and unreasonable for an employer to dismiss an employee summarily on the ground of serious misconduct without taking reasonable steps to investigate the allegations of misconduct and give the employee a fair chance of answering them.<sup>301</sup>

It is the reason or reasons for the act which must be discerned. An investigation of the reason or reasons for the act will involve, as a matter of meaning and language, an enquiry into the explanation for the act or why the act was done.<sup>302</sup>

Findings made by an inquiry established by the employer will be relevant to the Commission's determination of the issues before it provided it is established that:

- the employer conducted a full and extensive investigation into all of the relevant matters as was reasonable in the circumstances
- the employer gave the employee every reasonable opportunity to respond to allegations, and
- the findings were based upon reasonable grounds.<sup>303</sup>

An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

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<sup>295</sup> *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373].

<sup>296</sup> *ibid.*

<sup>297</sup> *Rode v Burwood Mitsubishi* [Print R4471](#) (AIRCFCB, Ross VP, Polites SDP, Foggo C, 11 May 1999) at para. 19.

<sup>298</sup> *ibid.*

<sup>299</sup> *Miller v University of New South Wales* [2003] FCAFC 180 (14 August 2003) at para.13, [(2003) 132 FCR 147].

<sup>300</sup> *ibid.*, at para. 64. See also *Walton v Mermaid Dry Cleaners Pty Limited* [1996] IRCA 267 (12 June 1996), [(1996) 142 ALR 681 at p. 685].

<sup>301</sup> *Department of Social Security v Uink* [Print P7680](#) (AIRCFCB, Ross VP, Drake DP, Palmer C, 24 December 1997); citing *Schaale v Hoechst Australia Ltd* (1993) 47 IR 249 at p. 252.

<sup>302</sup> *APS Group (Placements) Pty Ltd v O’Loughlin* [2011] FWAFB 5230 (Lawler VP, O’Callaghan SDP, Roberts C, 8 August 2011) at para. 33; citing *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at para. 151.

<sup>303</sup> *Department of Social Security v Uink* [Print P7680](#) (AIRCFCB, Ross VP, Drake DP, Palmer C, 24 December 1997).

Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee:

- it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances
- it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto
- that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged, and
- that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal.

A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.<sup>304</sup>

## Capacity

Capacity is the employee's ability to do the job as required by the employer.<sup>305</sup> Capacity also includes the employee's ability to do the work they were employed to do.<sup>306</sup>

The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.<sup>307</sup>

### *Inherent requirements*

The concept of **capacity** in s.387(a) as a basis for a valid reason for dismissal goes beyond the physical capacity or skill of the employee, and encompasses situations where employees do not have or maintain the necessary licence, certification, qualification, approval or accreditation to lawfully perform the inherent requirements of their job.<sup>308</sup>

Inability to perform the inherent requirements of the position may be a valid reason for the termination of an employee. This issue was considered in *J Boag & Son Brewing Pty Ltd v Button*:<sup>309</sup>

*Where an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered. (emphasis added).*

The situation may arise where an employer dismisses an employee as a consequence of a mandatory assessment by a third party which removes the capacity of the employee to perform an inherent requirement of the job, including where a tradesperson who is required to be licenced has the

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<sup>304</sup> *Australia Meat Holdings Pty Ltd v McLauchlan* [Print Q1625](#) (AIRCFB, Ross VP, Polites SDP, Hoffman C, 5 June 1998); citing *Bi-Lo Pty Ltd v Hooper* (1994) 53 IR 224 at pp. 229–230.

<sup>305</sup> *Walton v Mermaid Dry Cleaners Pty Limited* [\[1996\] IRCA 267](#) (12 June 1996), [(1996) 142 ALR 681 at p. 684].

<sup>306</sup> *Webb v RMIT University* [\[2011\] FWA FB 8336](#) (Drake SDP, Hamilton DP, Jones C, 8 December 2011) at para. 6.

<sup>307</sup> *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* [Print S5897](#) (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 62, [(2000) 98 IR 137].

<sup>308</sup> *DA v Baptist Care SA* [\[2020\] FWCFB 6046](#) (Hatcher VP, Simpson C, Hunt C, 20 November 2020) at para. 28.

<sup>309</sup> *J Boag & Son Brewing Pty Ltd v Button* [\[2010\] FWA FB 4022](#) (Lawler VP, O'Callaghan SDP, Williams C, 26 May 2010) at para.22, [(2010) 195 IR 292].

license cancelled, where a professional fails to maintain their mandatory certification to practise, where a court imposes a custodial sentence on an employee, and when a host employer refuses to accept labour from an employee of a labour hire agency.<sup>310</sup>

In a situation where an employee's capacity to perform the inherent requirements of their job is affected by the actions of a third party, the employer still has an obligation to treat the employee fairly.<sup>311</sup>

Where an employee cannot perform the inherent requirements of their job and there is no reasonable scope for the employee to be redeployed into another role, it is likely that there will be a valid reason for dismissal based on the employee's capacity.<sup>312</sup>

### **Temporary absence**

The Fair Work Act protects an employee from being dismissed due to a temporary absence for illness or injury for up to three months, or up to three months in total over a 12 month period, or where an employee is on paid personal/carer's leave for the duration of the absence.<sup>313</sup> After three months it becomes a question of whether the employee is likely to return to their duties in the short or medium term.<sup>314</sup> Medical evidence could have a bearing on the adequacy of the reason for termination.<sup>315</sup>

### **Warnings**

Where an employee has been dismissed for poor performance, another relevant criterion is whether or not they were warned about their performance.<sup>316</sup>

#### Case example: **Valid reason due to capacity – Performance**

***Fichera v Thomas Warburton Pty Ltd*** [\[2012\] FWA 4382](#) (Gooley C, 24 May 2012).

The employee was a Branch Manager at a branch that had low sales and was underperforming. It was found that the employee was incapable of providing the necessary leadership to improve the performance of the branch and this was a valid reason for dismissal.

**Note:** The employer however failed to follow its own performance management process and warn the employee that his employment was at risk. This rendered the dismissal unfair.

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<sup>310</sup> *DA v Baptist Care SA* [\[2020\] FWCFB 6046](#) (Hatcher VP, Simpson C, Hunt C, 20 November 2020) at para. 19.

<sup>311</sup> *DA v Baptist Care SA* [\[2020\] FWCFB 6046](#) (Hatcher VP, Simpson C, Hunt C, 20 November 2020) at para. 32.

<sup>312</sup> *DA v Baptist Care SA* [\[2020\] FWCFB 6046](#) (Hatcher VP, Simpson C, Hunt C, 20 November 2020) at para. 28.

<sup>313</sup> *Shortland v Smiths Snackfood Co* [\[2011\] FWAFB 2303](#) (Watson VP, O'Callaghan SDP, Cargill C, 29 April 2011) at para. 19.

<sup>314</sup> *ibid.*

<sup>315</sup> *ibid.*

<sup>316</sup> Fair Work Act s.387(e).



Case example: **Valid reason due to capacity – Physical capacity**

***Birdi v Rail Corporation NSW T/A RailCorp*** [\[2011\] FWA 7728](#) (Harrison C, 10 November 2011).

Permission to appeal refused in [\[2012\] FWAFB 1404](#) (Watson VP, Richards SDP, Cloghan C, 24 February 2012).

It was found, on medical evidence, that the employee was unable to perform the inherent requirements of either his current role as a train guard or in any other non-safety critical role. This was a valid reason for dismissal and the termination was not harsh, unjust or unreasonable. The application was dismissed.

Case example: **Valid reason due to capacity – Physical capacity**

***Ermilov v Qantas Flight Catering Pty Ltd*** [PR953449](#) (AIRC, Cartwright SDP, 18 November 2004).

Permission to appeal refused in [PR956925](#) (AIRC FB, Giudice J, Hamberger SDP, Raffaelli C, 4 April 2005).

There was conflicting medical evidence about the employee's capacity to perform the role. It was found that physical incapacity caused by a work-related injury amounted to a valid reason for dismissal.

Permission to appeal was refused and the application was dismissed.

Case example: **Valid reason due to capacity – Physical capacity – Inherent requirements**

***Harte v Forbes Australia Pty Ltd T/A Hunt Boilers*** [\[2011\] FWA 6948](#) (Bissett C, 18 October 2011).

The employee was employed as a technician and was injured at work. He was subsequently placed on office duties. His substantive position required both site-based and office-based duties. The employee was unable to perform the inherent requirements of his job. This was found to be a valid reason for the applicant's dismissal.

It was found that the employee's dismissal was not harsh, unjust or unreasonable.

Case example: **Valid reason due to capacity – Physical capacity and conduct – Restricted duties and drink driving**

***J Boag & Son Brewing Pty Ltd v Button*** [2010] FWA 4022 (Lawler VP, O’Callaghan SDP, Williams C, 26 May 2010), [(2010) 195 IR 292].

The employee was employed as a brewery technician and suffered a congenital health issue that placed him on restricted duties. After numerous medical investigations the employer terminated the employment contract on the basis that the employee could not perform the inherent requirements of his substantive role and for breaching policy in relation to a drink driving offence.

It was found that the appropriate test for capacity involves the consideration of the inherent requirements of the substantive position and not the modified position. It was also found that the employee had breached a reasonable policy of the employer concerning drink driving. The application was dismissed.

Case example: **Valid reason due to capacity – Loss of security clearance**

***Applicant v Department of Defence*** [2014] FWC 4919 (Deegan C, 22 July 2014).

The employee was employed by an agency known as the Australian Signals Directorate. He was required, as a condition of his employment, to hold a Top Secret Positive Vetting (TSPV) security clearance. After receiving a number of reports about the employee’s behaviour, a review was conducted to determine if the employee should have his security clearance altered or revoked. As a result of the review the employee’s security clearance was revoked. He was advised he would not be able to apply for a new clearance for a period of five years. The employee was dismissed because he did not hold an essential qualification, the TSPV security clearance.

The Commission was satisfied that there was a valid reason for the employee’s dismissal. The holding of a TSPV clearance was an essential requirement of the employee’s employment. The loss of that qualification was a valid reason for the dismissal.

Case example: **Valid reason due to capacity – Failed psychometric assessment**

**DA v Baptist Care SA** [2020] FWCFB 6046 (Hatcher VP, Simpson C, Hunt C, 20 November 2020).

The employee was a Child and Youth Support Worker, his role required him to work with children. In 2018 the provisions of the *Children and Young People (Safety) Act 2017* (SA) (CYP Act) came into effect. The CYP Act requires that a person must not be employed in a licensed children's residential facility unless the person has undergone a psychological or psychometric assessment of a kind determined by the Chief Executive of the Department.

Baptist Care required all of its Child and Youth Support Workers to enter into new contracts of employment which incorporated the relevant requirements of the CYP Act. On 8 July 2019 the assessor PsychCheck sent Baptist Care a Statement of Suitability for the employee which assessed him as currently psychologically unsuitable. On 9 July 2019 the employee was required to attend a meeting with Baptist Care and, at that meeting, he was given a letter requiring him to show cause why his employment as a Child and Youth Support Worker should not be terminated as a result of his assessment as unsuitable. On 30 July 2019 the employee's employment was terminated by Baptist Care.

At first instance the Commission found that there was a valid reason for the employee's dismissal as a Child and Youth Support Worker because he was unable to fulfil an inherent requirement of his job, namely an assessment of psychological suitability that allowed him to undertake the care of children under the guardianship of the State. The employee appealed this decision.

The Full Bench held that the situation that led to the employee's dismissal was not novel, and reflected circumstances sometimes found in other unfair dismissal cases. The concept of 'capacity' in s.387(a) as a basis for a valid reason for dismissal goes beyond the physical or skill capacity of the employee, and encompasses situations where employees do not have or maintain the necessary licence, certification, qualification or approval. The Full Bench held that where an employee cannot perform the inherent requirements of their job and there is no reasonable scope for the employee to be redeployed into another role, it is likely that there will be a valid reason for dismissal based on the employee's capacity.

The Full Bench found that the employee was dismissed because the fact that PsychCheck had assessed him as being currently psychologically unsuitable meant that it was not lawful under the CYP Act for Baptist Care to continue to employ him in a children's residential facility.

Case example: **NOT a valid reason due to capacity – Capacity – Psychological**

**Ambulance Victoria v V** [2012] FWAFB 1616 (Watson SDP, Hamilton DP, Booth C, 15 March 2012).

The employee was absent from work for a long period of time for medical reasons. It was found that there was no clear finding on medical evidence that the employee was unable to perform the inherent requirements of the position.

**Note:** On appeal it was found that there was no error in the first instance and the appeal was dismissed.

Case example: **NOT a valid reason due to capacity – Physical capacity – Frustration of employment contract – Dishonesty**

**Balfours Bakery v Cooper** [2011] FWA FB 8032 (Giudice J, Hamberger SDP, Spencer C, 2 December 2011).

The employee suffered a shoulder injury. He made a claim for income protection insurance and had access to 2 years' income protection. He then made a WorkCover claim. The employer dismissed the employee and claimed that the injury prevented him from returning to work and that he had been dishonest in making both the insurance claim and the WorkCover claim.

It was found that this was not a valid reason for the termination and that the employee's dismissal was harsh, unjust or unreasonable. Permission to appeal was refused.

Case example: **NOT a valid reason due to capacity – Capacity – Psychological**

**Dundovich v P & O Ports** PR923358 (AIRCFB, Ross VP, Hamilton DP, Eames C, 8 October 2002).

An employee with a work-related injury participated in a return to work program but was dismissed at the conclusion of the 2 week program. It was found that there was no valid reason for the employee's dismissal.

## Conduct

To determine a valid reason relating to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred.<sup>317</sup>

The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>318</sup> The question the Commission must address is whether there was a valid reason for the dismissal.<sup>319</sup>

The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct.<sup>320</sup> The Commission must make a finding as to whether the conduct occurred based on the evidence before it.<sup>321</sup>

Inconsistent treatment of previous similar conduct by other employees in the workplace is an issue that can be relevant.<sup>322</sup>

<sup>317</sup> *Edwards v Justice Giudice* [1999] FCA 1836 (23 December 1999) at paras 6–7, [(1999) 94 FCR 561]. See also *Rail Corporation New South Wales v Vrettos* [2008] AIRCFB 747 (Kaufman SDP, McCarthy DP, Blair C, 8 October 2008) at para. 27, [(2008) 176 IR 129]; *Container Terminals Australia Limited v Toby* Print S8434 (AIRCFB, Boulton J, Marsh SDP, Jones C, 24 July 2000) at para. 13.

<sup>318</sup> *Walton v Mermaid Dry Cleaners Pty Limited* [1996] IRCA 267 (12 June 1996), [(1996) 142 ALR 681 at p. 685].

<sup>319</sup> *ibid.*

<sup>320</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at para. 24.

<sup>321</sup> *ibid.*

<sup>322</sup> *APS Group (Placements) Pty Ltd v O'Loughlin* [2011] FWA FB 5230 (Lawler VP, O'Callaghan SDP, Roberts C, 8 August 2011) at paras 59–61, [(2011) 209 IR 351]. See also *Sexton v Pacific National (ACT) Pty Ltd* PR931440 (AIRC, Lawler VP, 14 May 2003) at para. 32; *Electricity Commission of New South Wales t/a Pacific Power v Nieass* (1995) 81 IR 46 (14 September 1995) at p. 66.

An employee's dishonesty may constitute misconduct and a valid reason for dismissal.<sup>323</sup> However, dishonesty does not automatically make the dismissal of an employee one that is not unfair.<sup>324</sup>

A single foolish, dishonest act may not always, in the circumstances of a particular case, justify summary dismissal.<sup>325</sup>

The failure of the employee to follow the employer's lawful and reasonable directions can constitute a valid reason for dismissal.<sup>326</sup>

### **Serious misconduct**

Fair Work Regulation 1.07 defines serious misconduct.<sup>327</sup> Serious misconduct is conduct that is wilful or deliberate and that is inconsistent with the continuation of the employment contract.<sup>328</sup> It is also conduct that causes serious and imminent risk to the health and safety of a person or to the reputation, viability or profitability of the employer's business.<sup>329</sup>

Serious misconduct includes theft, fraud, assault, sexual harassment, intoxication at work and the refusal to carry out lawful and reasonable instructions consistent with the employment contract.<sup>330</sup>

Where serious misconduct is alleged the test for a valid reason for dismissal does not change. The test remains whether the reason was 'sound, defensible or well founded'.<sup>331</sup> A valid reason for dismissal does not require conduct amounting to a repudiation of the contract of employment.<sup>332</sup>

Where an employee has been dismissed without notice (summary dismissal) for serious misconduct the Commission may find that, although there was a valid reason for the dismissal, the dismissal was harsh because summary dismissal was a disproportionate response.<sup>333</sup>

Where the conduct involves serious misconduct, the principle established in *Briginshaw v Briginshaw*<sup>334</sup> may be relevant:

*The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained'<sup>335</sup> and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect*

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<sup>323</sup> *APS Group (Placements) Pty Ltd v O'Loughlin* [2011] FWA FB 5230 (Lawler VP, O'Callaghan SDP, Roberts C, 8 August 2011) at para. 56, [(2011) 209 IR 351].

<sup>324</sup> *ibid.*

<sup>325</sup> *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 (7 December 2007) at para. 61, [(2007) 168 IR 375].

<sup>326</sup> *Lambeth v University of Western Sydney* [2009] AIRC 47 (Hamberger SDP, 16 January 2009) at para. 70. See also *Grant v BHP Coal Pty Ltd* [2014] FWC FB 3027 (Richards SDP, Asbury DP, Booth C, 18 June 2014).

<sup>327</sup> Fair Work Regulations.

<sup>328</sup> reg 1.07(2)(a).

<sup>329</sup> reg 1.07(2)(b).

<sup>330</sup> reg 1.07(3).

<sup>331</sup> *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373]; cited in *Annetta v Ansett Australia Ltd* Print S6824 (AIRC FB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 10, [(2000) 98 IR 233].

<sup>332</sup> *Annetta v Ansett Australia Ltd* Print S6824 (AIRC FB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 10, [(2000) 98 IR 233].

<sup>333</sup> *Potter v WorkCover Corporation* PR948009 (Ross VP, Williams SDP, Foggo C, 15 June 2004) at para. 55, [(2004) 133 IR 458]. See also *Annetta v Ansett Australia Ltd* Print S6824 (AIRC FB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 10, [(2000) 98 IR 233].

<sup>334</sup> *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336]; cited in *Barber v Commonwealth of Australia as represented by the Department of Parliamentary Services* [2011] FWA 4092 (Thatcher C, 6 July 2011) at para. 33, [(2011) 212 IR 1].

<sup>335</sup> *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336].

*inferences’ or ‘by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’<sup>336</sup>*

The Briginshaw principle does not raise the standard of proof beyond the balance of probabilities.<sup>337</sup> The strength of the evidence needed to establish a fact on the balance of probabilities ‘may vary according to the nature of what it is sought to prove’.<sup>338</sup> More serious allegations may require stronger evidence.

### **Out of hours conduct**

‘It is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees.’<sup>339</sup>

The out of hours conduct must have a relevant connection to the employment relationship.<sup>340</sup>

*Rose v Telstra*<sup>341</sup> looked at relevant decisions on out-of-hours conduct and provides the following summary:

- ‘The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employee and employer; or
- The conduct damages the employer’s interests; or
- The conduct is incompatible with the employee’s duty as an employee.’<sup>342</sup>

In cases involving out of hours conduct, it is not sufficient for the employer to simply assert that the conduct will in some way affect the employer’s reputation or compromise the employee’s capacity to perform his or her duties, there needs to be evidentiary material upon which a firm finding may be made.<sup>343</sup>

Conduct outside of work involving criminal offences does not, alone, warrant dismissal.<sup>344</sup> There still must be a relevant connection between the criminal activity and the employee’s employment.<sup>345</sup>

However if the employee is unable to attend work for a significant period because they are convicted of a serious offence and imprisoned, then the contract of employment may be brought to an end by the operation of law due to frustration.<sup>346</sup>

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<sup>336</sup> *ibid.*, [(1938) 60 CLR 336] at pp. 362–3].

<sup>337</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 (16 December 1992), [(1992) 67 ALJR 170]; cited in *Guneyi v Melbourne Health T/A Royal Melbourne Hospital* [2012] FWA 10270 (Hamilton DP, 18 December 2012) at para. 14. See also *Budd v Dampier Salt Limited* [2007] AIRCFB 797 (Giudice J, Lacy SDP, Cargill C, 5 October 2007) at para. 15, [(2007) 166 IR 407].

<sup>338</sup> *ibid.*

<sup>339</sup> *Appellant v Respondent* [Print R1221](#) (AIRCFB, MacBean SDP, Duncan SDP, Deegan C, 1 February 1999), [(1999) 89 IR 407 at p. 416].

<sup>340</sup> *Rose v Telstra Corporation Limited* [Print Q9292](#) (AIRC, Ross VP, 4 December 1998); see also *Kedwell v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Operations/Warkworth Mining* [2016] FWC 6018 (Saunders C, 9 September 2016) at para. 104.

<sup>341</sup> *Rose v Telstra Corporation Limited* [Print Q9292](#) (AIRC, Ross VP, 4 December 1998).

<sup>342</sup> *Rose v Telstra Corporation Limited* [Print Q9292](#) (AIRC, Ross VP, 4 December 1998); cited with approval in *Farquharson v Qantas Airways Limited* [PR971685](#) (AIRCFB, Lawler VP, O’Callaghan SDP, Raffaelli C, 10 August 2006) at para. 25, [(2006) 155 IR 22].

<sup>343</sup> *Wakim v Bluestar Global Logistics* [2016] FWC 6992 (Hatcher VP, 7 October 2016) at para. 32.

<sup>344</sup> *HEF of Australia v Western Hospital* (1991) 33 AILR 249; cited in *Rose v Telstra Corporation Limited* [Print Q9292](#) (AIRC, Ross VP, 4 December 1998).

<sup>345</sup> *ibid.* See also *Cooper v Australian Tax Office* [2014] FWC 7551 (Lawrence DP, 6 November 2014).

<sup>346</sup> *F.C. Shepherd & Co Ltd v Jerrom* [1987] ICR 802; cited in *Rose v Telstra Corporation Limited* [Print Q9292](#) (AIRC, Ross VP, 4 December 1998).

### ***Fighting or assault***

Generally, in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable.<sup>347</sup>

Extenuating circumstances include:

- the circumstances in which the fight occurred, such as whether the dismissed employee was provoked or acting in self-defence
- length of service, including the work record of the dismissed employee, and
- whether or not the employee was in a supervisory position.<sup>348</sup>

The authorities are clear that the Commission must take into account all of the circumstances surrounding the incident and not merely establish who the aggressor was.<sup>349</sup>

### ***Effect on the safety and welfare of other employees***

Where the employee's conduct or capacity affects the safety and welfare of other employees the Commission may find that this is a valid reason for the dismissal.<sup>350</sup>

Fair Work Regulation 1.07 (which defines serious misconduct) may also be relevant when dealing with Occupational Health and Safety (OHS) breaches that amount to serious misconduct.<sup>351</sup>

The kind of conduct that is relevant need not only be wilful, malicious or intentional conduct, but conduct that can imperil or put other employees in the workplace in jeopardy.<sup>352</sup>

The Commission may take into account the following issues when determining whether there has been a breach of safety:

- the seriousness of the breach/incident
- company policies setting out safety procedures and consequences for breaches
- relevant OHS training by the employer
- whether the incident/breach was isolated or recurring in nature, and
- whether or not the employee concerned was a supervisor and expected to set an example.<sup>353</sup>

### ***Breach of company policy***

A substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal.<sup>354</sup>

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<sup>347</sup> *The AWU-FIME Amalgamated Union v Queensland Alumina Limited* [1995] IRCA 346 (17 July 1995), [(1995) 62 IR 385]; cited in *Tenix Defence Systems Pty Ltd v Fearnley* [Print S6238](#) (AIRCFB, Ross VP, Polites SDP, Smith C, 22 May 2000) at para. 22.

<sup>348</sup> *ibid.*

<sup>349</sup> *Culpeper v Intercontinental Ship Management Pty Ltd* [PR944547](#) (AIRCFB, Marsh SDP, Blain DP, Hoffman C, 23 March 2004) at para. 49, [(2004) 134 IR 243].

<sup>350</sup> Fair Work Act s.387(a).

<sup>351</sup> Fair Work Regulations reg 1.07.

<sup>352</sup> *Gottwald v Downer EDI Rail Pty Ltd* [2007] AIRC 969 (Richards SDP, 30 November 2007) at para. 102. See also *Hudson v Woolworths Ltd* [2007] AIRC 912 (Thatcher C, 24 October 2007).

<sup>353</sup> *Butson v BHP Billiton Iron Ore Pty Ltd* [2010] FWA 640 (McCarthy DP, 1 February 2010).

<sup>354</sup> *Browne v Coles Group Supply Chain Pty Ltd* [2014] FWC 3670 (Hatcher VP, 10 June 2014) at para. 62; citing *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 (Lawler VP, Hamberger SDP, Cribb C, 28 August 2013) at para. 36, [(2013) 238 IR 1].

However a finding that an employee has failed to comply with policies and procedures does not mean that a dismissal is not harsh, unjust or unreasonable. In each case all of the circumstances must be taken into account.<sup>355</sup>

If widespread breaches of policy occur without an employer response then this weighs against a decision that the dismissal was justified and not harsh, unjust or unreasonable.<sup>356</sup>

### ***Loss of trust and confidence***

It is not sufficient to find that there is a valid reason for an employee's dismissal simply because someone has lost trust and confidence in an employee's ability to perform their role. There needs to be sufficient evidence and reasoning to support this loss of trust and confidence.<sup>357</sup>

#### **Case example: Valid reason due to conduct – Poor attitude and behaviour**

***Kolodka v Virgin Australia Airlines Pty Ltd t/a Virgin Australia*** [2012] FWA 7828 (Smith DP, 12 September 2012).

The employer dismissed the employee for poor behaviour and having a poor attitude towards his team members, customers and supervisors. It was found that there was a valid reason for the employee's termination due to the employee's conduct.

#### **Case example: Valid reason due to conduct – Various conduct issues**

***Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski*** [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

The employee had a long history of performance and conduct related issues, including unauthorised absences, non-compliance with OHS and other company policies and late attendance. The employer gave multiple warnings and conducted several counselling sessions. It was found that the employee's misconduct was a valid reason for the dismissal.

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<sup>355</sup> *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 (Lawler VP, Hamberger SDP, Cribb C, 28 August 2013) at para. 48, [(2013) 238 IR 1]; see also *Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946 (Sams DP, Gostencnik DP, McKinnon C, 1 May 2019).

<sup>356</sup> *ibid.*, at para. 67.

<sup>357</sup> *Mammarella v Department of Parliamentary Services* [2019] FWC 6340 (Harper-Greenwell C, 11 September 2019) at para. 61.



Case example: **Valid reason due to conduct – Recklessness and carelessness in causing forklift accident**

**IGA Distribution (Vic) Pty Ltd v Nguyen** [2011] FWA 4070 (Boulton J, O’Callaghan SDP, Ryan C, 9 September 2011), [(2011) 212 IR 141].

The employee was terminated for causing a forklift to collide with another forklift. It was found that, due to the seriousness of the conduct and the possible health and safety risks caused by the incident, there was a valid reason for the dismissal.

**Note:** However it was found that, notwithstanding the finding of a valid reason for dismissal, the termination was harsh and unjust because the employer was wrong in accusing the employee of deliberately causing the accident.

Case example: **Valid reason due to conduct – Conduct – Social media**

**O’Keefe v Williams Muir’s Pty Ltd T/A Troy Williams The Good Guys** [2011] FWA 5311 (Swan DP, 11 August 2011).

The employee made negative and threatening comments about a colleague on Facebook. The Commission held that threatening another work employee is a serious issue and one which would not be tolerated in any workplace. The manner in which the threat was made and the words used provided sufficient reason for the respondent’s dismissal of the applicant on the grounds of serious misconduct.

Case example: **Valid reason due to conduct – Drinking alcohol while on lunch break**

**Selak v Woolworths Limited** [2008] AIRCFB 81 (Watson VP, Cartwright SDP, Foggo C, 8 February 2008), [(2008) 171 IR 267].

The employee, a store manager, was terminated for consuming two beers on his lunch break. The employer had an explicit policy that no alcohol was to be consumed during work hours. It was found that this was a valid reason for his dismissal.

Case example: **Valid reason due to conduct – Drinking alcohol while on lunch break**

**Agnew v Nationwide News** PR927597 (AIRC, Rafaelli C, 11 February 2003).

Leave to appeal refused in PR936856 (AIRC, Harrison SDP, Ives DP, Bacon C, 27 August 2003), [(2003) 126 IR 461].

The employees were terminated after it was discovered they were drinking alcohol during their lunch break. It was found that a breach of the policy was a valid reason for the dismissal.

However, it was held dismissal was harsh in all of the circumstances when taking into account recent policy change, inconsistent enforcement of the policy and the employees’ period of service.

Case example: **Valid reason due to conduct – Dishonesty in disciplinary interview**

***Streeter v Telstra Corporation Limited*** [2008] AIRCFB 15 (Acton SDP, Cartwright SDP, Larkin C, 24 January 2008), [(2008) 170 IR 1].

The employee engaged in sexual intercourse in a hotel room in front of colleagues. Her colleagues complained about her behaviour to the employer. After a number of interviews, the employee conceded that such activity did take place. The Full Bench found on appeal, in a majority decision, that the employee's dishonesty throughout the investigation amounted to a valid reason for her dismissal.

The Full Bench found it was reasonable for Telstra to conduct the investigation given it appeared the employee's activities had caused difficulties at her work and were likely to cause difficulties at her work in the future. In the circumstances, the Full Bench also held that the questions Telstra asked the employee were reasonable. The Full Bench found the employee needed to be honest with Telstra during the investigation, notwithstanding the inherently personal nature of her activities, so that Telstra could determine and take appropriate action to deal with the difficulties. The employee's dishonesty during the investigation meant Telstra could not be confident the employee would be honest with it in the future. The relationship of trust and confidence between Telstra and the employee was, thereby, destroyed.

Case example: **Valid reason due to conduct – Transmission of pornographic emails**

***Flanagan v Thales Australia Ltd t/a Thales Australia*** [2012] FWA 6291 (Bull C, 7 September 2012).

The employees accessed pornographic material via work email accounts in breach of a company policy. It was held that this was a valid reason for dismissal.

**Note:** Due to the lack of procedural fairness in the termination process, it was ultimately found that the dismissals were harsh, unjust or unreasonable.

Case example: **Valid reason due to conduct – Dishonesty**

***Woodman v The Hoyts Corporation Pty Ltd*** [PR906309](#) (AIRCFCB, Giudice J, Watson SDP, Grainger C, 11 July 2001), [(2001) 107 IR 172].

The employee was dismissed for allowing a colleague to take an item from the Candy Bar without paying for it and for lying to management when questioned about the incident. It was found that, notwithstanding the size of the theft, covering it up amounted to serious misconduct and a valid reason for the dismissal.

**Note:** It was ultimately found that the termination was harsh due to deficiencies in the dismissal process.

Case example: **Valid reason due to conduct – Breach of policy – Dress code**

***Woolworths Limited (t/as Safeway) v Brown*** [PR963023](#) (AIRC FB, Lawler VP, Lloyd SDP, Bacon C, 26 September 2005), [(2005) 145 IR 285].

The employee was dismissed from his employment as a butcher for refusing to remove his eyebrow ring while at work. It was found that the employee refused to comply with a lawful direction of his employer and this was a valid reason for dismissal.

Case example: **Valid reason due to conduct – Breach of policy – Gambling**

***Atfield v Jupiters Limited trading as Conrad Jupiters Gold Coast*** [PR925334](#) (AIRC, Hodder C, 10 December 2002), [(2002) 123 IR 273].

Leave to appeal was refused in [PR928970](#) (AIRC FB, Giudice J, Lawler VP, Foggo C, 19 March 2003), [(2003) 124 IR 217].

The employee, a manager working for a casino, was dismissed for serious misconduct for placing a bet at a TAB within the casino complex. It was found there was a valid reason for the dismissal.

**Note:** Despite a finding that there was a valid reason for the dismissal, in all of the circumstances the dismissal was found to be harsh.

Case example: **Valid reason due to conduct – Serious safety breach**

***Parmalat Food Products Pty Ltd v Wililo*** [\[2011\] FWA FB 1166](#) (Watson VP, Sams DP, Asbury C, 2 March 2011), [(2011) 207 IR 243].

The employee was dismissed for breaching health and safety policy when he placed his arms, head and torso under an unstable load on a forklift. It was held that this was a valid reason for dismissal.

Case example: **Valid reason due to conduct – Serious safety breach**

***Gottwald v Downer EDI Rail Pty Ltd*** [\[2007\] AIRC 969](#) (Richards SDP, 30 November 2007).

The employee was dismissed for a health and safety breach after a rail car that he had been working on rolled into a workshop. It was found that the employee's conduct was of the kind that could imperil or put other employees in the workplace in jeopardy and was a valid reason for dismissal.

**Note:** The notice of termination and the reasons given in the disciplinary meetings for the dismissal were unclear and ineffective and therefore, ultimately the termination was harsh.

Case example: **Valid reason due to conduct – Improper use of work information**

***Applicant v Australian Federal Police*** [2012] FWA 1352 (Harrison SDP, 19 April 2012).

Permission to appeal was refused in [2012] FWAFB 6949 (Watson VP, Sams DP, Deegan C, 24 August 2012).

The employee was dismissed for breaching the employer's code of conduct by requesting a colleague investigate her ex-husband's financial affairs. It was found that this breach constituted a valid reason for dismissal.

Case example: **Valid reason due to conduct – Fighting/assault**

***DP World Sydney Ltd v Lambley*** [2013] FWCFCB 9230 (Catanzariti VP, Lawler VP, Cambridge C, 22 November 2013), [(2012) 222 IR 277].

Appeal to the Federal Court dismissed in [2013] FCA 4 (10 January 2013).

The employee was dismissed for serious misconduct for assaulting another employee. The Commission held fighting in the workplace usually amounts to a valid reason for dismissal, as an employer has every right to establish policies against fighting and to ensure compliance with those policies by dismissing employees who are found to have engaged in fighting unless there are extenuating circumstances.

Case example: **Valid reason due to conduct – Breach of policy – Offensive email**

***Anderson v Thiess Pty Ltd*** [2015] FWCFCB 478 (Ross J, Hatcher VP, Simpson C, 30 January 2015).

The employee was dismissed after sending an offensive email in breach of the employer's workplace policies. It was held that this amounted to a valid reason for dismissal, in particular as the email was one which vilified persons of the Muslim faith and had caused offence.

**Note:** However it was found that, notwithstanding the finding of a valid reason for dismissal, the termination was harsh and unreasonable because of its consequences for the employee's personal and economic situation and that it was not reasonably open to the employer to conclude that the misconduct was wilful.

Case example: **Valid reason due to conduct – Failure to follow lawful and reasonable directions**

***Grant v BHP Coal Pty Ltd*** [2014] FWCFB 3027 (Richards SDP, Asbury DP, Booth C, 18 June 2014).

Decision at first instance [2014] FWC 1712 (Spencer C, 14 March 2014).

The employee was on extended sick leave whilst receiving treatment for a shoulder injury sustained in the course of his duties. After a lengthy absence from the workplace following surgery, the employer required the employee to attend its nominated medical specialist for a functional assessment test before being assigned duties. The employee did not attend the medical appointment, nor the rescheduled medical appointment.

The employee was dismissed for failing to follow lawful and reasonable directions to attend a medical appointment, as well as his refusal to participate in the disciplinary investigation. At first instance the Commission found this a valid reason for dismissal and the application was dismissed. This decision was affirmed on appeal.

Case example: **Valid reason due to conduct – Employee conflict**

***Lumley v Bremick Pty Ltd Australia t/a Bremick Fasteners*** [2014] FWCFB 8278 (Hatcher VP, Gostencnik DP, Ryan C, 5 December 2014).

An employee was dismissed after an ongoing workplace conflict with a colleague could not be resolved. Both employees received written warnings and mediation was conducted by the manager. After further altercation, and a final warning, the employee challenged the employer to sack her.

At first instance the Commission found that the dismissal was for a valid reason, soundly based on the conduct of the employee. This was confirmed on appeal, where the Full Bench found that the conflict had put the employer in an 'impossible position, irrespective of who was at fault'. Permission to appeal was refused.

Case example: **NOT a valid reason due to conduct – Failing to comply with restricted duties**

***Perry v Coffs Ex-Services Memorial and Sporting Club Ltd*** [2009] AIRC 777 (Thatcher C, 18 August 2009).

The employee was injured at work and consequently placed on a return to work program involving restricted duties. The employee was found to be carrying two trays of empty wine glasses above the weight restriction specified in her return to work program. It was found there was no valid reason for the employee's dismissal.

Case example: **NOT a valid reason due to conduct – Swearing/bad language**

***Symes v Linfox Armaguard Pty Ltd*** [\[2012\] FWA 4789](#) (Cargill C, 8 June 2012).

Appeal to Full Bench dismissed in [\[2012\] FWAFB 7877](#) (Kaufman SDP, Smith DP, Lee C, 12 September 2012).

The employee was dismissed for misconduct after he swore at a manager and then punched a noticeboard. It was found that although swearing was inappropriate and unwarranted in a workplace, it was tolerated by the employer. It was held that the employee's behaviour did not provide a valid reason for dismissal.

Case example: **NOT a valid reason due to conduct – Failing to report other employee's dishonesty**

***Crockett v Voodoo Hair t/a Voodoo Hair*** [\[2012\] FWA 8300](#) (Sams DP, 9 October 2012).

The employer accused the employee of witnessing another employee stealing clients for her own personal business and of supplying client details to that other employee.

It was found the employee was denied procedural fairness because the employer failed to properly investigate the matter and give the employee an opportunity to respond to the allegations. The Commission found that there was no valid reason for the dismissal.

Case example: **NOT a valid reason due to conduct – Fighting/assault**

***Dewson v Boom Logistics Ltd*** [\[2012\] FWA 9027](#) (Cambridge C, 24 October 2012).

The employee was dismissed for serious misconduct involving physical assault upon another employee.

It was noted that the employer in this case did not satisfy 'even a basic level of proof' that the employee committed the assaults. It was held that there was no valid reason for the dismissal.

Case example: **NOT a valid reason due to conduct – Shortcomings in reporting an injured patient**

***Lengkong v Bupa Care Services Pty Ltd t/a Bupa Morphettville*** [\[2012\] FWA 3737](#) (O'Callaghan SDP, 1 May 2012).

The employee was dismissed for serious misconduct after a complaint was made about an injury suffered by an elderly resident under the employee's care.

It was found that, even though the employee may not have properly investigated or reported the incident, this was an oversight and did not negatively affect the resident's welfare or compromise the employer's position. It was held that there was no valid reason for the termination.

Case example: **NOT a valid reason due to conduct – Allegations of misappropriation and fraud**

***McKerrow v Sarina Leagues Club incorporated T/A Sarina Leagues Club*** [\[2012\] FWA 1251](#) (Asbury C, 21 February 2012).

The employee was dismissed for misappropriation of club funds and fraud. The employer alleged that she made payments out of the employer's funds to a different organisation and attempted to hide the transaction when the other organisation returned the money.

It was found that the employee was guilty of an error of judgment in paying the amount to the other organisation, however it was done for a purpose consistent with the objects of the employer and the employee held a reasonable belief that the amount would be repaid. Therefore, there found to be no valid reason for dismissal.

Case example: **NOT a valid reason due to conduct – Alleged failure to follow employer's lawful and reasonable direction**

***Schreier v Austal Ships Pty Ltd*** [Print N9636](#) (AIRC, O'Connor C, 19 March 1997).

Leave to appeal refused in [Print P3975](#) (AIRC FB, Ross VP, Drake DP, Dight C, 13 August 1997).

The employee was dismissed for performance issues and failing to follow a lawful instruction. The employer had directed the employee to attend 15 hours of training outside of work hours and the employee refused to do so. It was found that this did not amount to a valid reason for dismissal.

Case example: **NOT a valid reason due to conduct – Theft of alcohol**

***Black and Santoro v Ansett Australia Limited*** [Print S3905](#) (AIRC, Drake SDP, 20 March 2000).

The employees were dismissed for serious misconduct arising from the theft of beverages. It was considered that, where the alleged commission of a crime is relied upon as a reason for dismissal, the standard of proof requires more than 'mere conjecture, guesswork or surmise'. On the evidence that existed at the time of the dismissal, it found that there was no valid reason for the terminations.

Case example: **NOT a valid reason due to conduct – Employer used illegally obtained evidence to support allegation of theft**

***Walker v Mittagong Sands Pty Limited T/A Cowra Quartz*** [\[2010\] FWA 9440](#) (Thatcher C, 8 December 2010).

The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee's vehicle without the employee being present. It was held that this evidence could not be used to prove the misconduct and therefore there was no valid reason for the dismissal.

The Commission found that the utility and container were clearly the personal property of the employee. By reaching over to touch the container the employer technically committed an act of trespass. By opening the bottle and removing some oil he committed an act of larceny (stealing). Simply put, he did not have the authority to search the employee's property and take the oil, and his actions were unlawful. The evidence obtained in consequence of that unlawful act includes the custody of the purported sample and the analysis thereof by the analytical laboratory.

Case example: **NOT a valid reason due to conduct – Refusal to follow company policy**

***Lee v Superior Wood Pty Ltd*** [\[2019\] FWC FB 2946](#) (Sams DP, Gostencnik DP, McKinnon C, 1 May 2019).

The applicant was employed as a casual general hand. A new company policy introduced fingerprint scanners to record work site attendance. The employees were advised to register their finger prints to record site attendance.

The applicant submitted that biometric data is sensitive personal information under the *Privacy Act 1998* (Cth) and the employer was not entitled to require that information. The employer addressed the applicant's concern by providing a document from the supplier explaining the nature of the data collected. The employer issued the applicant with a verbal warning and written warnings due to his non-compliance with the new company policy. The applicant was subsequently dismissed because of his refusal to use the biometric fingerprint scanner.

The Full Bench found that the applicant was unfairly dismissed and held that the direction to comply with company policy was unlawful (because it was in breach of the Privacy Act), and that the applicant was entitled to refuse to follow the direction.



Case example: **NOT a valid reason due to conduct – Loss of trust and confidence**

***Mammarella v Department of Parliamentary Services*** [2019] FWC 6340 (Harper-Greenwell C, 11 September 2019).

The applicant was employed by the Victorian Department of Parliamentary Services as an Electoral Officer. The applicant had management and control of the assets within the electoral office, and his role was to represent the Member of the Victorian Legislative Council for Western Metropolitan Melbourne, Mr Eideh, in the wider community.

In September 2017 the Independent Broad-based Anti-corruption Commission (IBAC) commenced an investigation into allegations of fraudulent work practices in the electorate office where the applicant worked. An audit of the electorate office was conducted by the Department of Parliamentary Services in November 2018. In December 2018 the applicant was charged with criminal offences in relation to the IBAC investigation. Following the audit the applicant was advised that there was a loss of trust and confidence in his ability to perform his role and he was subsequently dismissed.

Giving consideration to *Byrne* and *Crozier*, the Commission accepted that the applicant was a person of interest in the IBAC investigation, involving allegations of fraudulent and corrupt behaviour. However, whilst the Commission accepted that Mr Eideh may have lost trust and confidence in the applicant, it is not sufficient to find that there is a valid reason for dismissal simply because someone has lost trust and confidence in an employee's ability to perform their role. The Commission held that there needs to be sufficient evidence and reasoning to support this loss of trust and confidence. The Commission noted that as at the time of the submission there had been no findings made in relation to the criminal charges against the applicant. The Commission found that there was no valid reason for the applicant's dismissal without being able to establish adequate reasons and found that the applicant's dismissal was unjust and unfair.

## Notification of reason for dismissal

 See Fair Work Act s.387(b)

Notification of 'the reason' relates to the 'valid reason' for dismissal.<sup>358</sup>

Notification of the valid reason to terminate must be given to the employee:

- **before** the decision to terminate is made<sup>359</sup>
- in explicit terms,<sup>360</sup> and
- in plain and clear terms.<sup>361</sup>

In *Crozier v Palazzo Corporation Pty Ltd*,<sup>362</sup> the Full Bench established the following:

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<sup>358</sup> *Chubb Security Australia Pty Ltd v Thomas* [Print S2679](#) (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

<sup>359</sup> *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* [Print S5897](#) (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

<sup>360</sup> *Previsic v Australian Quarantine Inspection Services* [Print Q3730](#) (AIRC, Holmes C, 6 October 1998).

<sup>361</sup> *ibid.*

<sup>362</sup> *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* [Print S5897](#) (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 73, [(2000) 98 IR 137].

**[73]** *As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.*

Although considering provisions in previous legislation, the principle in *Crozier v Palazzo Corporation Pty Ltd* remains unchanged and continues to apply.<sup>363</sup>

**Case example: Employees notified of the reason – Employee failed to respond to employer’s requests for information about a potential conflict of interest**

***Villani v Holcim (Australia) Pty Ltd*** [2011] FWA 141 (Gooley C, 12 January 2011).

Permission to appeal refused by Full Bench in [PR508383](#) (Kaufman SDP, Sams DP, Gay C, 12 April 2011) and by the Full Court of the Federal Court in [\[2011\] FCAFC 155](#) (2 December 2011).

The employer sent letters to the employee’s lawyers requesting the provision of further information about a potential conflict of interest. The employee failed to provide any information or respond to the requests.

It was held that the employee was properly notified of the reason for termination even though the employee was not advised that a failure to respond may result in the termination of his employment. The termination was found not to be harsh, unjust or unreasonable.

**Case example: Employees notified of the reason – Employee alleged meetings to discuss misconduct were too short**

***Ehssan v Infoxchange Australia*** [2011] FWA 5491 (Gay C, 25 August 2011).

Permission to appeal refused in [\[2011\] FWA 6747](#) (O’Callaghan, Ives DP, Blair C, 29 September 2011).

The employee argued that the meetings held to discuss the alleged misconduct were too short and did not give him a proper opportunity to respond.

It was held that the employee was notified of the reason for dismissal and was afforded an opportunity to respond to the allegations. The application was dismissed.

<sup>363</sup> See for example *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [2012] FWA 10626 (Cargill C, 20 December 2012).

Case example: **Employees NOT notified of the reason – Casual employee – Removed from roster**

***Leigh v Nestle Australia Ltd*** [\[2010\] FWA 4744](#) (Drake SDP, 25 June 2010).

Permission to appeal refused in *Employee W v Employer N* [\[2010\] FWA 7802](#) (Watson VP, O’Callaghan SDP, Spencer C, 22 October 2010), [(2010) 202 IR 12].

The employee was accused of misconduct including the harassment of colleagues. He was also convicted of several criminal offences.

Even though there was a valid reason for dismissal based on the criminal convictions, the employee was not notified of the reason for the termination of his employment nor was he given an opportunity to respond. Compensation was awarded.

Case example: **Employees NOT notified of the reason – Employee thwarted employer’s attempts to contact him**

***Sabeto v Waterloo Car Centre Pty Ltd*** [PR930816](#) (AIRCFCB, Acton SDP, O’Callaghan SDP, Foggo C, 20 May 2003), [(2003) 123 IR 222].

An employee, when questioned about unaccounted for cash, left work and was unable to be contacted. On appeal the Full Bench found that although there was a valid reason for dismissal based on capacity, the employer failed to notify the employee of that reason. The Full Bench held that the dismissal was harsh, unjust or unreasonable and compensation was ordered.

Case example: **Employees NOT notified of the reason – Reasons for selection for redundancy were given after the decision was made**

***Clarke v Formfile Infosoft Pty Ltd*** [PR931288](#) (AIRCFCB, Watson SDP, Lacy SDP, O’Connor C, 13 May 2003), [(2003) 122 IR 348].

The employees were made redundant due to a downturn in business. The employees were notified that they were being dismissed due to redundancy but were not notified of the reason why they were selected for redundancy. It was held that the employees were not properly notified of the reason for their dismissals before the dismissals took effect.

Case example: **Employees NOT notified of the reason – Employee locked out of work and notified of termination by email**

***Stewart v Sea Change Conveyancing Pty Ltd*** [\[2012\] FWA 1896](#) (Gooley C, 19 March 2012).

The employee was dismissed after she made derogatory comments about her employer to a colleague. It was held that the dismissal was harsh, unjust and unreasonable because the employee was not notified of the reason for her dismissal before the decision to dismiss was made.

Case example: **Employees NOT notified of the reason – Decision to dismiss made before reason given or opportunity to respond afforded**

*De Silva v ExxonMobil Chemical Australia Pty Ltd* [PR910623](#) (AIRC, Lacy SDP, 9 January 2000).

The employee was dismissed for poor performance. The employer provided the reason for dismissal to the employee after the decision to dismiss had already been made.

It was concluded that, while there were procedural deficiencies, they were not sufficient to render the dismissal harsh, unjust or unreasonable.


Case example: **Employees NOT notified of the reason – Dismissed by email**

*Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [\[2012\] FWA 10626](#) (Cargill C, 20 December 2012).

The employee was dismissed for being absent from work on personal leave after her medical certificate had expired. The employer dismissed the employee by email without attempting to contact the employee first.

It was found that the employee was not notified of the reason for her dismissal. It was held that it was not satisfactory that the employer gave the employee an opportunity to discuss the dismissal after it had taken effect.

## Opportunity to respond

 See Fair Work Act s.387(c)

An employee must be notified of the reason for termination and must also be given an opportunity to respond to that reason **before** the decision to terminate is made.<sup>364</sup>

This process does not require any formality and is to be applied in a common sense way to ensure the employee has been treated fairly.<sup>365</sup>

‘Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of this section.’<sup>366</sup>

For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal.<sup>367</sup>

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<sup>364</sup> *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* [Print S5897](#) (AIRC, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 75, [(2000) 98 IR 137].

<sup>365</sup> *Royal Melbourne Institute of Technology v Asher* [\[2010\] FWAFB 1200](#) (Watson VP, Acton SDP, Williams C, 3 March 2010) at para. 26, [(2010) 194 IR 1]; citing *Gibson v Bosmac Pty Ltd* [\[1995\] IRCA 222](#) (5 May 1995), [(1995) 60 IR 1, at p. 7 (Wilcox CJ)].

<sup>366</sup> *ibid.*, 14–15.

<sup>367</sup> *Chubb Security Australia Pty Ltd v Thomas* [Print S2679](#) (AIRC, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

In *Wadey v YMCA Canberra*<sup>368</sup> Moore J stated the following principle about the right of an employee to appropriately defend allegations made by the employer:

*[T]he opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.*<sup>369</sup>



#### Related information

- Notification of reason for dismissal

#### Case example: **Opportunity to respond was provided – Employee not provided with statements or identities of witnesses**

***Melouney v ACM Group Ltd*** [2012] FWA 9386 (Bull C, 12 November 2012).

The employer summarily dismissed the employee with allegations regarding his conduct in denigrating his employer and encouraging other staff to leave the employer and work with a competitor. The employer did not give the employee an opportunity to review witness statements which supported allegations of misconduct.

The Commission found that the employee was given an opportunity to respond and that he denied the offending conduct had occurred. The Commission also considered the extent to which the failure of the employer to provide the employee with the identity of the source of the allegations was a denial of natural justice and unfair. It was held that the dismissal was not harsh, unjust or unreasonable.

#### Case example: **Opportunity to respond was provided – Employee claimed new allegations were made with no opportunity to respond**

***Williams v Dtarawarra Pty Ltd t/a Dtarawarra Aboriginal Resource Unit*** [2011] FWA 5091 (Sams DP, 30 August 2011).

The employee was dismissed for misconduct and breach of company policy. The employee claimed that new allegations were made against her after she had been dismissed and as such she was denied procedural fairness.

It was found that the employee was notified of all the reasons for her dismissal and the employer gave her sufficient opportunities to respond to the allegations. It was held that the dismissal was not harsh, unjust or unreasonable.

<sup>368</sup> *Wadey v YMCA Canberra* [1996] IRCA 568; cited in *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 (Thatcher C, 5 November 2010) at para. 85, [(2010) 204 IR 399].

<sup>369</sup> *ibid.*

Case example: **Opportunity to respond was provided – Employee’s failure to co-operate**

*Dissanayake v Busways Blacktown Pty Ltd* [2011] FWA 3549 (Sams DP, 23 June 2011).

Permission to appeal refused in [2011] FWAFB 6487 (Acton SDP, McCarthy DP, Spencer C, 22 September 2011).

The employee was summarily dismissed for serious and wilful misconduct. The employee failed to cooperate in the disciplinary interviews but argued that he was not afforded an opportunity to defend the allegations made against him.

It was held that the employee’s failure to cooperate and his denial of wrongdoing was no basis for finding that the employer had denied him opportunity to respond. The dismissal was held not to be harsh, unjust or unreasonable. Further, it was held that the seriousness of the employee’s misconduct outweighed any minor procedural deficiencies.

Case example: **NO opportunity to respond was provided**

*Slavin v Horizon Holdings Pty Ltd* [2012] FWA 5588 (Lee C, 2 August 2012).

The employee was dismissed for refusing to return a company car and being aggressive when asked to do so. During the meeting in which the employer dismissed the employee, the employer read out a script which concluded with the termination.

It was found that although there was a valid reason for dismissal based on the failure to comply with a lawful and reasonable direction, the termination was harsh. It was held that the termination was unfair because the employer had decided to terminate the employee prior to the disciplinary meeting and notification of dismissal.

Case example: **NO opportunity to respond was provided – Termination letter read out in disciplinary meeting**

*Ryan v Logan & Co Pty Ltd* [2011] FWA 161 (Cargill C, 11 January 2011).

The employer dismissed the employee for poor performance and alleged misconduct by reading out a termination letter in a meeting. It was found that the employee was given no opportunity to respond as the outcome of the meeting had been pre-determined. The termination was held to be harsh.

Case example: **NO opportunity to respond was provided – Not notified of particulars of the allegations**

***Barclay v Nylex Corporation Pty Ltd*** [PR932226](#) (AIRC, Ross VP, 30 May 2003), [(2003) 126 IR 294].

The employee was dismissed for sleeping at work during the night shift and for engaging in deceptive conduct to hide this behaviour from the employer. However, the employer did not notify the employee of the particulars of why he had been dismissed and he was given a limited opportunity to respond.

The employee's 25 years of service and the age of the employee, as well as the procedural deficiencies of the dismissal process was taken into account. It was held that the termination was harsh.

Case example: **NO opportunity to respond was provided – Limited English**

***Dimovski v Howe & Co Pty Ltd*** [PR924186](#) (AIRC, Ives DP, 24 December 2002), [(2002) 127 IR 390].

The employee was dismissed for removing company property without proper authorisation. The employee argued that it was unintentional.

It was held that the employer did not give the employee an opportunity to directly address the comments of his accusers but instead relied on second hand allegations. It was also found that the employer did not properly accommodate the employee's limited understanding of the English language. It was held that the dismissal was unfair.

Case example: **NO opportunity to respond was provided – Argument leading to constructive dismissal**

***Claypole v Australian Native Landscapes*** [\[2007\] AIRC 682](#) (Hamberger SDP, 6 September 2007).

The employee was dismissed during a violent argument with his employer which involved the employer chasing the employee in a car and leaving the employee on the side of the road without a vehicle to drive home in. The employer argued that the employee had abandoned his employment and later argued that he had breached company policy.

It was found that there was no valid reason for the dismissal and the applicant was not notified in a proper manner, nor given an opportunity to respond.

Case example: **NO opportunity to respond was provided – Applicant not notified of reason until hearing**

***Suzara v St Vincent’s Private Hospitals Ltd T/A St Vincent’s Private Hospital Melbourne*** [2019] FWC 87 (Cribb C, 9 January 2019).

The applicant was employed as a Theatre Technician. He was dismissed for yelling at and harassing a colleague, and for not following instructions from a surgeon which caused theatre to be delayed by one hour. The respondent also relied on a third reason for the dismissal at the hearing, which was that the applicant was dishonest. The applicant had travelled overseas while on personal leave with a medical certificate. The applicant also had a history of poor performance and conduct. The respondent had issued three warnings to the applicant and counselled him on his conduct on 15 occasions in two years.

The applicant was notified of the first two reasons for dismissal before the termination took effect, however he was not notified of the third reason (dishonesty) until the hearing. A fourth reason (relating to his conduct and work performance) was notified in the letter of dismissal after termination. The applicant was not given an opportunity to respond to the dishonesty reasons prior to the dismissal.

The Commission found that the applicant’s conduct towards his colleague and his failure to follow the surgeon’s instructions, together with his dishonesty amounted to serious and unacceptable behaviour. The Commission found that the formal warnings concerned the applicant’s unacceptable conduct. The Commission found that there was a valid reason for dismissal even with the procedural defects of the applicant not having been notified of all of the reasons for his dismissal. The Commission took into account the applicant’s disciplinary history and found that the dismissal was not unfair. The application was dismissed.

## Unreasonable refusal of a support person

 See Fair Work Act s.387(d)

There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

*This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.*<sup>370</sup>

A support person does not act as an advocate – a support person does not present or defend a case on behalf of the employee.<sup>371</sup>

<sup>370</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 1542.

<sup>371</sup> *Victorian Association for the Teaching of English Inc v de Laps* [2014] FWC 613 (Acton SDP, Hamilton DP, Blair C, 19 February 2014) at para. 52, [(2014) 241 IR 1].



Case example: **Unreasonable refusal of support person – Employer denied employee choice of support person**

***Dewson v Boom Logistics Ltd*** [2012] FWA 9027 (Cambridge C, 24 October 2012); [2013] FWC 760 (Cambridge C, 5 February 2013).

The employee was dismissed for serious misconduct including allegations of assault and bullying. The employee requested that a particular union official be present at the disciplinary meeting as a support person. The employer refused the request and nominated a different union delegate to act as a support person.

It was held that the employer unreasonably refused to allow the employee a support person of his choice and, in light of other procedural deficiencies, determined that the dismissal was unfair.

Case example: **Unreasonable refusal of support person – Employer refused to reschedule meeting so union representative could attend**

***Laker v Bendigo and Adelaide Bank Limited*** [2010] FWA 5713 (Lewin C, 28 September 2010).

The employee was dismissed for poor performance. The employee requested that the disciplinary meeting be rescheduled to allow for the attendance of a union representative. The employer refused to reschedule the meeting.

It was held that the request for adjournment was not an unreasonable burden on the employer. It was found that the dismissal was unfair because the conduct of the termination meeting was unreasonable.

Case example: **Unreasonable refusal of support person – Request for union representative denied – Employer offered choice of someone from HR**

***Lankam v Federal Express (Australia) Pty Ltd T/A Fed Ex*** [2011] FWA 6230 (Deegan C, 9 September 2011).

The employee was dismissed for alleged misconduct and breach of company policy relating to delivery parcels. The employee requested that a union representative be present at the first disciplinary meeting, however the employer only allowed for a member from human resources to be present. Further disciplinary meetings were held both with and without a union representative present.

Notwithstanding the finding that the dismissal was unjust because there was no valid reason for dismissal, it was also held that the dismissal was unreasonable because the employer did not adequately provide for the employee's English language difficulties in the disciplinary process.

Case example: **NO unreasonable refusal of support person – Employer refused to reschedule meeting on short notice**

*Jalea v Sunstate Airlines (Queensland) Pty Ltd T/A Qantas Link* [2012] FWA 1360 (Bissett C, 5 March 2012).

Permission to appeal refused in [2012] FWA 7267 (Drake SDP, McCarthy DP and Riordan C, 11 September 2012).

The employee was dismissed for the use of inappropriate language and physical force towards her manager. The employer scheduled two meetings to discuss the allegations with the employee and her representative. The employee's representative requested that the meetings be rescheduled but the employer refused these requests.

It was found that the employer provided adequate notice of each meeting and in circumstances where the employee's requests were received at short notice, there was no basis for a finding that the employer unreasonably refused to allow a support person to assist the employee.

Case example: **NO unreasonable refusal of support person – Employee alleged that a support person was denied**

*Mabior v Baiada Group Pty Ltd T/A Adelaide Poultry* [2011] FWA 5778 (Steel C, 25 August 2011).

The employee was dismissed for misconduct relating to alleged racist remarks about a colleague. Whether the employee was given an opportunity to have a support person was in issue.

It was concluded that the employee was an unreliable witness and preferred the evidence of the employer. It was held that there was no unreasonable refusal of a support person.

Case example: **NO unreasonable refusal of support person – Union delegate attended at employer's request**

*Dissanayake v Busways Blacktown Pty Ltd* [2011] FWA 3549 (Sams DP, 23 June 2011).

Permission to appeal refused in [2011] FWA 6487 (Acton SDP, McCarthy DP, Spencer C, 22 September 2011).

The employee was dismissed for misconduct relating to reckless driving of a school bus. The employee did not request a support person but argued that he was denied procedural fairness because he was not offered one.

It was found that the employer was not in breach of s.387(d) because there was no request by the employee for a support person, it followed that there was not an unreasonable refusal of such a request.

Case example: **NO unreasonable refusal of support person – Employee notified that she could have support person**

***Biggs-Venz v Ozcare*** [2010] FWA 4797 (Richards SDP, 8 July 2010).

The employee was dismissed for poor performance. There was no evidence in the proceedings that the employee sought or requested a support person. Accordingly it was found that there was no unreasonable refusal by the employer to allow a support person.

Case example: **NO unreasonable refusal of support person – Employee’s choice of representative unavailable but no request for adjournment**


***Mydlowski v AAA Cleaning, Security Maintenance Pty Ltd*** [2010] FWA 1810 (Richards SDP, 1 March 2010).

The employee requested that a particular union representative be present at the meeting however the representative was unavailable. The employer did not reschedule the meeting; however the employee did not seek that the meeting be rescheduled.

It was discussed that a refusal to adjourn a disciplinary meeting may be relevant to issue of procedural fairness but is not relevant to the requirements of s.387(d). It was also noted that whether a support person ‘assists’ the employee at a disciplinary meeting is relevant when considering s.387(d).

For the purposes of s.387(d), it was found that the support person sufficiently assisted the employee and that there was no unreasonable refusal by the employer.

## Warnings – Unsatisfactory performance

 See Fair Work Act s.387(e)

### When are warnings relevant?

Warnings become relevant when an employee is dismissed for unsatisfactory performance.

Unsatisfactory performance is more likely to relate to the employee’s capacity to do the job than their conduct.<sup>372</sup>

Performance includes ‘factors such as diligence, quality, care taken and so on’.<sup>373</sup>

The Commission must take into account whether there was a period of time between:

- an employee being warned about unsatisfactory performance, and

<sup>372</sup> *Annetta v Ansett Australia Ltd* [Print S6824](#) (AIRCFCB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 16, [(2000) 98 IR 233]. See also *Davis v Collinsville Coal Operations* [PR953370](#) (AIRCFCB, Harrison SDP, McCarthy SDP, Redmond C, 19 November 2004) at para. 49; *Fischer v Telstra Corporation Limited* [Print R2558](#) (AIRCFCB, Ross VP, Duncan DP, Redmond C, 1 March 1999) at para. 29.

<sup>373</sup> *Annetta v Ansett Australia Ltd* [Print S6824](#) (AIRCFCB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 16, [(2000) 98 IR 233].

- a subsequent dismissal.<sup>374</sup>

This period of time gives the employee the opportunity to understand their employment is at risk and to try and improve their performance.<sup>375</sup>



There is no legislative requirement specifying that an employee must be given a certain number of written warnings before being dismissed for poor performance. For example, there is no rule that an employee must receive three written warnings.

However, industrial tribunals over the years have consistently upheld unfair dismissal claims where an employee has not had an opportunity to respond to performance concerns or to improve their performance over a reasonable period of time.

### How should a warning be given?

Warnings must identify the relevant aspect of the employee's performance which is of concern to the employer.<sup>376</sup> A mere exhortation to improve is not sufficient.<sup>377</sup>

The warning must make it clear that the employee's employment is at risk unless performance improves.<sup>378</sup>



An **exhortation** is something said or written in order to strongly encourage or persuade a person to do something.

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<sup>374</sup> *Johnston v Woodpile Investments T/A Hog's Breath Café - Mindarie* [2012] FWA 2 (Williams C, 6 January 2012) at para. 58.

<sup>375</sup> *ibid.*

<sup>376</sup> *Fastidia Pty Ltd v Goodwin* [Print S9280](#) (AIRC FB, Ross VP, Williams SDP, Blair C, 21 August 2000) at para. 43. See also *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* [Print S5897](#) (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 79–80, [(2000) 98 IR 137].

<sup>377</sup> *Fastidia Pty Ltd v Goodwin* [Print S9280](#) (AIRC FB, Ross VP, Williams SDP, Blair C, 21 August 2000) at para. 44. See also *Nicolson v Heaven & Earth Gallery Pty Ltd* [1994] IRCA 43 (20 September 1994), [(1994) 57 IR 50, at p. 60 (Wilcox CJ)].

<sup>378</sup> *Fastidia Pty Ltd v Goodwin* [Print S9280](#) (AIRC FB, Ross VP, Williams SDP, Blair C, 21 August 2000) at para. 45; see also *Sookanathan v Victoria Police* [2019] FWC 8309 (Gregory C, 13 December 2019) at para. 136.

Case example: **Employee was warned – Employer followed a fair performance management process**

***A v The Commonwealth of Australia, represented by Centrelink*** [2011] FWA 3532 (O’Callaghan SDP, 6 June 2011).

Permission to appeal was refused in [2011] FWAFB 6612 (Watson VP, Ives DP and Bissett C, 11 October 2011).

The employee was dismissed for failing to achieve the goals in her performance improvement plan. The employee had received several warnings, both formally and informally.

It was found that, although the employee had a psychiatric condition, the employer was not being unfair in applying normal performance expectations. It was held that the dismissal was not harsh, unjust or unreasonable.

Case example: **Employee was warned**

***Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski*** [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

The employee was dismissed after a long history of misconduct and performance-related issues. The employee was involved in multiple counselling sessions and received both written and verbal warnings over a two year period. There was no improvement demonstrated by the employee.

The Commission found that the employee was warned about his unsatisfactory performance before the dismissal. He received written warnings in relation to the loss of product/faulty product, not wearing a proper uniform, failure to check production orders, not running machines at proper speed, absences from his work station during working hours without reason and failure to wear Personal Protection Equipment. Multiple written warnings were given in relation to some of those issues and the warnings often dealt with more than one issue. Attendance issues and absences from the factory, without authority, were subject to written and informal counselling on multiple occasions and one written warning in respect of absences from the factory. It was held that there was a valid reason for the dismissal and sufficient warnings were given. The application was dismissed.

Case example: **Employee was NOT warned – No warning regarding poor performance given**

***Martin v Donut King Chirnside Park T/A Hersing Pty Ltd*** [2012] FWA 2905 (Smith DP, 19 April 2012).

The employee was employed as a casual employee in a small business for some 5 years. She was terminated for alleged poor performance but received no warnings.

It was found that an employee must be warned that her poor performance may result in termination. Such a warning was not given in this case. The termination was found to be harsh, unjust and unreasonable.

Case example: **Employee was NOT warned – Warnings for poor performance not consistent**

***Andersen v Acquista Investments P/L and Veolia Environmental Services (Australia) Pty Ltd T/A Integrated Waste Services*** [2011] FWA 4560 (Hampton C, 28 July 2011).

The employee was dismissed for late attendance, as well as other matters such as the failure to obey a no smoking directive. The Commissioner found that there was evidence that management and other employees also smoked in the office in contravention of the directive. The Commissioner similarly found that the warnings in relation to late attendance were a valid concern but inconsistently applied.

The Commissioner held that the inconsistency in the employer's attitude towards late attendance and smoking undermined the directives and warnings given. It was held that there was no valid reason for dismissal and that the termination was unfair.

Case example: **Employee was NOT warned – No formal warnings provided**

***Dean v Sybecca Pty Ltd t/as Sleepy Lagoon Hotel*** [2010] FWA 8462 (Richards SDP, 4 November 2010).

The employee was dismissed for performance and conduct issues. It was found that the employee was never expressly warned that his employment was in jeopardy.

It was held that, although the employer was a small business and did not have human resources expertise, the employer was required to openly communicate with the employee about their concerns and to provide an opportunity for improvement. It was held that the termination was harsh, unjust or unreasonable.

Case example: **Employee was NOT warned – Pre-prepared scripts and written warnings suggested pre-determined outcomes**

***Joshi v Panasonic Australia Pty Ltd*** [2010] FWA 2946 (Cambridge C, 15 April 2010).

The employee was dismissed for poor performance. It was found that the employer had pre-prepared a script regarding the warnings to be given before disciplinary meetings took place. This suggested that the meetings had pre-determined outcomes.

It was concluded that the meetings were simply a 'mechanical process' that did not genuinely afford the employee an opportunity to respond to the warnings or affect the outcome of the meeting. It was found that there was no valid reason for dismissal and held that the termination was unfair.


Case example: **Employee was NOT warned – Non-compliance with enterprise agreement**

***Mawkes v State of Victoria (Department of Human Services)*** [\[2006\] FCA 1746](#) (15 December 2006), [(2006) 161 IR 34].

The employee was dismissed for misconduct. The employee was issued a final warning after the employer conducted an investigation into the misconduct.

The Federal Court found that the employer was obliged, under the applicable certified agreement, to comply with a number of procedural steps before issuing a warning. The Court held that the warning was invalid as the correct process had not been followed.

## Size of employer’s enterprise and human resources specialists

 See Fair Work Act ss.387(f) and 387(g)



Sections 387(f) and (g) look at factors that might have impacted the ability of the employer to follow a fair process in effecting a dismissal. Whether the employer was a small business or a larger employer will be relevant.

For example, a small business may not have the same resources on hand as a larger business which may employ managers or specialist human resources staff.

While there is acknowledgement that small businesses are genuinely different in nature both organisationally and operationally, the procedures followed in dismissing a person cannot be ‘devoid of any fairness’.<sup>379</sup>

The Commission has observed that ‘no employer should ever consider’ that ss.387(f) and (g) could ‘be used as a shield behind which to hide when they had engaged in conduct which was improper, belligerent and bullying’.<sup>380</sup> The Commission has commented that ‘[c]ommon sense courtesies of conduct ought to exist in any workplace, whatever the size’.<sup>381</sup>

Case example: **Dismissal was unfair – Small company with no human resources expertise**

***Pergaminos v Thian Pty Ltd t/as Glenhuntly Terrace*** [PR920123](#) (AIRC, Lacy SDP, 16 July 2002).

The employee was employed as a cook in a special needs house. Due to a downturn in business, there was no money to pay the employee’s entitlements. The employer was a small business. It was found that the size of the business affected the procedures followed in dismissing the employee. It was found that the termination was harsh and unjust and ordered 4 weeks’ compensation.

<sup>379</sup> *Williams v The Chuang Family Trust t/a Top Hair Design* [\[2012\] FWA 9517](#) (Cloghan C, 12 November 2012) at para. 40.

<sup>380</sup> *Sykes v Heatly Pty Ltd t/a Heatly Sports* [PR914149](#) (AIRC, Grainger C, 6 February 2002) at para. 20.

<sup>381</sup> *ibid.*

Case example: **Dismissal was NOT unfair – Large organisation with dedicated human resources specialists acted satisfactorily**

***Oakley v Department of Employment and Workplace Relations*** [PR952429](#) (AIRC, Raffaelli C, 15 October 2004).

Permission to appeal granted and appeal upheld in [PR954267](#) (AIRC FB, Acton SDP, Duncan SDP, Grainger C, 15 December 2004), [(2004) 137 IR 321].

The size of the employer had a significant and positive impact on the procedures it followed leading to dismissal. The absence of dedicated human resources specialists or expertise was not relevant as the employer had dedicated human resources specialists and expertise. The employee's application was dismissed.

Case example: **Dismissal was NOT unfair – Small business with lack of human resources expertise contributed to deficiencies in dismissal process**

***Hall v Aristoc Offset*** [PR916208](#) (AIRC, Hamilton DP, 5 April 2002).

The employer was a small business owner. Due to a downturn in business the employer determined it would need to make redundancies.

It was found that there were deficiencies in relation to consultation and notification of the dismissal. The deficiencies were due to the size of the business and the lack of human resources expertise. However, the failure by the employer to correctly follow procedures would not have changed the outcome, and the employee suffered no hardship due to the dismissal. As such, the termination was not harsh, unjust or unreasonable and the application was dismissed.

## Other relevant matters

 See Fair Work Act s.387(h)

### Any other matters

Any other matters must be relevant in the context of the circumstances of the particular case.<sup>382</sup>

Not every submission that is made has to be dealt with, but those which are centrally relevant to the consideration of whether a dismissal was unfair should be given adequate consideration.<sup>383</sup>

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<sup>382</sup> *Kehagias v Unilever Australia Limited* [Print Q0498](#) (AIRC FB, Watson SDP, Williams SDP, Larkin C, 29 April 1998).

<sup>383</sup> *Sipple v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Warkworth Operations* [\[2015\] FWCFB 2586](#) (Catanzariti VP, Harrison SDP, Bull C, 24 April 2015) at para. 18; citing *Soliman v University of Technology, Sydney* [\[2012\] FCAFC 146](#) (24 October 2012) at paras 55–57, [(2012) 207 FCR 277]; *Linfox Australia Pty Ltd v Fair Work Commission* [\[2013\] FCAFC 157](#) (13 December 2013) at para. 47; *Fox v Australian Industrial Relations Commission* [\[2007\] FCAFC 150](#) (27 September 2007) at paras 37, 40.



## Differential treatment compared to that given to other employees

Differential treatment compared to treatment of other employees may be taken into account.<sup>384</sup>

The Commission will approach claims of differential treatment in other cases with caution as a basis for supporting a finding that a termination was harsh, unjust or unreasonable.<sup>385</sup>

The Commission must be satisfied that any examples of differential treatment where no termination occurred are properly comparable, comparing ‘apples with apples’.<sup>386</sup>

There must be sufficient evidence to support the examples provided to ensure a proper comparison can be made.<sup>387</sup>

## The impact of the dismissal on the employee’s personal or economic situation

The impact of the dismissal on the employee’s personal or economic situation may be taken into account.<sup>388</sup>

The ability to find alternative work, particularly in a small town where the former employer is the only employer (or employs the majority of the population) may result in prolonged period of unemployment or under-employment for the employee.<sup>389</sup>

## Long, satisfactory work performance or history

The employee’s work performance or history is a factor that can be taken into account.<sup>390</sup>

A long unblemished record will weigh in the employee’s favour and may be relied on as a factor for the Commission to consider in determining if the termination of employment was harsh, unjust or unreasonable.<sup>391</sup>

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<sup>384</sup> *Sexton v Pacific National (ACT) Pty Ltd* [PR931440](#) (AIRC, Lawler VP, 14 May 2003) at para. 33. See also *Davis v Collinsville Coal Operations* [PR953370](#) (AIRC, Harrison SDP, McCarthy DP, Redmond C, 19 November 2004) at para. 31; *National Jet Systems Pty Ltd v Mollinger* [Print R3130](#) (AIRC, Giudice J, Polites SDP, Gregor C, 18 March 1999) at para. 25; *SERCO Gas Services Pty Ltd v Alkemade and others* [Print R6090](#) (AIRC, Ross VP, Polites SDP, Hingley C, 21 June 1999) at para. 6; *Department of Employment and Workplace Relations v Oakley* [PR954267](#) (AIRC, Acton SDP, Duncan SDP, Grainger C, 15 December 2004) at para. 45, [(2004) 137 IR 321].

<sup>385</sup> *Sexton v Pacific National (ACT) Pty Ltd* [PR931440](#) (AIRC, Lawler VP, 14 May 2003) at para. 36.

<sup>386</sup> *ibid.*

<sup>387</sup> *ibid.*

<sup>388</sup> *Ricegrowers Co-operative Limited v Schliebs* [PR908351](#) (AIRC, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001) at para. 26; citing *Byrne v Australian Airlines Ltd* [\[1995\] HCA 24](#) (11 October 1995), [(1995) 185 CLR 410]; *Gasz v Mobil Refinery Australia Pty Ltd* [PR960826](#) (AIRC, Watson SDP, Hamilton DP, Lewin C, 1 August 2005) at para. 17; *Ashley v Statewide Autistic Services Inc* [PR959835](#) (AIRC, Ross VP, O’Callaghan SDP, Cribb C, 7 July 2005) at para. 110.

<sup>389</sup> *Ricegrowers Co-operative Limited v Schliebs* [PR908351](#) (AIRC, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001) at para. 27.

<sup>390</sup> *Streeter v Telstra Corporation Limited* [\[2008\] AIRCFB 15](#) (Acton SDP, Cartwright SDP, Larkin C, 24 January 2008) at para. 25, [(2008) 170 IR 1]; *Cunningham v Australian Bureau of Statistics* [PR963720](#) (AIRC, Giudice J, Watson SDP, Simmonds C, 10 October 2005), [(2005) 148 IR 20]; *Gasz v Mobil Refinery Australia Pty Ltd* [PR960826](#) (AIRC, Watson SDP, Hamilton DP, Lewin C, 1 August 2005) at para. 17.

<sup>391</sup> *Streeter v Telstra Corporation Limited* [\[2008\] AIRCFB 15](#) (Acton SDP, Cartwright SDP, Larkin C, 24 January 2008) at para. 27, [(2008) 170 IR 1].

## Summary dismissal

A situation where an employee is summarily dismissed can also be a relevant factor that may be taken into account.<sup>392</sup>

Summary dismissal is the most severe form of termination of employment. By its nature, summary dismissal indicates and records some very serious wrongdoing. Summary dismissal is implemented without any notice or payment in lieu of a period of notice. A summary dismissal may also remove entitlements to certain service related payments such as accrued long service leave. Summary dismissal should be clearly distinguished from a dismissal with notice or payment for the notice period.<sup>393</sup>

In cases involving summary dismissal, the proportionality of the dismissal may be considered under s.387(h).<sup>394</sup> In other words, was the penalty imposed a disproportionate response to the conduct complained of?<sup>395</sup>

## Procedural fairness

Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself.

Procedural fairness is one of the factors that the Commission will take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. Procedural fairness can take many forms, such as:

- whether an employer has followed their own procedures in dismissing an employee<sup>396</sup>
- whether the employee had an opportunity to explain their side of whatever happened,<sup>397</sup> or
- being able to seek advice or have a support person available at a meeting.

The terms ‘procedural fairness’ and ‘natural justice’ have similar meaning and can be used interchangeably.<sup>398</sup>

Procedural fairness is one aspect of the rules of natural justice.<sup>399</sup>

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<sup>392</sup> *Streeter v Telstra Corporation Limited* [2008] AIRCFB 15 (Acton SDP, Cartwright SDP, Larkin C, 24 January 2008) at para. 27, [(2008) 170 IR 1]; *Department of Employment and Workplace Relations v Oakley* PR954267 (AIRCFB, Acton SDP, Duncan SDP, Grainger c, 15 December 2004) at para. 45, [(2004) 137 IR 321]; *Sabeto v Waterloo Car Centre Pty Ltd* PR930816 (AIRC, Acton SDP, O’Callaghan SDP, Foggo C, 20 May 2003) at para. 26, [(2003) 123 IR 222].

<sup>393</sup> *Puszka v Ryan Wilks Pty Ltd T/A Ryan Wilks Proprietary Limited* [2019] FWC 1132 (Cambridge C, 7 March 2019) at para. 41.

<sup>394</sup> *Potter v WorkCover Corporation* PR948009 (Ross VP, Williams SDP, Foggo C, 15 June 2004) at para. 55, [(2004) 133 IR 458].

<sup>395</sup> *ibid.*

<sup>396</sup> See for example *Odgers v Central Queensland Services Pty Ltd* [2019] FWC 7150 (Hunt C, 15 October 2019) at paras 220–240.

<sup>397</sup> See for example *Naoum v ISS Security Pty Ltd ABN: 14 001 375 186* [2019] FWC 6421 (Cambridge C, 27 September 2019) at paras 49–52.

<sup>398</sup> *Butterworths Australian Legal Dictionary*, 1997, at p. 928.

<sup>399</sup> *McIntosh v Australian Federal Police* [2014] FWC 6662 (Acton SDP, Smith DP, Lewin C, 8 October 2014) at para 64; citing *Minister for Immigration & Multicultural Affairs v Bhardwaj* [2002] HCA 11 (14 March 2002) at para. 40 (per Gaudron and Gummow JJ).

Procedural fairness requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it.<sup>400</sup>

The rules of natural justice are flexible, requiring fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise.<sup>401</sup>

What is fair will depend on the particular statutory framework within which the decision is taken.<sup>402</sup>

Ordinarily, procedural fairness would require that an allegation be put to a person and they be given an opportunity to answer it before a decision was made.<sup>403</sup>

### Case example: Dismissal was unfair – Procedurally unfair

*Jimenez v Accent Group T/A Platypus Shoes (Australia) Pty Ltd* [2016] FWC 5141 (Cambridge C, 5 August 2016).

The employee was employed as a Store Manager. He was summarily dismissed for serious misconduct involving the employer's findings in respect to four allegations including the failure to properly record and receipt the cash provided for a sale of shoes to a friend, a breach of lay by policy and the falsification of timekeeping records.

The Commission held that only one of the employer's findings of serious misconduct could be sustained. The employer's finding in respect to the allegation regarding the applicant failing to properly record and receipt the cash provided in respect to the purchase of shoes, established a valid reason for the dismissal of the applicant. The Commission found that in the context of the retail industry, the misconduct of the applicant in respect to the mishandling of cash in respect to the sale of the shoes to a friend represented serious misconduct that would justify dismissal with notice. However, the employer had consciously permitted the applicant to come to work following the investigation in the full knowledge of the nature and extent of the misconduct for which it later summarily dismissed him. Allowing the applicant to continue work was considered inconsistent with decision to then summarily dismiss him on the basis of that misconduct. The Commission found that 'the manifestly erroneous approach adopted by the employer when dealing with what has subsequently been established to be both serious misconduct and significantly less serious misdemeanours, has meant that there was not proper basis to justify the summary dismissal of the applicant. The procedural errors made by the employer have rendered what would have otherwise been an entirely fair dismissal with notice, to be an unreasonable and unjust summary dismissal.'

The Commission determined that the summary dismissal of the applicant was unreasonable and unjust, and ordered compensation of \$1,100.

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<sup>400</sup> *Minister for Immigration & Multicultural Affairs v Bhardwaj* [2002] HCA 11 (14 March 2002) at para. 40 (per Gaudron and Gummow JJ).

<sup>401</sup> *Kioa v West* [1985] HCA 81 (18 December 1985) at para. 11 (per Gibbs CJ), [(1985) 159 CLR 550].

<sup>402</sup> *Kioa v West* [1985] HCA 81 (18 December 1985) at para. 21 (per Wilson J), [(1985) 159 CLR 550]; citing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41 (15 October 1963) at para. 13 (Kitto J), [(1963) 113 CLR 475].

<sup>403</sup> *Kioa v West* [1985] HCA 81 (18 December 1985) at para. 22 (per Wilson J), [(1985) 159 CLR 550].

### Case example: Dismissal was unfair – Differential treatment

***Fagan v Department of Human Services*** [2012] FWA 3043 (Cribb C, 19 April 2012).

The employee was a corrections officer. He was dismissed for taking toilet paper to an inmate during lockdown in breach of the employer's policy. The employee claimed that another employee was not dismissed for the same conduct in comparable circumstances. The employer argued that the applicant employee's conduct differed from the other employee.

It was found that the conduct of the 2 employees was comparable and that there was differential treatment. It was also found that the termination was harsh in the circumstances and an order for compensation was made.

### Case example: Dismissal was NOT unfair – Not procedurally unfair

***Rooney v Pickles Auctions Pty Ltd*** [2016] FWC 858 (Cambridge C, 9 February 2016).

The employee had worked for the employer for about 6 years and 8 months and was employed in the role of a Detailer/Floor Staff. The employee was dismissed on the afternoon of 17 June 2015 because earlier that day he had failed to attend for work at or before his scheduled start time and without prior notification of his lateness. The employee had a history of poor attendance, primarily involving his failure to attend at or before the scheduled start time and he had been provided with numerous verbal and written warnings regarding his poor attendance.

The Commission found that the employer provided the employee with an opportunity to explain or make out a defence for his late attendance and failure to provide prior notification on 17 June. When the employee could not provide any satisfactory explanation the employer carefully considered the circumstances, and reluctantly decided that in view of the employee's demonstrated inability to be able to improve his attendance, his employment should be terminated.

The Commission found that the notification of the dismissal of the employee, and other aspects of the procedure that the employer adopted to deal with the dismissal, contained no identifiable deficiency. It found was a valid basis for the dismissal and the procedural aspects of the employer's approach to the dismissal of the applicant was proper and just, and should be properly recognised as 'commendable'. The Commission concluded that the employee's dismissal was not harsh, unjust or unreasonable and dismissed the application.

Case example: **Dismissal was NOT unfair – Not procedurally unfair**

***Hill v Cobham Aviation Services Pty Ltd T/A Cobham Aviation Services*** [2019] FWC 7875  
(Anderson DP, 22 November 2019).

The applicant was dismissed for misconduct which the respondent considered a breach of its Code of Business Conduct. Since 2017 the applicant had experienced major health challenges, including depression. His employment security was not adversely impacted by these challenges.

However from 2017, performance and conduct issues emerged sporadically. These issues concerned the applicant's conduct in and around other staff. Performance reviews referred to these matters and from time to time, he was informally spoken to by his manager about his conduct. A new software system was introduced in 2018 and the applicant as well as other managers and staff experienced difficulties with the system and adapting to it. An email disagreement occurred between the applicant and a colleague about an invoice and what information it should contain. The applicant lent over a partition and in a raised voice abused his colleague.

Management intervened and investigated the incident. It commenced a disciplinary process and provided the allegations in a letter to the applicant. The applicant then took five weeks of personal leave (supported by medical certificates), and upon his return a disciplinary meeting occurred. During the meeting the applicant became loud and aggressive. The meeting was rescheduled to prevent further escalation. The respondent arranged for a representative from the company's employee assistance program (EAP) and security to be available for the rescheduled meeting. After discussions at the rescheduled meeting the applicant was dismissed for breaching the Code of Conduct, for his conduct during the disciplinary meetings and a lack of remorse.

The Commission found the applicant's outbursts and unsatisfactory dealing with staff were of relatively recent duration (given his 13 years of service), were sporadic and were not a constant occurrence. However unacceptable workplace conduct, even when occasional, if repeated and not remediated can warrant disciplinary sanction including dismissal, depending on the circumstances. The Commission found a valid reason for dismissal, in particular the applicant's misconduct in the workplace when he abused, threatened and intimidated a colleague. With respect to the applicant's depression, the respondent had advised of the company's willingness to enable him to take time to get better and informed him of the counselling services available through the EAP. The Commission found this was an appropriate and respectful response. The applicant presented no evidence that his conduct arose from or was caused by his depression.

The Commission held that the applicant was not denied procedural fairness. Aside from the warnings and counselling, the allegations of misconduct were put to him; he was provided an opportunity to explain; and disciplinary meetings were deferred to meet his circumstances. The applicant was invited to obtain assistance from a support person but declined. The Commission found that the applicant was not denied 'a fair go' and that the dismissal was not unfair. The application was dismissed.

Case example: **Dismissal was NOT unfair – No differential treatment**

***Darvell v Australia Post*** [2009] FWA 1406 (Hamilton DP, 2 March 2010).

Permission to appeal refused in [2010] FWAFB 4082 (Acton SDP, Ives DP, Smith C, 1 June 2010), [(2010) 195 IR 307].

The employee was a truck driver and an occupational health and safety representative. He was summarily dismissed when he refused to follow his employer's direction on safety grounds. The employee argued that the employer had treated him differently to other employees.

It was held that there must be sufficient evidence of comparable cases to enable proper comparison. The application was dismissed.

Case example: **Dismissal was NOT unfair – No differential treatment**

***Parry v Hans Continental Small Goods Pty Ltd*** [2010] FWA 9013 (Spencer C, 8 December 2010).

The employee had been employed for 9 years and was dismissed for swearing at his manager. The employee was a union delegate. The employee claimed differential treatment.

It was found that the common usage of swear words in the workplace was distinguished from the employee's swearing, which was directed at his manager in an insulting manner. The dismissal was not unfair and the application was dismissed.

Case example: **Dismissal was NOT unfair – No differential treatment**

***Daly v Bendigo Health Care Group*** PR973305 (AIRC, Kaufman SDP, 13 July 2006).

The employee was employed as nurse in a psychiatric facility. The husband of a patient made a complaint about the treatment of his wife at the facility. Following an investigation, the employee was terminated for serious misconduct. The employee alleged differential treatment because other nurses on the shift who were also responsible for the care of the patient were not dismissed.

There was insufficient evidence to enable a proper comparison with other employees. It was found that the summary dismissal of the employee was justified and dismissed her application.

Case example: **Dismissal was NOT unfair – No differential treatment**

***Sexton v Pacific National (ACT) Pty Ltd*** [PR931440](#) (AIRC, Lawler VP, 14 May 2003).

The employee and his co-driver were shunting 30 rail carriages and negligently caused the rail carriages to go down the wrong track and collide with another set of carriages. The employee had previously been warned in relation to a derailment incident. The employee claimed differential treatment between himself and his co-driver.

The separate derailment incident was distinguished from that of the employee as the employee involved in the other incident had no previous warnings. The employee's age and length of service were taken into account, as well as his apology and positive work history. It was found that the termination was not harsh, unjust or unreasonable and the application was dismissed.

Case example: **Dismissal was NOT unfair – No differential treatment**

***Sipple v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Warkworth Operations*** [\[2015\] FWCFB 5728](#) (Hamberger SDP, Gostencnik DP, Riordan C, 16 October 2015).

Decision at first instance [\[2015\] FWC 1080](#) (Stanton C, 18 February 2015).

The employee was employed as a pit services operator at a mine. He was dismissed on the basis that he was no longer able to perform the inherent requirements of his position as a multi-skilled worker due to personal injury. At first instance it was found that there was a valid reason for the dismissal on the basis that the employee was unfit to perform his role and that the termination was not harsh, unjust or unreasonable.

A Full Bench granted permission to appeal on the basis that the Commission had failed to properly consider a number of matters, including the age of the appellant, his length of service, his literacy, family commitments and the availability of other duties, which were relevant to the consideration of whether his dismissal was harsh, unjust or unreasonable.

The Full Bench majority agreed that there was a valid reason for the employee's dismissal. Much of the employee's case rested on the fact that he could continue to work as a service cart operator. However, the majority held that the employer did not have a need for a service cart operator and the employee's medical restrictions significantly limited his capacity to operate other pieces of equipment and perform the inherent requirements of the role of pit service operator. The majority found that the additional matters did not weigh so heavily in favour of the employee as to render the dismissal in the circumstances, harsh, unjust or unreasonable. The appeal was dismissed.

## Part 6 – Making an application



### Link to form

- [Form F2 – Unfair dismissal application](#)

All forms are available on the [Forms](#) page of the Commission’s website.

## Application fee

The application fee is also often referred to as a filing fee.

An unfair dismissal application must be accompanied by payment of the prescribed fee (or an application to waive the prescribed fee).<sup>404</sup>

While the word ‘accompanied’ can be defined as ‘at the same time as’, it can also mean to complement or be in addition to something, or to go along with. In *Bonnar v Rail Industry Safety & Standards Board* the Commission considered that in the context of s.395, ‘accompanied’ should be interpreted to mean that the fee is ‘to complement’ the application or be made ‘in addition to’ the application. It does not require that the fee be paid *at precisely the same time as* the application.<sup>405</sup>

Applications that are not accompanied by the fee or a waiver may be discontinued or cancelled by the Commission.<sup>406</sup>



### Current application fee

The current fee can be found on the [Lodge an application](#) page of the Commission’s website.

## Timeframe for lodgment – 21 days



See Fair Work Act s.394(2)

An unfair dismissal application must be lodged with the Commission within 21 days after the dismissal takes effect (please note that if an employee was dismissed on or before 31 December 2012, the application must have been lodged within 14 days).<sup>407</sup> The Commission may allow a further period for lodgment in exceptional circumstances.

Time limits are imposed on making an application for unfair dismissal to the Commission for a reason. A request for an extension to that time is not and should not be treated as a *fait accompli*.<sup>408</sup>

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<sup>404</sup> Fair Work Act s.395(1)

<sup>405</sup> *Bonnar v Rail Industry Safety & Standards Board* [2018] FWC 2151 (Dean DP, 24 April 2018) at para. 36.

<sup>406</sup> *Druett v State Rail Authority of NSW & Ors* [2007] AIRC 805 (Lawler VP, 19 September 2007); see also *Atanaskovic Hartnell Corporate Services Pty Ltd t/a Atanaskovis Hartnell v Kelly* [2017] FWC 763 (Hatcher VP, Sams DP, Hunt C, 15 February 2017).

<sup>407</sup> Fair Work Act s.394(2).

<sup>408</sup> *Shipperlee v Flexi Personnel Australia Pty Ltd T/A Flexi Personnel* [2020] FWC 2348 (Bissett C, 7 May 2020) at para. 81.





A **fait accompli** is an accomplished fact; a thing already done.<sup>409</sup>



#### Related information

### Notification of dismissal

Notification of dismissal should not be made by text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where text message or other electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation.

- When does a dismissal take effect?
- What are exceptional circumstances?
- What is a day?

### How is 21 days calculated?

The 21 days for lodgment does not include the date that the dismissal took effect.<sup>410</sup> This means that day one commences the day following the dismissal.

#### ***Weekends and public holidays***

If the **final day** of the 21 day period falls on a weekend or on a **public holiday** (where the Commission is closed) the timeframe will be extended until the next business day.<sup>411</sup> Public holidays or weekends that fall **during** the 21 days will not extend the period of lodgment.

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<sup>409</sup> The Macquarie Dictionary Online.

<sup>410</sup> *Acts Interpretation Act 1901* (Cth) s.36(1). This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).

<sup>411</sup> *Acts Interpretation Act 1901* (Cth) s.36(2). This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A). See also *Hemi v BMD Constructions Pty Ltd* [2013] FWC 3593 (Richards SDP, 12 June 2013); *Cahill v Bstore Pty Ltd T/A Bstore for Birkenstock* [2015] FWC 103 (O’Callaghan SDP, Gooley DP, Williams C, 9 January 2015); *Stedman v Transdev NSW Pty Ltd T/A Transdev Buses* [2015] FWC 1877 (Harrison SDP, Lawrence DP, Cambridge C, 20 March 2015); *Boyd v MarketTrack Global Pty Ltd T/A Numerator* [2019] FWC 8489 (Dean DP, 16 December 2019).



The Commission is closed on the following **public holidays** (or substitute public holidays):

- New Year's day
- Australia Day
- Good Friday
- Easter Monday
- ANZAC day
- Christmas day
- Boxing day

On state or local public holidays (such as Queen's Birthday) the local Commission offices will be closed however electronic applications can be submitted. An application can still be made to the Commission on the day after a weekend or public holiday (if the final day of the 21 day period falls on that weekend or public holiday).<sup>412</sup>

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<sup>412</sup> *ibid.*

Case example: **Application lodged day after public holiday within time**

***Boyd v MarketTrack Global Pty Ltd T/A Numerator*** [2019] FWC 8489 (Dean DP, 16 December 2019).

In this matter, the 21 day period prescribed by s.394(2) of the Fair Work Act for the applicant to make his unfair dismissal claim expired on Monday, 7 October 2019. That day was Labour Day and a public holiday in New South Wales. The application was filed by the applicant’s representative the following day on 8 October 2019.

Commission staff contacted the applicant’s representative regarding the receipt of the application outside of the 21 day period, who submitted that the application was lodged within the 21 day legislated timeframe pursuant to s.36(2) of the *Acts Interpretation Act 1901* (Cth) (the AI Act) as in force on 25 June 2009. Section 36(2) of the AI Act provides that ‘Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.’

The applicant’s representative submitted that as Monday, 7 October 2019 was a public holiday in New South Wales, the next business day after 7 October 2019 was Tuesday, 8 October 2019 and accordingly, the time for lodging the application was extended to 8 October 2019, and the application was therefore lodged within that time.

The respondent objected on the basis that Monday, 7 October 2019 was a State public holiday and not a National public holiday. While the Commission’s New South Wales office was closed on that day, other Commission offices nationally were opened and were able to accept applications electronically. The respondent submitted that as the application was lodged electronically by the applicant’s representative on 8 October 2019, there was nothing to suggest it could not have been lodged electronically on 7 October 2019.

The Commission found that the application was made within time, and no extension of time was necessary. Monday 7 October 2019 was a public holiday in NSW. The NSW registry of the Commission was closed, as was the office of the applicant’s representative. The respondent’s premises, where the applicant was based, was located in Crows Nest, NSW. The Commission held that in this case there was no connection with any other state or territory other than NSW, and accordingly there was no requirement for the applicant’s representative to check whether a Commission registry in another state or territory was open in order to lodge an application within time.

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## Who is the employer?

An application for unfair dismissal must name the employer against who the claim is being made. That employer must be a national system employer. If an application is made against an entity that is not the employer, the application can be dismissed.

It may not always be clear who the employer is in every situation. An employer may be the corporate trustee of a family trust, or an entity that has been through name changes or involved in a transmission of business.

## How can you find out?

Under the Fair Work Act employers are required to provide employees with a pay slip.<sup>413</sup> The Fair Work Regulations requires that a pay slip must specify the employer's name and include their Australian Business Number (ABN) if they have one.<sup>414</sup>



The employer is generally the entity that pays the employee.

## What if you get it wrong?

Section 586 of the Fair Work Act provides a power for the Commission to correct or amend an application, or waive an irregularity in the form or manner in which an application is made.<sup>415</sup>

An applicant can apply to the Commission to amend an application if they have made a mistake on the form such as misspelling the name or not providing the full name of the employer. In certain circumstances, this power may also be used to substitute the name of the employer.<sup>416</sup>

### Case example: **Name of employer changed**

***Djula v Centurion Transport Co. Pty Ltd*** [\[2015\] FWCFB 2371](#) (Catanzariti VP, Harrison SDP, Bull C, 12 May 2015).

Decision at first instance [\[2015\] FWC 790](#) (Williams C, 5 February 2015).

The employee lodged an unfair dismissal application which named the incorrect employer. He applied under s.586 of the Fair Work Act to amend the application to change the name of the respondent from Centurion Transport Co. Pty Ltd to CFC Consolidated P/L as trustee for CFC Employment Trust (CFC Consolidated).

Centurion Transport Co. Pty Ltd was the applicant's employer when he was first engaged. At the time he was dismissed, his employer was CFC Consolidated Pty Ltd as trustee for CFC Employment Trust. ASIC records showed that Centurion and CFC Consolidated had a common director, the same registered office address and the same principal place of business address. The two companies had separate management and operational structures.

At first instance the Commissioner found that s.586 of the Fair Work Act did not provide the power to grant the amendment sought and dismissed the unfair dismissal application. However, on appeal the Full Bench found that s.586 did provide the power for the Commissioner to make the amendment sought. The decision at first instance was quashed and the application was amended.

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<sup>413</sup> Fair Work Act s.536.

<sup>414</sup> Fair Work Regulations reg 3.46.

<sup>415</sup> Fair Work Act s.586; see *Narayan v MW Engineers Pty Ltd* [\[2013\] FWCFB 2530](#) (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89].

<sup>416</sup> See for example *Djula v Centurion Transport Co. Pty Ltd* [\[2015\] FWCFB 2371](#) (Catanzariti VP, Harrison SDP, Bull C, 12 May 2015) at para. 28.

## Multiple actions

 See Fair Work Act ss.725–733

When employment is terminated, it will be necessary to choose one of several options for challenging the termination, (apart from an unfair dismissal application there could for example, be a right to make a general protections application or a claim under anti-discrimination laws).

Multiple actions in relation to the same dismissal are **NOT** permitted.



### Important

An unfair dismissal application **must not be made** if a general protections application or unlawful termination application has also been made regarding the same dismissal.<sup>417</sup>

Different applications could result in different remedies, if the application is successful. Advice should therefore be obtained promptly on all available options, before a final decision is made about making an application under the unfair dismissal provisions.

This benchbook deals only with unfair dismissal. Information about general protections applications is contained in the general protections benchbook, which can be accessed at the following link: [www.fwc.gov.au/resources/benchbooks/general-protections-benchbook](http://www.fwc.gov.au/resources/benchbooks/general-protections-benchbook)



### Legal advice

If you would like free legal advice there are [Community Legal Centres](#) in each state and territory who may be able to assist.

The law institute or law society in your state or territory may be able to refer you to a private solicitor who specialises in workplace law.

### Workplace Advice Service

The Commission has a free legal assistance service available to **eligible** employees and employers. The Commission coordinates the Service in collaboration with lawyers from our network of partner organisations. You can check your eligibility and fill in the [Workplace Advice Service](#) request form online.

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<sup>417</sup> *Du v University of Ballarat* [2011] FWA 5225 (Acton SDP, Hamilton DP, McKenna C, 9 August 2011) at para. 24, [(2011) 211 IR 382].

Case example: **Multiple actions NOT found – Application to Workers Compensation Tribunal**

***Qantas Airways Limited v Lawless*** [2014] FWCFB 3582 (Hatcher VP, Harrison SDP, Roberts C, 12 June 2014).

Decision at first instance [2014] FWC 744 (Bartel DP, 30 January 2014).

Qantas applied to have an unfair dismissal application dismissed on the basis that it was barred by s.725 of the Fair Work Act. Qantas claimed that because the employee had filed a notice of dispute in the South Australian Workers Compensation Tribunal (WC Tribunal) prior to the filing of the unfair dismissal application, he had commenced multiple actions in relation to his dismissal.

On appeal the Full Bench affirmed the decision at first instance that the notice of dispute was not an application or complaint in relation to the employee’s dismissal. The Bench found that the subject matter of the notice of dispute was the reasonableness of a Rehabilitation and Return to Work Plan and the remedy confined to the modification of the Plan. The objection to multiple actions was dismissed.

## What happens if you make the wrong application?

Section 586 of the Fair Work Act provides a power for the Commission to correct or amend an application, or waive an irregularity in the form or manner in which an application is made.<sup>418</sup>

However, the power in s.586 does not allow the Commission to amend an unfair dismissal application so that it becomes a general protections application.<sup>419</sup> It cannot be used to allow an amendment to an application that fundamentally changes the kind of application that was originally made.<sup>420</sup>

If a person decides that they have made an incorrect application and would like to pursue a different type of application, under another section of the Fair Work Act in relation to a dismissal, they will need to discontinue the existing application and file a new application under the appropriate section.

Where a new application is made under s.365, the application must be accompanied by the prescribed application fee (s.367 and reg.3.02 of the *Fair Work Commission Regulations 2009*) and must be made within 21 days after the dismissal took effect or within such further period as the Commission allows.<sup>421</sup>



### Related information

- Further applications


<sup>418</sup> Fair Work Act s.586; see *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89].

<sup>419</sup> *Ioannou v Northern Belting Services Pty Ltd* [2014] FWCFB 6660 (Boulton J, Gostencnik DP, Johns C, 2 October 2014) at para. 11.

<sup>420</sup> *Ioannou v Northern Belting Services Pty Ltd* [2014] FWCFB 6660 (Boulton J, Gostencnik DP, Johns C, 2 October 2014) at para. 17.

<sup>421</sup> *Ioannou v Northern Belting Services Pty Ltd* [2014] FWCFB 6660 (Boulton J, Gostencnik DP, Johns C, 2 October 2014) at para 16.

## Discontinuing an application

 See Fair Work Act s.588

A person who has applied to the Commission for an unfair dismissal remedy may discontinue the application in accordance with the procedural rules **whether the matter has settled or not**.<sup>422</sup>

### How to file a notice of discontinuance

There are two ways to discontinue a matter before the Commission. A signed 'Notice of Discontinuance' [Form F50] can be filed with the Commission to discontinue the application. A copy of the signed notice of discontinuance must then be served on the respondent. A matter can also be discontinued by advising the Commission, or a member of staff of the Commission by letter, email, fax, telephone or orally, in person.<sup>423</sup>

Once filed a notice of discontinuance is self executing and it brings the application to an end.<sup>424</sup>



An applicant, or their representative acting on the applicant's instructions, can discontinue an application at any time.



#### Link to form

- [Form F50 – Notice of discontinuance](#)

All forms are available on the [Forms](#) page of the Commission's website.

### Discontinuance filed by mistake or under duress

In certain circumstances a notice of discontinuance can, in effect, be set aside if it was filed by mistake or under duress. In such circumstances, an application would need to be made to a court for a declaration that the notice was a nullity.<sup>425</sup>

### Further applications

If an unfair dismissal applicant unconditionally discontinues their application before the Commission has determined it on the merits (i.e. without there having been a settlement of the matter), then they can make a fresh application in respect of the same dismissal.<sup>426</sup>

This could be another unfair dismissal application, or if eligible, a general protections dismissal application or an unlawful termination application.

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<sup>422</sup> Fair Work Act s.588.

<sup>423</sup> Fair Work Commission Rules r 10.


<sup>424</sup> *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89]; citing *Tomlinson v Leveda Inc* (1996) 65 IR 178, at p. 180.


<sup>425</sup> *AB v Tabcorp* [2015] FWCFB 523 (Ross J, Hatcher VP, Cargill C, 29 January 2015) at para. 11.

<sup>426</sup> *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 24, [(2013) 231 IR 89].

The subsequent application must be accompanied by the prescribed application fee and must be made within 21 days after the dismissal took effect (or within such further period as the Commission allows).

## Extension of time for lodging an application

 See Fair Work Act s.394(2)–(3)

 **Contains issues that may form the basis of a jurisdictional issue**

The Commission may extend the time period for lodging an unfair dismissal application only if the Commission is satisfied that there were exceptional circumstances for not lodging the application on time.

The Commission will take into account:

- the reasons for the delay
- whether the former employee first became aware of the dismissal after it had taken effect
- any action taken by the former employee to dispute the dismissal
- prejudice to the employer (including prejudice caused by the delay)
- the merits of the application, and
- fairness between the former employee and other persons in similar positions.

### What are exceptional circumstances?

These are circumstances that are:

- out of the ordinary course
- unusual
- special, or
- uncommon.<sup>427</sup>

They need not be:

- unique
- unprecedented, or
- very rare.<sup>428</sup>

Exceptional circumstances are NOT regularly, routinely or normally encountered.<sup>429</sup>

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<sup>427</sup> *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (26 March 2007) at para. 25; citing *R v Kelly* [2000] QB 198, at p. 208; cited in *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 (Lawler VP, Sams DP, Williams DP, 16 February 2011) at para. 13, [(2011) 203 IR 1].

<sup>428</sup> *ibid.*

<sup>429</sup> *ibid.*



Exceptional circumstances may be a single exceptional event or a series of events that together are exceptional.<sup>430</sup> The assessment of whether exceptional circumstances exist requires a consideration of ALL the relevant circumstances.<sup>431</sup>

Ignorance of the timeframe for lodgment is not an exceptional circumstance.<sup>432</sup>

### **Reason for delay**

The Commission must consider the reason for the delay.<sup>433</sup>

The absence of any explanation for any part of the delay, will usually weigh against an applicant in such an assessment. Similarly a credible explanation for the entirety of the delay, will usually weigh in the applicant's favour, though, it is a question of degree and insight. However, the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the relevant matters (including the reason for delay) and the assignment of appropriate weight to each.<sup>434</sup>

### **Representative error**

A late lodgment of an application due to representative error may be grounds for an extension of time.<sup>435</sup>

There is a distinction between a delay caused by the representative where the employee is blameless and when the employee has contributed to the delay.<sup>436</sup>

The actions of the employee are the central consideration in deciding whether the explanation of representative error is acceptable.<sup>437</sup>

Where an application is delayed because the employee has left the matter in the hands of their representative and has not followed up their claim, the extension may be refused.<sup>438</sup>

Where an employee has given clear instructions to lodge an application and the representative has failed to do so, the extension may be granted.<sup>439</sup>

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<sup>430</sup> *ibid.*, at para. 26.

<sup>431</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 (Ross J, Binet DP, Harper-Greenwell C, 16 February 2018) at para. 38.

<sup>432</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 (Lawler VP, Sams DP, Williams DP, 16 February 2011) at para. 14, [(2011) 203 IR 1].

<sup>433</sup> Fair Work Act s.366(2)(a).

<sup>434</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 (Ross J, Binet DP, Harper-Greenwell C, 16 February 2018) at para. 39.

<sup>435</sup> *Clark v Ringwood Private Hospital* Print P5279 (AIRCFCB, Ross VP, Drake DP, Deegan C, 22 September 1997), [(1997) 74 IR 413, at pp. 418–420]; *Davidson v Aboriginal & Islander Child Care Agency* Print Q0784 (AIRCFCB, Ross VP, Watson SDP, Eames C, 12 May 1998), [(1998) 105 IR 1]; cited in *McConnell v A & PM Fornataro T/A Tony's Plumbing Service* [2011] FWAFB 466 (Lawler VP, O'Callaghan SDP, Bissett C, 31 January 2011) at para. 35, [(2011) 202 IR 59].

<sup>436</sup> *ibid.*

<sup>437</sup> *ibid.*

<sup>438</sup> *ibid.*

<sup>439</sup> *ibid.*

A representative error is only one of a number of factors to be considered in deciding whether to extend the timeframe for lodgment.<sup>440</sup>

A representative error includes inactivity or failure to act promptly.<sup>441</sup>



### Related information

#### Notification of dismissal

Notification of dismissal should not be made by text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where text message or other electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation.

- When does a dismissal take effect?

#### Case example: **Exceptional circumstances – Resignation with future date of effect**

***Nohra v Target Australia Pty Ltd*** [2010] FWA 6857 (Roberts C, 22 October 2010), [(2010) 204 IR 389].

**Length of time outside timeframe:** 15 days

The employee resigned with a future date of effect, to take leave. The letter of resignation effectively gave seven months' notice to be the primary carer for her sick mother-in-law. The employer ended the employment while the employee was on carer's leave. The employee believed that the timeframe for lodgment was only relevant to unfair dismissal and not relevant for constructive dismissal. The extension of time was granted.

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<sup>440</sup> *ibid.*

<sup>441</sup> *Burns v Aboriginal Legal Service of Western Australia (Inc)* [Print T3496](#) (AIRCFCB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) at para. 28.

Case example: **Exceptional circumstances – Representative error**

***Robinson v Interstate Transport Pty Ltd*** [2011] FWAFB 2728 (Watson SDP, Drake SDP, Harrison C, 17 May 2011), [(2011) 211 IR 347].

**Length of time outside timeframe:** 3 days

The employee's initial representative overlooked a reminder to file the application for a general protections claim. The employee had given specific instructions to his representative to file the claim. On appeal it was found that he was entitled to rely on his representative and was blameless in relation to the delay. The extension of time was granted.

**Note:** This was in relation to a general protections claim under s.365 of the Fair Work Act. The extension of time provisions in relation to a general protections claim has identical wording to the extension of time provisions in relation to an unfair dismissal claim.

Case example: **Exceptional circumstances – Illness**

***Ovenden v Fortezza Pty Ltd T/A High Country Automotive Group*** [2010] FWA 3863 (Deegan C, 20 May 2010).

**Length of time outside timeframe:** 26 days

The employee gave evidence that he was suffering from depression and anxiety exacerbated by work stress. The employee had been dismissed while he was on personal leave and was covered by a medical certificate. The employer had refused to accept the medical certificates and had claimed the employee had abandoned his employment. The extension of time was granted.

Case example: **Exceptional circumstances – Technical issues**

***Johnson v Joy Manufacturing Co Pty Ltd t/as Joy Mining Machinery*** [2010] FWA 1394 (Lawler VP, 25 February 2010).

**Length of time outside timeframe:** 4 days

The employee had attempted twice to lodge the application through the Fair Work website within time but was unable to successfully file the application. The application was then posted to Fair Work Australia. It was held that the applicant had made a bona fide attempt to make an application before the expiry of the 14 day period and that it was just and equitable to exercise the discretion to extend time. The extension of time was granted.

Case example: **NOT exceptional circumstances – Christmas period**

***Smith v KJM Contractors Pty Ltd*** [2010] FWA 5515 (Richards SDP, 29 July 2010), [(2010) 201 IR 356].

**Length of time outside timeframe:** 8 days

An employee made his application for unfair dismissal 8 days after the 14 day period. Christmas occurred during the 14 day timeframe.

The Commission found that this was not exceptional as the Christmas period was not an unforeseen event. The extension of time was refused.

Case example: **NOT exceptional circumstances – Representative error**

***McLennan v Northern Territory Stolen Generations Aboriginal Corporation*** [2012] FWA 3167 (Spencer C, 12 April 2012).

**Length of time outside timeframe:** 1 day

The employee submitted that she thought her representative would file an application for unfair dismissal on her behalf.

The Commission found that there had been no evidence that the employee gave clear instructions to her representative to lodge an application on her behalf. The extension of time was refused.

Case example: **NOT exceptional circumstances – Employee seeking internal review**

***Gao v Department of Human Services*** [2011] FWAFB 5605 (Giudice J, Harrison SDP, Asbury C, 23 August 2011).

**Length of time outside timeframe:** Approx. 7 months

The employee sought a review of matters relevant to the decision to dismiss through an internal process of the employer. The employer provided a response and then the employee requested a further review.

The Commission found that the circumstances were not sufficient to justify the delay. The extension of time was refused.

Case example: **NOT exceptional circumstances – Shock and trauma caused by termination – Ignorance of timeframe**

*Rose v BMD Constructions Pty Ltd* [\[2011\] FWA 673](#) (Roe C, 1 February 2011).

**Length of time outside timeframe:** 13 days

The employee filed an application for unfair dismissal 13 days late claiming her reason for not lodging on time was that she was incapacitated by shock from her termination.

The Commission found that the employee was not sufficiently incapacitated by the shock to justify an extension of time. Ignorance of the timeframe in itself is not sufficient to justify an extension of time. The extension of time was refused.

Case example: **NOT exceptional circumstances – Illness**

*Muir McMeeken v Action Industrial Catering Pty Ltd* [\[2012\] FWA 5933](#) (Boulton J, Hamilton DP, Cloghan C, 12 September 2012).

Decision at first instance [\[2012\] FWA 4035](#) (Williams C, 15 May 2012).

**Length of time outside timeframe:** Approx. 5 weeks

The employee gave evidence that she was ill during the timeframe for lodgment. The employee followed up complaints with other agencies during the 14 day timeframe. She was hospitalised after the 14 day timeframe had passed.

The Commission found that ill health may have prevented the employee from making an application for 2 weeks out of the 5 weeks that the application was late. The extension of time was refused.

### Action taken to dispute the dismissal

Action taken by the employee to contest the dismissal, other than lodging an unfair dismissal application, may favour granting an extension of time.<sup>442</sup>

Case example: **Action taken to dispute the dismissal – Lodged in the wrong jurisdiction**

*Poulton v Rail Infrastructure Corporation* [PR966972](#) (AIRCFB, Watson SDP, Hamberger C, Richards C, 22 December 2005).

**Length of time outside timeframe:** Approx. 21 months

The employee sought but was unable to get advice as to which was the correct jurisdiction to apply to. There was uncertainty about where he should lodge his application and the lodgment in the incorrect jurisdiction was not unreasonable. The extension of time was granted.

<sup>442</sup> *Brodie-Hanns v MTV Publishing Ltd* [\(1995\) 67 IR 298](#), at pp. 299–300.

Case example: **Action taken to dispute the dismissal – Lodged in the wrong jurisdiction**

***Palmer v RCR Engineering Pty Ltd*** [2009] FWA 1431 (McCarthy DP, 2 December 2009).

**Length of time outside timeframe:** 25 days

The employee initially lodged his application within the time frame however in the wrong jurisdiction. The employee lodged their application within 3 days of becoming aware of the jurisdictional issue.

The Commission found in this case it was clear that the employee took action to contest his termination of employment almost immediately but in the wrong jurisdiction. Had the application been lodged in the correct jurisdiction it would have been well within the time allowed by the Fair Work Act. The extension of time was granted.

Case example: **Action NOT taken to dispute the dismissal – Employee seeking to resolve matter internally**

***Prasad v Alcatel-Lucent Australia Ltd*** [2011] FWAFB 1515 (Boulton J, Hamberger SDP, McKenna C, 14 March 2011), [(2011) 209 IR 236].

**Length of time outside timeframe:** Approx. 4 months

The employee was working under a subclass 457 visa and was made redundant after a restructure. The employee obtained legal advice about unfair dismissal some months after the redundancy. The extension of time was refused.

Case example: **Action NOT taken to dispute the dismissal – Lodged in the wrong jurisdiction**

***Robertson v Zeugma Electrical and Communications Services Pty Ltd*** [2010] FWA 4525 (McCarthy DP, 17 June 2010).

**Length of time outside timeframe:** Approx. 6 weeks

The employee lodged an application for unfair dismissal with the Western Australian Industrial Relations Commission and submitted she did not know this was the wrong jurisdiction.

The Commission found that mere inadvertence or accident is not sufficient alone to warrant an exceptional circumstance for the extension of time. The extension of time was refused.

Case example: **Action NOT taken to dispute the dismissal – Lodged in wrong jurisdiction**

***Parkes v Melena Pty Ltd t/as Ekas Market Research Services*** [PR943310](#) (AIRCFB, Giudice J, Duncan SDP, Larkin C, 5 February 2004).

**Length of time outside timeframe:** Approx. 17 months

The employee lodged their application 6 months late in the incorrect jurisdiction. After the employee discovered that her first application was lodged in the wrong jurisdiction she took a further 10 months to lodge an application with the Commission. The Commission found that no exceptional circumstances existed. The extension of time was refused.

### Prejudice to the employer

Prejudice to the employer will go against granting an extension of time.<sup>443</sup> However the ‘mere absence of prejudice to the employer is an insufficient basis to grant an extension of time’.<sup>444</sup>

A long delay gives rise ‘to a general presumption of prejudice’.<sup>445</sup>

The employer must produce evidence to demonstrate prejudice. It is then up to the employee to show that the facts do not amount to prejudice.<sup>446</sup>



**Prejudice to the employer** means unfair disadvantage to the employer that was caused by the delay in filing the application.

Case example: **Prejudice to the employer – Extension granted**

***Carfoot v SAC Sydney Archdiocese T/A St Vincent De Paul Society*** [\[2010\] FWA 4080](#) (Raffaelli C, 10 June 2010).

**Length of time outside timeframe:** 5 days

The employer argued it would be prejudiced by an extension of time being granted. The Commission found that any prejudice caused due to the short delay would be minimal. The extension of time was granted.

<sup>443</sup> *ibid.*

<sup>444</sup> *ibid.*

<sup>445</sup> *Brisbane South Regional Health Authority v Taylor* [\[1996\] HCA 25](#) (2 October 1996), [(1996) 186 CLR 541, at p. 556].

<sup>446</sup> *Cowie v State Electricity Commission of Victoria* [\[1964\] VR 788](#) (21 July 1964); cited in *Brisbane South Regional Health Authority v Taylor* [\[1996\] HCA 25](#) (2 October 1996), [(1996) 186 CLR 541, at p. 547]. See *Jervis v Coffey Engineering Group Pty Limited* [PR927201](#) (AIRCFB, Marsh SDP, Duncan SDP, Harrison C, 3 February 2003) at para. 16.

Case example: **Prejudice to the employer – NO extension granted**

***Druett v Rail Corporation New South Wales (RailCorp)*** [2008] AIRC 363 (Cartwright SDP, 28 April 2008).

Leave to appeal refused [2008] AIRCFB 599 (Watson VP, Drake SDP, Spencer C, 20 August 2008), [(2008) 176 IR 32].

**Length of time outside timeframe:** Approx. 28 years

The employer demonstrated prejudice caused by the delay. The employer had no record of employment other than an employment history card.

The Commission found that there was no merit to the application. Extending the time for lodgment of an application for which there was no jurisdiction was a pointless exercise. Moreover, to do so would be unfair to previous unsuccessful applicants in like positions. The extension of time was refused.

Case example: **Prejudice to the employer – NO extension granted**

***Burke v Department of Agriculture, Fisheries and Forestry – Australian Quarantine and Inspection Service*** [2011] FWA 1386 (Simpson C, 4 March 2011).

Permission to appeal refused [2011] FWA 8480 (Harrison SDP, Richards SDP, Smith C, 8 December 2011).

**Length of time outside timeframe:** 377 days

The employer argued prejudice due to the significant delay in filing the application. This argument was accepted. The extension of time was refused.

**Note:** This was in relation to a general protections claim under s.365 of the Fair Work Act. The extension of time provisions in relation to a general protections claim has identical wording to the extension of time provisions in relation to an unfair dismissal claim.

## Merits of the application

The merits of the application are a relevant consideration in determining whether to exercise the discretion to extend the timeframe.<sup>447</sup>

A highly meritorious claim may persuade a decision-maker to accept an explanation for delay that would otherwise have been insufficient.<sup>448</sup>

When considering the merits, the Commission may consider whether the employee has a sufficient case.<sup>449</sup> The Commission cannot make any findings on contested matters without hearing

<sup>447</sup> *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, at pp. 299–300.

<sup>448</sup> *Haining v Deputy President Drake* [1998] FCA 1168 (17 September 1998), (1998) 87 FCR 248, at p. 250].

<sup>449</sup> *Kyvelos v Champion Socks Pty Ltd* Print T2421 (AIRC FB, Giudice J, Acton SDP, Gay C, 10 November 2000) at para. 14.



evidence.<sup>450</sup> Evidence on the merits is rarely called at an extension of time hearing.<sup>451</sup> As a result of this the Commission ‘should not embark on a detailed consideration of the substantive case’.<sup>452</sup>

Case example: **Merits of the matter – Extension granted**

***Applicant v Respondent*** [2012] FWA 2111 (Sams DP, 22 March 2012).

**Length of time outside timeframe:** 9 days

The employee claimed that he was shocked at being dismissed in circumstances where he had been made redundant three months earlier (although not paid any redundancy benefits) and immediately re-engaged. He said that he was not given a written notice of his termination of employment and has still not received one.

The Commission found that the merits of the case were described as the strongest factor in the employee’s favour. The extension of time was granted.

Case example: **Merits of the matter – Extension granted**

***Dundas-Taylor v The Cuisine Group Pty Ltd*** [2011] FWA 6008 (Acton SDP, McCarthy DP, Spencer C, 5 September 2011), [(2011) 212 IR 265].

**Length of time outside timeframe:** 41 days

The employee lodged an initial application for unfair dismissal before he had been dismissed. His subsequent application was lodged after 14 days.

The decision at first instance denied the employee an extension on the basis of the merits of the case. On appeal the Full Bench found that there was insufficient evidence in the first instance to conclude that the merits would be anything less than a neutral consideration. The extension of time was granted.

## Fairness as between the person and other persons in a similar position

The key issue is that the applicant seeking an extension of time is considered in relation to other applicants employed by the same employer, and affected by the same issue, who filed applications in time.<sup>453</sup>

## Objecting to an application

The Commission can only deal with unfair dismissal applications that fall within its powers, also known as its ‘jurisdiction’. If an employer believes that the Commission does not have jurisdiction to deal with the unfair dismissal application, or the person is not eligible to make the application, then the employer can lodge an objection.

The standard Form F3 for an employer’s response to an unfair dismissal application at paragraph 2.1 asks whether the employer has ‘any jurisdictional **or other objections** to the application’

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<sup>450</sup> *ibid.*

<sup>451</sup> *ibid.*

<sup>452</sup> *ibid.*

<sup>453</sup> *Whittle v Redi Milk Australia Pty Ltd* [2016] FWC 3773 (Ryan C, 14 June 2016) at para. 38.

(underlining added), and objections identified under this part of the form have often been referred to as ‘jurisdictional objections’.<sup>454</sup>

### What are jurisdictional or other objections?

An objection can be lodged by an employer if the applicant:

- was not an employee (e.g. they were an independent contractor or volunteer)
- was not dismissed or resigned voluntarily
- was made genuinely redundant
- earned over the high income threshold and was not covered by a modern award or employed under the terms of an enterprise agreement
- was employed for a specified period, task, seasonal contract or traineeship arrangement, and was dismissed at the end of the period, task, season or arrangement
- was not a national system employee
- was not a regular casual employee and had no reasonable expectation of continuing employment
- made the application against an entity who is not the employer
- made multiple applications regarding the dismissal
- worked for the employer for less than six months, or less than one year if the employer was a small business employer, or
- lodged their application to the Commission outside the specified time limit and there are not exceptional circumstances permitting an extension of time.

By lodging a objection the employer is saying that the Commission does not have the power to deal with the claim.

An objection to an unfair dismissal application can also be raised **after** lodging the Form F3 employer’s response by completing a Form F4 – Objection to application for unfair dismissal remedy.



#### Important

Making an objection will NOT stop an unfair dismissal application.

Objections must be determined by the Commission. This is done by a member holding a conference or hearing and making a formal decision. An employer may be required to provide evidence and/or submissions with regard to its objections.



#### Link to form

- [Form F3 – Employer’s response to unfair dismissal application](#)

<sup>454</sup> *McKerlie v Ratelt Australia Pty Ltd t/a Ratelt* [2020] FWCFB 5131 (Hatcher VP, Anderson DP, Johns C, 24 September 2020) at para. 59.

- [Form F4 – Objection to application for unfair dismissal remedy](#)<sup>455</sup>
- All forms are available on the [Forms](#) page of the Commission’s website.

## How are objections to applications for unfair dismissal managed?

Section 396 of the Fair Work Act requires that certain matters, including whether the dismissal was a case of genuine redundancy, be determined before considering the merits of the application. The requirement to decide issues in a certain order of priority does not mean they need to be the subject of a separate, preliminary hearing, and not all the ‘initial matters’ identified in s.396 are jurisdictional matters. Determining whether a dismissal is a genuine redundancy (as defined) precedes and may remove the need to determine other questions (or the ‘merits’ of the application).<sup>456</sup>

Depending on the nature of the objection raised, the Commission will either:

- hold a conference or hearing to determine the jurisdictional objection first, and deal with the objection independently of the merits of an application, or
- hold a conference or hearing that deals with both the jurisdictional objection and the merits of the application.

Where the Commission holds a conference or hearing to determine the jurisdictional objection first, and the objection is dismissed, the Commission will determine the merits of the unfair dismissal application at a separate hearing or conference. If the Commission decides that the employer’s jurisdictional objection is valid, the unfair dismissal application will be dismissed and no further action will be taken.

A jurisdictional objection and the merits of an unfair dismissal application may be heard together where the nature of the evidence that would be considered by a Commission with regard to both is likely to be the same. The Commission will determine whether the jurisdictional objection is valid, and if not, proceed to determine whether the dismissal was unfair. If the jurisdictional objection is valid, the employee’s unfair dismissal application will be dismissed.



### Important

Where an objection is raised and the matter is listed for conciliation, Commission staff will contact the respondent to confirm their willingness to participate in the conciliation. Raising an objection does not mean an application will automatically be sent for hearing to determine the validity of the objection raised.

Conciliators will seek to assist parties resolve matters even where there has been one or more objection raised. A conciliator may use any objection to help ‘reality test’ parties as part of the conciliation process.

<sup>455</sup> To file a Form F4 the employer **must** also complete a Form F3 (Employer response to unfair dismissal application). If an employer has set out their objection in their completed Form F3, they do not need to complete Form F4.

<sup>456</sup> *McKerlie v Ratelt Australia Pty Ltd t/a Ratelt* [2020] FWCFB 5131 (Hatcher VP, Anderson DP, Johns C, 24 September 2020) at para. 58.



**Related information**

- Jurisdictional hearing

## Part 7 – Commission process – Conciliations, hearings and conferences

### Conciliations

#### Overview

**Conciliation** is a voluntary process to help an employer and employee resolve an unfair dismissal dispute. It is an informal method of resolving the unfair dismissal claim that is generally conducted by telephone and can avoid the need for a formal conference or hearing.

Because conciliations are generally conducted by telephone parties do not need to attend a Commission office.

In a conciliation, each party can negotiate in an informal manner and explore the possibility of reaching an agreed settlement. In a conciliation any outcome is possible provided both parties agree to it. But in a hearing the outcomes are limited and strictly controlled by law.

Parties are under no obligation to reach a settlement.

Unrepresented parties are usually offered a 3-day cooling off period following conciliation to decide if they wish to opt out of any agreed settlement.



#### Related information

- Outcomes at conciliation

### Conciliators

Conciliations are generally conducted by Commission staff who are trained and experienced in conciliation, workplace relations and unfair dismissal law. In some situations, a Commission member will conduct a conciliation.

Conciliators are independent and impartial – they are not on the 'side' of employees or employers. The conciliator's job is to:

- help the parties reach a resolution
- lead the discussion and provide guidance
- ensure conversations remain polite and on-topic, and
- explore the issues involved.

The conciliator does not:

- give either party legal advice
- argue on behalf of either party
- judge the facts of the case, or
- make any type of decision or recommendation.



Once a matter has been referred to a Commission Member it may be subject to further conciliation prior to a conference or hearing. Further conciliation can be requested by either party at any stage if the matter does not settle at the initial telephone conciliation.

## Representation at conciliation

There is no requirement for a party to be represented by another person at conciliation, but a party may be represented if they prefer. A representative can be a lawyer, an advocate, a union official (for employees) or industry body official (for employers), or even a friend.

No formal permission from the Commission needs to be granted to be represented during conciliation by a conciliator who is a Commission staff member. However, if the conciliation is conducted by a member of the Commission and the representative is a lawyer or paid agent, then permission to appear must be sought.

A party may also consider having a family member or friend with them for support.



### Related information

- Representation by lawyers and paid agents

## Outcomes at conciliation

If an agreed settlement has been reached, a written agreement will be prepared for both parties to sign. Unrepresented parties may be offered a 3-day cooling off period to decide if they wish to opt out of any agreed settlement.

If no agreement is reached the matter will automatically proceed to a formal conference or hearing, unless the employee chooses to discontinue their application.

## Terms of settlement

In *Masters v Cameron*<sup>457</sup> the High Court determined that there are three classes of settlement agreement for when parties who have been in negotiation reach agreement upon terms of a contractual nature, **and** also agree that the matter of their negotiation shall be dealt with by a formal contract. The three classes are:

1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
2. It may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

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<sup>457</sup> *Masters v Cameron* [1954] HCA 72 (30 November 1954), [(1954) 91 CLR 353].

3. The case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.<sup>458</sup>

In each of the first two cases there is a binding contract:

- in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document, and
- in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have any, any binding effect of their own. The expressions ‘subject to contract’, ‘subject to the preparation of a formal contract’ and others of similar import prima facie create an overriding condition so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract of itself.<sup>459</sup>

The question of whether or not there was a binding agreement reached between the parties is a matter of fact. Even though the applicant did not sign the agreement arising from conciliation this does not mean that a binding agreement was not reached.<sup>460</sup>



#### Important

Once an agreement is made to settle an application then that is the end of the application in the Commission.

The enforcement of the agreement is not a matter that can be dealt with by the Commission.



#### Related information

- Role of the Court
- Binding settlement agreements

An application to have a matter heard where there is an agreement may result in the application being dismissed because it has no reasonable prospects of success.<sup>461</sup>



#### Related information

- No reasonable prospect of success

<sup>458</sup> *Curtis v Darwin City Council* [2012] FWA FB 8021 (Ross J, Smith DP, Gooley C, 17 September 2012) at para. 61, citing *Masters v Cameron* [1954] HCA 72 (30 November 1954) at paras 9–10, [(1954) 91 CLR 353].

<sup>459</sup> *Curtis v Darwin City Council* [2012] FWA FB 8021 (Ross J, Smith DP, Gooley C, 17 September 2012) at paras 62–63; see also *Zhang v Spring FG Accounting Pty Limited* [2021] FWC 14 (Bissett C, 4 January 2021).

<sup>460</sup> *Heyden v Maa Ambe Group Pty Ltd ATF Maa Ambe Unit Trust T/A Red Rooster* [2014] FWC 7854 (Richards SDP, 6 November 2014) at para. 48.

<sup>461</sup> *Australian Postal Corporation v Gorman* [2011] FCA 975 (25 August 2011) at para. 33.

Case example: **Settlement agreement – Binding agreement made – NOT signed under duress**

***Chapman v Ignis Labs Pty Ltd T/A Ignis Labs*** [2020] FWCFB 3849 (Hatcher VP, Young DP, Harper-Greenwell C, 22 July 2020).

At first instance the employee's unfair dismissal application was dismissed because the parties had reached a settlement at conciliation. The Commission concluded that a binding settlement agreement had been reached between the parties at conciliation and on that basis determined that the application had no reasonable prospects of success.

The employee appealed. One of the grounds for appeal contended that the settlement agreement was obtained under duress. In the appeal proceedings the employee accepted that an agreement to resolve the application was reached at conciliation, however he contended that he was not bound by it because he entered into the settlement agreement under duress. The duress alleged was the conduct of his representative in settlement discussions during the conciliation.

The Full Bench found that this ground of appeal did not disclose any arguable case of appealable error for two reasons. Firstly, it was clear that the effect of duress, should it be established (which the Full Bench did not consider could be established), would be to render the settlement agreement voidable, rather than void. As a result the employee's contention that he is not bound by the settlement agreement on that basis, without more, cannot be sustained. Secondly, it was equally clear that a determination that the settlement agreement ought be set aside on the ground of duress is a matter for the courts, not the Commission.

The Full Bench found no error in the Commission's approach to this matter at first instance.

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### Case example: **Deed of settlement – Binding agreement NOT made**

*Singh v Sydney Trains* [2017] FWCFB 4562 (Gostencnik DP, Clancy DP, Saunders C, 3 October 2017).

At first instance the Commission dismissed this application for unfair dismissal remedy. This decision was made on the basis that the parties had reached a binding settlement agreement by email exchanges and as a result the application had no reasonable prospects of success.

On appeal the appellant Mr Singh contended that Commission erred on a number of grounds related to whether a binding settlement agreement was reached.


The Full Bench found that the appeal raised important questions on the correct approach to the determination of whether a binding settlement agreement was reached between parties. The central issue required consideration of whether the Commission correctly applied legal principles relevant to the question of whether a binding settlement agreement had been reached.

The Full Bench held that the offer and acceptance must precisely correspond. As there was a requirement for alterations to be made to the draft deed, the response was not an unequivocal acceptance of the terms offered in the deed. It was clear from their email communications that the parties could not reach agreement on the deed's terms; with the main sticking point being Mr Singh's work location on re-employment.

The Full Bench considered that the employer's submissions on the alleged contract's terms amounted to an impermissible attempt to cherry pick a range of terms proposed at different times by different parties, to come up with an agreement which may be workable. The Full Bench found that the Commission erred in finding that the parties reached a binding settlement and there would be an injustice if Mr Singh was prevented from pursuing his application. The appeal was upheld and the decision and order at first instance quashed. The employer's application to dismiss Mr Singh's application for an unfair dismissal remedy was dismissed.

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## Hearings and conferences

 See Fair Work Act ss.397–399

Applications for unfair dismissal that do not settle at conciliation, or are not withdrawn, proceed to arbitration, being a determinative conference or hearing before a member of the Commission. Applications that have had an objection made against them proceed to a jurisdictional conference or hearing. The objection may be heard at the same time as the merits of the case or separately.

### Determinative conference

A determinative conference is a proceeding which is conducted in private, and results in a decision.

**In private** means that members of the public are excluded. Persons who are necessary for the Commission to perform its functions are permitted to be present.<sup>462</sup>

A Commission member takes account of particular circumstances of the parties in conducting the arbitration by conference. In a matter where both parties are self-represented the matter will be listed for determinative conference unless the member decides otherwise.

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<sup>462</sup> *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49 (5 October 2006) at para. 25, [(2006) 230 CLR 486].

While determinative conferences are held in private, the Commission will still publish its reasons for decision, including the names of the parties, on the Commission’s website (unless the Commission decides otherwise).

Determinative conferences may involve more informal procedures than in a hearing.

## Hearing

A **hearing** is a proceeding which is generally conducted in public, resulting in a decision. Hearings are more formal than conferences.

The Commission can only conduct a hearing if it considers it appropriate to do so.<sup>463</sup> In making this decision the Commission must take into account:

- the views of the parties, and
- whether a hearing is the most effective and efficient way to resolve the matter.<sup>464</sup>



A hearing or determinative conference is a different step that is distinct from the voluntary telephone conciliation that parties generally engage in as a part of the unfair dismissal process.

**Conciliation** is an informal process conducted by a conciliator intended to try and settle a matter by agreement.

**Hearings and conferences** are determinative processes held before a Commission member which will result in a decision about the matter.

## ‘On the papers’

Sometimes the Commission is able to determine a matter based on written submissions without the need for a formal hearing or conference where the facts are not in dispute. This is referred to as a matter being determined **‘on the papers’**.

The Commission has the power to direct a party to a matter to provide copies of documents, records, or any other information.<sup>465</sup>

The Commission may determine an unfair dismissal matter ‘on the papers’ provided the matter does not involve ‘facts the existence of which is in dispute’.<sup>466</sup>

## Jurisdictional hearing

Applications for unfair dismissal may be legally challenged by an employer who believes that the Commission does not have jurisdiction to deal with the unfair dismissal application.

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<sup>463</sup> Fair Work Act s.399(1).

<sup>464</sup> Fair Work Act ss.399(1)(a) and (b).

<sup>465</sup> Fair Work Act s.590.

<sup>466</sup> *Gutzeit v Liquorland (Qld) Pty Ltd T/A Spirit Hotels Liquorland (South East Queensland)* [2015] FWCFB 1257 (Ross J, Acton SDP, Gostencnik DP, 24 March 2015) at para. 22.



### Important

A jurisdictional hearing can occur before **OR** after conciliation.

A **jurisdictional hearing** is a formal process by which a member of the Commission will make a decision as to whether the Commission can deal with the unfair dismissal case. This process involves the parties to the matter making submissions, giving sworn evidence and provides an opportunity to challenge or cross-examine the other party's evidence.

At a jurisdictional hearing each party will have an opportunity to present their case, and after hearing the evidence the member of the Commission will decide the matter either in favour of the applicant or in favour of the respondent.

In some cases a jurisdictional hearing will be conducted by telephone conference.

## Initial matters to be considered before merits



See Fair Work Act ss.396

The Commission must decide the following matters relating to an application for unfair dismissal before considering the merits of the application:

- whether the application was made within the 21 day time period required in s.394(2)
- whether the person was protected from unfair dismissal
- whether the dismissal was consistent with the Small Business Fair Dismissal Code, and
- whether the dismissal was a case of genuine redundancy.

## Preparing for hearings and conferences

For information on preparing for hearings and conferences, you can refer to the Commission's website at: [www.fwc.gov.au/hearings-decisions/how-commission-works/prepare-conference-or-hearing](http://www.fwc.gov.au/hearings-decisions/how-commission-works/prepare-conference-or-hearing)

The Commission website also has downloadable documents to help parties prepare for an unfair dismissal conference or hearing, and gather information that will be relevant to the member deciding whether or not the dismissal was unfair.

Applicant	Respondent
Applicant's outline of argument: merits	Respondent's outline of argument: merits
Applicant's statement(s) of evidence	Respondent's statement(s) of evidence
Applicant's document list	Respondent's document list
Applicant's outline of argument: objection	Respondent's outline of argument: objection

## Representation by lawyers and paid agents

 See Fair Work Act ss.12 and 596, Fair Work Commission Rules 2013 r 11–12A



### Related information

- Notification of acting for a person
- What is representation?
- Exceptions – Representation in certain types of matter

## Definitions

A **lawyer** is a person who is admitted to the legal profession by a Supreme Court of a state or territory.<sup>467</sup>

A **paid agent** is a person who charges or receives a fee to represent a person in the matter before the Commission.<sup>468</sup>

## Seeking permission

A lawyer or paid agent must seek the permission of the Commission to represent a person in a matter before the Commission. This includes making an application or submission on another person's behalf.<sup>469</sup>

Only a Commission member can give permission for a lawyer or paid agent to represent a party.<sup>470</sup> Unless acting under delegation, employees of the Commission, such as conciliators, cannot give or refuse permission for a person to be represented.<sup>471</sup>

## Notification of acting for a person

Each lawyer or paid agent acting for a person in relation to a matter before the Commission must lodge a notice with the Commission informing it that the lawyer or paid agent acts for the person in the matter.<sup>472</sup>

There are two ways in which a lawyer or paid agent can give notice that they act for a person in relation to a matter before the Commission:

- they can give notice by identifying themselves as the person's representative in an application or other approved Commission form that they lodge in the matter, or
- they can give notice by lodging a Form F53.<sup>473</sup>

The notice may serve to inform the Commission and other parties that the lawyer or paid agent needs to be copied into correspondence and documents lodged in the matter. It also puts the other

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<sup>467</sup> Fair Work Act s.12.

<sup>468</sup> Fair Work Act s.12.

<sup>469</sup> Fair Work Act s.596(1).

<sup>470</sup> *Department of Education and Early Childhood Development v A Whole New Approach Pty Ltd* [2011] FWA 8040 (Gooley C, 29 November 2011) at para. 67.

<sup>471</sup> *ibid.*

<sup>472</sup> Fair Work Commission Rules 2013 r 11(1).

<sup>473</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 17.

parties on notice that costs are being incurred for which the other parties (or their lawyers or paid agents) could become liable if a costs order is made by the Commission.<sup>474</sup>

### **Meaning of ‘act for’ a person**

In broad terms, a lawyer or paid agent **acts for** a person in relation to a matter before the Commission if they provide their professional services to the person in relation to the matter—for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission or a member of the staff of the Commission
- preparing to appear as an advocate
- negotiating a settlement or compromise of the matter
- giving legal or other advice
- preparing or advising on documents (including applications, forms, affidavits, statutory declarations, witness statements, written submissions and appeal books) for use at a conference or hearing
- lodging documents with the Commission
- sending letters or emails to the Commission, another party or another lawyer or paid agent, or
- carrying out work incidental to any of the above.<sup>475</sup>



#### **Link to form**

- [Form F53 – Notice that lawyer or paid agent acts for a person](#)

All forms are available on the [Forms](#) page of the Commission’s website.

### **Ceasing to ‘act for’ a person**

Each lawyer or paid agent who ceases to act for a person in relation to a matter before the Commission must lodge a notice with the Commission informing it that the lawyer or paid agent has ceased acting for the person in relation to the matter.<sup>476</sup>



#### **Link to form**

- [Form F54 – Notice that lawyer or paid agent has ceased to act for a person](#)

All forms are available on the [Forms](#) page of the Commission’s website.

<sup>474</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 16.

<sup>475</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 13.

<sup>476</sup> Fair Work Commission Rules 2013 r 11(2).

### ***In-house counsel, union representatives and employer association representatives***

The following representatives are **not** required to seek permission to appear:

- a lawyer or paid agent who is an employee (or officer) of the person, or
- a lawyer or paid agent who is an employee (or officer) of any of the following, which is representing the person:
  - an organisation (including a union or employer association), or
  - an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - a peak council, or
  - a bargaining representative, or
- a lawyer or paid agent who is a bargaining representative.<sup>477</sup>

In these circumstances a person is **not** considered to be represented by a lawyer or paid agent.<sup>478</sup>

### ***Others***

In circumstances where the person seeking to represent a person or organisation is **not** a lawyer or paid agent as defined in the Fair Work Act, permission to represent is not required.<sup>479</sup>

### ***Workplace Advice Service***

A lawyer who provides legal assistance to a person through the Workplace Advice Service is **not** required to seek permission to appear.<sup>480</sup>



The [Workplace Advice Service](#) is a free legal assistance program facilitated by the Commission. If you are an individual or a small business owner wanting to consult a lawyer on workplace issues involving dismissal, general protections or workplace bullying, the Commission can assess whether or not you may be eligible for the Service.

The Commission's role is to connect you with lawyers who may be able to help you. These lawyers work at law firms and other legal organisations that are completely independent of the Commission.

### **What is representation?**

A Full Bench of the Commission found that the term 'representation' is concerned with more than just advocacy at a hearing. A lawyer can be said to 'represent' their client when they engage in a wide range of activities connected with litigation, not just advocacy.<sup>481</sup>

Rule 15 of the Australian Bar Association's Barristers' Conduct Rules<sup>482</sup>, describes the work of a barrister in the following way:

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<sup>477</sup> Fair Work Act s.596(4).

<sup>478</sup> Fair Work Act s.596(4).

<sup>479</sup> *Cooper v Brisbane Bus Lines Pty Ltd* [2011] FWA 1400 (Simpson C, 3 March 2011) at para. 13.

<sup>480</sup> Fair Work Commission Rules 2013 r 11(3).

<sup>481</sup> *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.

<sup>482</sup> Australian Bar Association's Barristers' Conduct Rules cited in *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.

‘15. Barristers’ work consists of:

- (a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client’s case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers.’

This work is no different with respect to a solicitor. Outside of legal representation, a paid agent involved in proceedings before the Commission will typically engage in non-legal equivalents of most of the above categories of work, and would be regarded as ‘representing’ their client in doing so.<sup>483</sup>

Section 596(1) and (2) refer to a person being represented ‘*in a matter*’ before the Commission. The word ‘matter’ describes more than just a hearing, in a legal context it usually describes the whole situation that is brought before a court or tribunal.<sup>484</sup>

Section 596(1) also expressly provides that representation in a matter includes ‘*making an application or submission to the FWC on behalf of the person*’.<sup>485</sup>

### Meaning of ‘representing’ a person and ‘participating’ in a conference or hearing

The meaning of **represent** as used in s.596 of the Fair Work Act and the Rules, is narrower than **act for a person**. Generally, for an activity that constitutes acting for a person in a matter before the Commission to also constitute **representing** the person, the activity will need to involve some interaction with the Commission itself – for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission or a member of the staff of the Commission
- participating in a conference or hearing other than as an advocate
- negotiating a settlement or compromise of the matter in a conciliation conference
- lodging written applications, responses, submissions and other documents with the Commission, or
- sending letters or emails to both the Commission and another party or lawyer or paid agent.<sup>486</sup>

**Participating in a conference or hearing** includes:

- appearing as an advocate of a person in the conference or hearing (or otherwise speaking on behalf of a person in the conference or hearing), and

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<sup>483</sup> *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.

<sup>484</sup> *ibid.*, at para. 36.

<sup>485</sup> *ibid.*, at para. 37.

<sup>486</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 22.

- attending the conference or hearing and assisting a person to present their case without speaking on behalf of the person (such as by taking notes, providing documents or cataloguing exhibits for an advocate, or making suggestions to an advocate as how best to conduct the case).<sup>487</sup>

## Notification of representing a person

### *Representation – In a conference or hearing*

In any matter before the Commission, a person must not be represented by a lawyer or paid agent in a conference or hearing relating to the matter without the permission of the Commission.<sup>488</sup>



#### Link to form

- [Form F53 – Notice that lawyer or paid agent acts for a person](#)

All forms are available on the [Forms](#) page of the Commission’s website.

### *Proposed representation – In a conference or hearing*

If a person proposes to be represented in a matter before the Commission by a lawyer or paid agent participating in a conference or hearing relating to the matter; and the participation requires permission, the person must lodge a notice with the Commission informing the Commission that the person will seek the Commission’s permission for a lawyer or paid agent to participate in the conference or hearing.



#### Link to form

- [Form F53A – Notice that a person will seek permission for lawyer or paid agent to participate in a conference or hearing](#)

All forms are available on the [Forms](#) page of the Commission’s website.

### *Representation – Not in a conference or hearing*

If a person is not participating in a conference or hearing, a person may be represented by a lawyer or paid agent in the matter **without** the permission of the Commission.<sup>489</sup>

## Ceasing to ‘represent’ a person

Each lawyer or paid agent who ceases to represent a person in relation to a matter before the Commission must lodge a notice with the Commission informing it that the lawyer or paid agent has ceased representing the person in relation to the matter.<sup>490</sup>



#### Link to form

- [Form F54 – Notice that lawyer or paid agent has ceased to act for a person](#)

<sup>487</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 23.

<sup>488</sup> Fair Work Commission Rules 2013 r 12(1).

<sup>489</sup> Fair Work Commission Rules 2013 r 12(1).

<sup>490</sup> Fair Work Commission Rules 2013 r 11(2).



All forms are available on the [Forms](#) page of the Commission’s website.

### Exceptions – Representation in certain types of matter

A person may, without the permission of the Commission, be represented in a matter by a lawyer or paid agent participating in a **conference or hearing** in relation to the following:

- a matter arising under Part 2-3 of the Fair Work Act (modern awards)
- a matter arising under Part 2-5 of the Fair Work Act (workplace determinations)
- a matter arising under Part 2-6 of the Fair Work Act (minimum wages), and
- a matter arising under ss.510 or 512 of the Fair Work Act (entry permits).<sup>491</sup>

A person may also, without the permission of the Commission, be represented in a matter by a lawyer or paid agent participating in a **conference conducted by a member of the staff of the Commission**, whether or not under delegation, in relation to the following:

- an application under s.394 of the Fair Work Act for an unfair dismissal remedy, or
- an application under s.789FC of the Fair Work Act for an order under s.789FF to stop bullying.<sup>492</sup>

However, to avoid doubt, a person participating in a **conference before a Commission Member** in relation to an application under ss.394 or 789FC of the Fair Work Act **cannot be represented by a lawyer or paid agent without the permission of the Commission**.<sup>493</sup>

The Commission may direct that a person is not to be represented in a matter by a lawyer or paid agent except with the permission of the Commission.<sup>494</sup>



Under rule 12(1)(b) and s.596 of the Fair Work Act, apart from participating in a conference or hearing, a person’s lawyer or paid agent can act for and represent the person without permission, unless the Commission directs otherwise.

For example, unless the Commission directs otherwise, the lawyer or paid agent can:

- prepare and lodge written applications, responses, submissions and other documents with the Commission, and
- correspond with the Commission and other parties.<sup>495</sup>

### When will permission be granted?

The Commission can only give permission for a person to be represented by a lawyer or paid agent in a matter before the Commission if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter (**complexity**)

<sup>491</sup> Fair Work Commission Rules 2013 r 12(2).

<sup>492</sup> Fair Work Commission Rules 2013 r 12(2).

<sup>493</sup> Fair Work Commission Rules 2013 r 12(4).

<sup>494</sup> Fair Work Commission Rules 2013 r 12(3).

<sup>495</sup> Fair Work Commission Practice Note 2/2019, [Lawyers and paid agents](#), 1 August 2019 at para. 26.

- it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively (**effectiveness**), or
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (**fairness**).<sup>496</sup>

In granting permission, the Commission will have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.<sup>497</sup>

In practice the Commission is likely to grant permission in formal proceedings, however, where a party raises an objection, the discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.<sup>498</sup>

The Commission is obliged to perform its functions and exercise its powers in a manner that is ‘fair and just’.<sup>499</sup> In some cases it may not be fair and just for one party to be represented by a lawyer or paid agent when the other is not.<sup>500</sup>

The ‘normal position’ of the Fair Work Act is that ‘a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law ...’<sup>501</sup>

A party might be required to represent themselves if the Commission is not satisfied permission should be granted for a lawyer or paid agent to appear for a client on the grounds of complexity, effectiveness or fairness.<sup>502</sup>

If a party has not made submissions objecting to representation, it is still the case that representation requires permission of the Commission.<sup>503</sup>

Partial representation may be permitted during examination-in-chief and cross-examination of the party seeking representation<sup>504</sup> or during argument about jurisdictional issues.<sup>505</sup>

Permission to be represented has been granted where the employer’s Human Resources Manager was a witness for the employer. The Commission was satisfied it is reasonable for the employer not to want the Human Resources Manager to conduct the case as well as be a witness.<sup>506</sup>

### **Complexity**

Where a party raises a jurisdictional issue, permission for representation will usually be granted.<sup>507</sup>

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<sup>496</sup> Fair Work Act s.596(2).

<sup>497</sup> Explanatory Memorandum to Fair Work Bill 2008 at para. 2296. Also see *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (Lewin C, 18 March 2011) at para. 41.

<sup>498</sup> *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) at para. 12.

<sup>499</sup> Fair Work Act s.577(a).

<sup>500</sup> *Warrell v Fair Work Australia* [2013] FCA 291 (4 April 2013) at para. 27 (**Note:** Title corrected from *Warrell v Walton*, Flick J, 10 April 2013).

<sup>501</sup> *ibid.*, at para. 24.

<sup>502</sup> *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 (Cambridge C, 29 May 2013).

<sup>503</sup> *Viavattene v Health Care Australia* [2012] FWA 7407 (Booth C, 9 October 2012) at para. 4.

<sup>504</sup> *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at para. 6.

<sup>505</sup> *O’Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010) at para. 31.

<sup>506</sup> *Wilcox v Holcim (Australia) Pty Ltd T/A Humes* [2016] FWC 2359 (Simpson C, 20 April 2016) at para. 12.

<sup>507</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 (Richards SDP, 10 April 2012) at para. 23.

Jurisdictional issues by their nature are often complex and may require expertise in case law.<sup>508</sup>

However, even if there is a jurisdictional issue which needs to be resolved, permission may still be refused or limited to specific parts of a hearing.<sup>509</sup>

### **Effectiveness**

Where a person would be unable to effectively represent themselves, permission for representation may be granted.<sup>510</sup>

The Commission will generally grant permission for representation where the person is unable to represent themselves in a manner that creates a ‘striking impression’, or which has an ‘impressive’ effect or which is ‘powerful in effect’.<sup>511</sup>

However, what might be of ‘striking impression’ or ‘impressive’ or ‘powerful in effect’ is a matter of assessment by the Commission.<sup>512</sup>

#### **Example**

A circumstance where a person may be given permission to be represented is where the person is from a non-English speaking background or has difficulty reading or writing.<sup>513</sup>

### **Fairness**

Permission may be granted if it would be unfair to refuse permission taking into account the fairness between the parties to the matter.<sup>514</sup>

#### **Example**

A circumstance where a person may be given permission to be represented is where one party to the matter is a small business with no human resources staff and the other is represented by a union.<sup>515</sup>

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<sup>508</sup> *ibid.*

<sup>509</sup> See for example *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at paras 5–6.

<sup>510</sup> Fair Work Act s.596(2)(b)

<sup>511</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 (Richards SDP, 10 April 2012) at para. 16.

<sup>512</sup> *Australian Rail, Tram and Bus Industry Union v Rail Corporation New South Wales T/A RailCorp* [2012] FWA 9906 (Cambridge C, 22 November 2012) at para. 15.

<sup>513</sup> Fair Work Act, Note (a) to s.596(2).

<sup>514</sup> Fair Work Act s.596(2)(c).

<sup>515</sup> Fair Work Act, Note (b) to s.596(2).

Case example: **Permission granted for representation – Complexity**

***O’Grady v Royal Flying Doctor Service of Australia (South Eastern Section)*** [2010] FWA 1143 (Leary DP, 17 February 2010).

The employer objected to the employee’s application for unfair dismissal remedy on the basis that the dismissal was a case of genuine redundancy. The employer sought permission to be legally represented. The employee opposed legal representation.

The Commission held that the determination of jurisdiction was a legal issue. Legal representation would allow the matter to be dealt with more efficiently. There were complex issues to be considered and the employer was a not for profit organisation without a person experienced in workplace relations advocacy. This was not a ‘simple factual contest’ but a contest about jurisdiction which might raise issues not previously considered. Permission for legal representation was granted to both parties while dealing with the issue of jurisdiction.

Case example: **Permission granted for representation – Complexity – Fairness**

***Rollason v Austar Coal Mine Pty Limited*** [2010] FWA 4863 (Stanton C, 1 July 2010).

The employee was dismissed for alleged sexual harassment. The employee contended his dismissal was, in part, related to an application made to the Commission concerning a workplace right. The employee, who was represented by a union, objected to the employer being legally represented.

The employer submitted that it did not have specialist human resources or other staff equipped with legal, industrial relations or advocacy skills to effectively represent itself in the proceedings, and its Human Resources Coordinator was on maternity leave and in any event she had no advocacy training or experience before courts or tribunals.

The Commission held that the relevant factual matrix was sufficiently complex that legal representation would assist in its effective and efficient resolution. The Union’s advocate, although not legally qualified, was highly experienced. Permission for legal representation was granted.

Case example: **Permission granted for representation – Complexity – Fairness**

***Wesslink v Walker Australia Pty Ltd T/as Tenneco*** [2011] FWA 2267 (Hampton C, 21 April 2011).

The employee was dismissed on the grounds of serious misconduct while under a modified work regime pursuant to workers’ compensation legislation. The employee was represented by the union who ‘vigorously’ opposed permission for the employer to be legally represented.

The Commission held that, among other factors, the matter had some complexity given the interaction with the workers’ compensation legislation, and that the applicant was represented by an experienced and legally qualified union advocate. Permission for legal representation was granted to the employer.

Case example: **Permission granted for representation – Complexity**

***Pedler v The Commonwealth of Australia, represented by Centrelink*** [\[2011\] FWAFB 4909](#)  
(Watson VP, Ives DP, Bissett C, 1 August 2011).

The employee appealed the decision in her unfair dismissal application. The employer had been refused permission to be represented in the unfair dismissal proceedings. On the second day of hearings the applicant sought representation, this was not opposed by the employer and permission for a legal representative to appear for the applicant was granted.

The employer sought permission to be represented by a legal representative in the appeal proceedings. The employee objected to the employer having legal representation.

The Full Bench concluded that the appeal proceedings were likely to involve a greater degree of complexity than proceedings at first instance. Permitting representation would enable the matter to be dealt with more efficiently. Permission for the employer to have legal representation was granted.

Case example: **Permission granted for representation – Complexity**

***Emery v City of Stirling*** [\[2019\] FWCFB 4015](#) (Sams DP, Gostencnik DP, McKinnon C, 20 June 2019).

At first instance the Commission refused permission for both parties to be represented. The appellant identified seven grounds of appeal but the primary focus was the denial of procedural fairness due to the refusal to grant permission for the appellant to be represented by a paid agent.

The Full Bench found this appeal ground, a procedural matter going to the conduct of the proceedings, directly impacted the outcome in the case. The Full Bench was satisfied that this appeal ground was established and it was sufficient to dispose of this appeal. The matter was a legally complex case and it was open to the Commission exercising discretion in favour of representation.

The Full Bench found there may have been a different outcome in the case if permission had been granted for the parties to be represented. The Full Bench also found that by the Commission focussing on efficiency without reference to the matter's complexity it also fell into error. The Full Bench upheld the appeal and the decision at first instance was quashed.

Case example: **Permission granted for representation – Efficiency**

***Venn v The Salvation Army T/A Barrington Lodge*** [\[2010\] FWA 912](#) (Leary DP, 9 February 2010).

The employee opposed permission for the employer to be legally represented because the employee was unrepresented and the employer could be represented by its human resources officer. However, the employee had obtained a restraining order against the human resources officer, and the human resources officer was going to be a witness in the matter. The employer had no-one else capable of presenting its case.

The employee was represented by a very experienced HR professional experienced in advocacy who had represented the applicant in other matters.

Permission for legal representation was granted to both parties. The Commission was satisfied that the respondent did not have a person able to present its case, and even if the Human Resources Officer was capable, it would be difficult for her to be both advocate and witness.

Case example: **Permission granted for representation – Fairness**

***Rahman v Storm International Pty Ltd T/A Storm International Property Maintenance*** [\[2011\] FWA 7583](#) (Cambridge C, 4 November 2011).

The employer was a medium-size business with some specialist human resources staff, but with no-one of experience as an industrial advocate. The applicant was represented by a legally qualified, skilled and experienced advocate from a union.

The Commission was not convinced that the matter was genuinely of sufficient complexity to require assistance by legal representatives, however permission was granted for the employer to be represented by a lawyer or paid agent on the basis of fairness. The Commission considered that unfairness would result from what, at least in perception, would be the more advantageous representation of the applicant as opposed to that to which the employer had been restricted, being an unqualified and presumably inexperienced human resources or other manager.

Although the matter was not a complex one, unfairness would arise from an imbalance of representation if permission for legal representation was not granted.

Case example: **Permission NOT granted for representation – Employer a member of employer association**

***Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria*** [\[2011\] FWA 1520](#) (Lewin C, 18 March 2011).

The employer in this matter was a large employer who was a member of an employer association. They sought to be represented by a private lawyer (not the employer association). The employee was self-represented.

The Commission found that there were no particularly complex jurisdictional or substantive issues. Effective representation from experience legally qualified persons was available from within the employer's employer association. Permission was refused.

Case example: **Permission NOT granted for representation – Complexity**

***Rodgers v Hunter Valley Earthmoving Company Pty Ltd*** [2009] FWA 572 (Harrison C, 9 October 2009).

The employee was represented by his union. The employee opposed the employer being represented by a lawyer. The employer argued that the complexity of the issues meant that the matter would be more efficiently dealt with by a lawyer.

The Commission determined that because the employee admitted to engaging in the behaviour which led to his dismissal, the matter was a relatively simple factual contest.

The Commission was of the opinion that this was not a matter which required forensic cross-examination or was of a complex nature, so permission for the employer to be legally represented was refused.

Case example: **Permission NOT granted for representation – Complexity**

***Hamilton v Carter Holt Harvey Wood Products Australia Pty Ltd*** [2012] FWA 5219 (Bartel DP, 19 June 2012).

Permission to appeal refused [2012] FWAFB 6832 (Drake SDP, Kaufman SDP, Lee C, 15 August 2012).

The employee in this matter was represented by his union. The employer sought to be represented by a lawyer. The employer was a large employer with in-house counsel. The employer argued that their in-house counsel was inexperienced in arbitrations of unfair dismissal matter compared to the applicant's union advocate.

The Commission held that the matter, while not straightforward did not involve complex jurisdictional issues or technicalities, and that no unfairness would arise if permission was refused. Permission for legal representation was refused.

Case example: **Permission NOT granted for representation – Complexity**

***Bowley v Trimatic Management Services Pty Ltd T/A TSA Telco Group*** [2013] FWC 1320 (Steel C, 1 March 2013).

The employee in this matter was self-represented. The employer sought to be represented by a lawyer. The employee opposed permission for the employer to be legally represented.

The Commission found that the matter appeared to be a performance-based termination and did not involve any complex facts, and that the employer company, with 1180 employees and a dedicated human resources department, did have the ability to represent itself. Permission for legal representation was refused.

## Rescheduling or adjourning matters

Parties to matters before the Commission may apply to have the matter adjourned.

There should be no presumption that an adjournment will be granted.<sup>516</sup> The principles in relation to adjourning (or staying) proceedings are as follows:

- a party to a matter before the Commission has a right to have the matter determined as quickly as possible
- serious consideration needs to be given before any action interferes with this right
- the party who applies for the adjournment must prove that it is necessary
- a party is not automatically entitled to an adjournment because they are involved in a criminal hearing, and
- an application for an adjournment must be determined on its own merits.<sup>517</sup>

The Commission's task is a 'balancing of justice between the parties' taking all relevant factors into account.<sup>518</sup>

An adjournment of an unfair dismissal application will only occur if there are substantial grounds for the adjournment application.

Examples where a request for an adjournment may be granted include:

- where illness of the applicant or a significant person in the respondent's business or a witness would prevent them from attending a proceeding – a medical certificate must be provided by the requesting party to substantiate the request
- unavailability of a representative that started acting for a party before the application was listed for hearing
- death or serious injury of a family member of an applicant, a significant person in the respondent's business or a witness, or
- where the applicant, a significant person in the respondent's business, a witness or a representative will be interstate or overseas and the travel was booked before the application was listed for hearing – the Commission may ask for proof that the booking was made prior to the matter being listed for hearing.

The other party will be asked to comment on the adjournment request prior to a decision being made by the Commission.

### Uncontested applications

The Commission attempts to contact the parties to an unfair dismissal application as the matter progresses. If a party does not respond to the Commission's notices or directions the application may still be dealt with as an uncontested application. Any orders made by the Commission in an uncontested application are legally binding and enforceable, subject to any contrary outcome on appeal.<sup>519</sup>

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<sup>516</sup> *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* [Print S8287](#) (AIRC, Watson SDP, 19 July 2000) at para. 26.

<sup>517</sup> *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* [Print S8287](#) (AIRC, Watson SDP, 19 July 2000) at para. 31; summarising the relevant principles from *McMahon v Gould* [\(1982\) 7 ACLR 202](#) (19 February 1982).

<sup>518</sup> *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* [Print S8287](#) (AIRC, Watson SDP, 19 July 2000) at para. 28; citing *McMahon v Gould* [\(1982\) 7 ACLR 202](#) (19 February 1982).

<sup>519</sup> See for example *Antonarakis v Logan City Electrical Service Division Pty Ltd* [\[2017\] FWC 3801](#) (Simpson C, 21 July 2017).



## Ongoing criminal matters

In determining whether a civil matter interferes with a defendant in a criminal matter’s right to silence the following relevant factors may be considered:

- the possibility of publicity reaching and influencing jurors in the criminal matter
- the proximity of the criminal hearing
- the possibility of a miscarriage of justice
- the burden on the defendant of preparing for both the civil and the criminal matters
- whether the defendant has already disclosed his defence to the criminal allegations.<sup>520</sup>

The principles within *McMahon v Gould* have been questioned in subsequent judgments but the decision has not been overturned.<sup>521</sup>

## Deceased applicant

The right under the Fair Work Act to make an unfair dismissal remedy application is personal to the dismissed employee. The Fair Work Act does not confer a right to a remedy, but only a right to make an application and having it heard according to law. It is a right that is a bare and non-assignable right and generally is not one that is to be regarded as a proprietary right.<sup>522</sup>

This situation also leads to a number of considerations with respect to procedural fairness, particularly with regard to the capacity to give and test evidence and to the right of reply, which prevent the proceedings from continuing following the passing of an applicant.<sup>523</sup>



If the applicant in an unfair dismissal matter has passed away, the estate of the applicant cannot continue with the application.

The Commission will find that the application has no reasonable prospects of success and dismiss it.

## Bias

A Commission member should not hear a case if there is a reasonable apprehension that they are biased.<sup>524</sup>

<sup>520</sup> *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982) at p. 206.

<sup>521</sup> See for example *Baker v CMR of Federal Police* [2000] FCA 1339 (19 September 2000) at paras 34–35, [(2000) 104 FCR 359]; *Yuill v Spedley Securities Ltd* (in liq) (1992) 8 ACSR 272 (Kirby P).

<sup>522</sup> *Stan v Frontline Australasia* [2014] FWC 5457 (Gostencnik DP, 12 August 2014) at para. 7; see also *Millington v Traders International Pty Ltd* [2014] FWCFB 888 (Hatcher VP, Asbury DP, Simpson C, 23 April 2014) at para. 71.

<sup>523</sup> *Rohrlach v L.M Robertson & P.F. Robertson T/A PF & LM Robertson* [2018] FWC 2798 (Simpson C, 21 May 2018) at para. 12.

<sup>524</sup> *R v Watson; Ex parte Armstrong* [1976] HCA 39 (3 August 1976), [(1976) 136 CLR 248; (1976) 9 ALR 551, 561–565]; cited in *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 7, [(1983) 151 CLR 288, 293–294].



**Reasonable apprehension of bias** means that a party to a matter before the Commission has a genuine concern that the Commission member might not be impartial and as a result may not deal with the matter in a fair and balanced way.

The question of a reasonable apprehension of bias is a difficult one involving matters ‘of degree and particular circumstances [which] may strike different minds in different ways’.<sup>525</sup>

A reasonable apprehension of bias involves deciding whether a ‘fair-minded lay observer’ would reasonably apprehend that the decision maker would not decide a case impartially and without prejudice.<sup>526</sup> It is not bias where a decision maker decides a case adversely to one party.<sup>527</sup>

Reasonable apprehension of bias may arise in the following four (sometimes overlapping) ways:

- if a Commission member has some direct or indirect interest in the case, financial or otherwise
- if a Commission member has published statements or acted in a way that gives rise to a reasonable apprehension of prejudice
- if the Commission member has some direct or indirect relationship, experience or contact with anyone involved in the case, and
- if the Commission member has some knowledge of extraneous information, which cannot be used in the case, however would be seen as detrimental.<sup>528</sup>

While it is important that justice must be seen to be done, it is of equal importance that Commission members discharge their duty to hear the evidence and decide the matter.<sup>529</sup> This means that they should not accept the suggestion of apprehended bias too readily.<sup>530</sup>

### Expression of a view or prejudgment

In deciding whether a Commission member should be disqualified for the appearance of bias, the Commission will consider whether a reasonable and fair minded person might anticipate that the Commission member might approach the matter with a partial or prejudiced mind.<sup>531</sup>

The question is not whether the decision maker’s mind was blank, but whether their mind was open to persuasion.<sup>532</sup>

The expression of a provisional view on a particular issue, or warning parties of the outcome of a provisional view, is usually entirely consistent with procedural fairness.<sup>533</sup>

<sup>525</sup> *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 8, [(1983) 151 CLR 288]; citing *R v Shaw; Ex parte Shaw* (1980) 55 ALJR 12 (14 November 1980) at p. 16 (Aickin J).

<sup>526</sup> *Dain v Bradley & Grant* [2012] FWA 9029 (Booth DP, 29 October 2012) at para. 14; citing *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 (9 February 2011) at para. 104.

<sup>527</sup> *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 352].

<sup>528</sup> *Webb v The Queen* [1994] HCA 30 (30 June 1994), [(1994) 181 CLR 41, 74]; see also *Construction, Forestry, Maritime, Mining and Energy Union v Watpac Construction Pty Ltd T/A Watpac Construction* [2019] FWCFB 3855 (Hamberger SDP, Gostencnik DP, Saunders DP, 4 June 2019).

<sup>529</sup> *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, at p. 352].

<sup>530</sup> *ibid.*

<sup>531</sup> *Johnson v Johnson* [2000] HCA 48 (7 September 2000) at para. 11, [(2000) 201 CLR 488].

<sup>532</sup> *The Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 (29 March 2001) at para. 71, [(2001) 205 CLR 507].

<sup>533</sup> *Oram v Derby Gem Pty Ltd* PR946375 (AIRCFCB, Lawler VP, Kaufman SDP, Blair C, 22 July 2004) at para. 110, [(2004) 134 IR 379].

## Prior relationship

Generally, a Commission member will not be disqualified in circumstances where it is found that the member, before being appointed as a member, gave legal advice or represented a person who now appears before them as a party in their capacity as a member.<sup>534</sup> However the member should not hear a matter if the member:

- is determining the correctness of advice they gave to a party in their role as a legal representative
- recommended a course of conduct to a party in their role as a legal representative and the legality, reasonableness or wisdom of that conduct is to be determined, or
- is determining the quality of the advice they gave while they were the legal representative of one of the parties.<sup>535</sup>

## Extraneous information

The general rule is that a Commission member should disclose any independent knowledge of factual matters that affect or may affect the decision to be made.<sup>536</sup>

A central element of the justice system is that a judge (or Commission member) should try the case based on the evidence and arguments presented.<sup>537</sup> A judge (or Commission member) should not take into account, or indeed receive, secret or private representations from a party or from a stranger about the case they are to decide.<sup>538</sup>

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<sup>534</sup> *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 25 (20 June 1991) at para. 10, [(1991) 173 CLR 78].

<sup>535</sup> *ibid.*

<sup>536</sup> *Re Media, Entertainment and Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd (No 2)* [1994] HCA 66 (9 February 1994) at para. 12, [(1994) 119 ALR 206].

<sup>537</sup> *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 350].

<sup>538</sup> *ibid.*

Case example: **NO apprehension of bias – Prior relationship and representation in alleged similar matter**

***National Tertiary Education Industry Union v Victoria University*** [2010] FWA 2263 (Gooley C, 17 March 2010).

The respondent requested that this matter be referred to another Commission Member on the basis of reasonable apprehension of bias. The reasons the respondent gave were:

- that the Member had, in her previous role as a solicitor, acted on behalf of the applicant in a similar dispute with the respondent;
- and the legal firm that the Member had worked for in their previous role was acting for the applicant in the current matter before the Commission.

The Commission held that there was no relevant overlap between the previous and current proceedings, and that the Member’s previous association with the applicant and the applicant’s legal firm was, on the authorities, an insufficient reason for the Member to stand aside from the matter. Accordingly the member declined to disqualify herself.

Case example: **NO apprehension of bias – Alleged prejudgment**

***RMIT University v National Tertiary Education Industry Union*** [2012] FWA 2418 (Lawler VP, 21 March 2012).

The union in this matter requested that the Commission Member disqualify himself from hearing an application for an order to stop industrial action. The reason was that the Member had, in deciding a related dispute involving the same parties, characterised any future ‘ban’ on the completion of a particular project as unprotected industrial action. The ban had eventuated and was the subject of the current application.

The Commission held that because the earlier decision did not amount to any conclusion that such a ban was in place, it could not indicate to a fair-minded and impartial observer that an order to stop industrial action should issue.

## Part 8 – Commission process – Remedies



### Important

Parties to an unfair dismissal matter need to give consideration to what remedy they consider appropriate and the reasons why before the matter is heard.

Having this information ready will assist the Commission in determining the matter.

### Powers of the Commission



See Fair Work Act s.390

The Commission may order a person's reinstatement, or the payment of compensation to a person, if the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed, and found that the person has been unfairly dismissed.

The question of whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one.<sup>539</sup> The grant of a remedy for an unfair dismissal is not automatic or a right.<sup>540</sup>



An **order** is a compulsory direction given by the Commission in accordance with a decision.

A person commits an offence under the Fair Work Act if the person contravenes a Commission order (or term of the order) that applies to that person.<sup>541</sup>

#### Case example: **Dismissal found unfair – Remedy NOT ordered – Conduct of employee**

*Cini v Plenty Valley Services Association Inc* [2012] FWA 6918 (Ryan C, 17 August 2012).

The employee was dismissed for the use of a cash account in a form that was not properly recorded or accounted for. The Commission found that the employer had a valid reason for the dismissal but that the employee had been unfairly dismissed due to the procedures followed in effecting the dismissal.

The Commission decided not to grant any form of remedy. It noted that even if it considered that a remedy was appropriate, it would have been a zero compensation amount, given the conduct of the employee in not providing proper accounting records for the cash component of the operations of his job.

<sup>539</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at para. 9.

<sup>540</sup> *Rushiti v Australian Postal Corporation T/A Australia Post* [2012] FWA 5012 (Ryan C, 19 June 2012) at para. 4, citing *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 24.

<sup>541</sup> Fair Work Act ss.405, 675.

Case example: **Dismissal found unfair – Remedy NOT ordered – Failure to provide evidence of earnings**

***Bevege v Javelin Transport – Kevin Lambert & Paul Scott T/A Resource Management Group*** [2015] FWC 1929 (Asbury DP, 20 March 2015).

The Commission found that the employee had been unfairly dismissed. The Commission directed the employee to file material in relation to his earnings pre and post dismissal to enable the Commission to assess compensation. The employee did not file any material. The Commission then provided the employee with a final chance to file material in relation to his earnings. No material was received from the employee.

The Commission considered that an order for compensation was appropriate in the circumstances of the case but as the employee had failed to provide evidence of his earnings, no compensation was ordered.



- **Related information**
- Compensation
- Enforcement of Commission orders

## Reinstatement

The Commission must determine if reinstatement is appropriate before considering any other remedy. It is not until the Commission is satisfied that reinstatement is inappropriate that compensation can be considered.<sup>542</sup>

### What does an order for reinstatement mean?



See Fair Work Act s.391

An order for reinstatement means that the employer must:

- reappoint the person to the position in which they were employed immediately before the dismissal,<sup>543</sup> or
- appoint the person to another position with terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.<sup>544</sup>

When ordering reinstatement the Commission does not have to specify a particular position. It can be left to the employer to choose the position and to comply with the order to provide terms and conditions that are no less favourable than those on which the person was employed immediately before their dismissal.<sup>545</sup>

<sup>542</sup> See discussion of Fair Work Act s.390(3) in *Holcim (Australia) Pty Ltd v Serafini* [2011] FWA 7794 (Drake SDP, Sams DP, Cloghan C, 10 November 2011) at para. 24, [(2011) 216 IR 1]; see also *Hatwell v Esso Australia Pty Ltd* [2019] FWC 931 (Colman DP, 13 February 2019).

<sup>543</sup> Fair Work Act s.391(1)(a).

<sup>544</sup> Fair Work Act s.391(1)(b).

<sup>545</sup> *Technical and Further Education Commission T/A TAFE NSW v Pykett* [2014] FWC 714 (Ross J, Booth DP, Bissett C, 29 January 2014) at para. 53, [(2014) 240 IR 130].

## When is reinstatement not appropriate?

Reinstatement might be *inappropriate* in a range of circumstances, for example:

- if the employer no longer conducts a business into which the employee may be reappointed<sup>546</sup>
- if an employee is incapacitated because of illness or injury. The weight to be accorded to ongoing incapacity when considering whether reinstatement is appropriate will depend upon all of the circumstances of the case<sup>547</sup>
- where there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship<sup>548</sup>
- where reinstatement of an employee would almost certainly lead to a further termination of the employee's employment (for example, because the employer discovers an act of serious misconduct after the employee's termination)<sup>549</sup>

### **Loss of trust and confidence**

'Trust and confidence is a necessary ingredient in any employment relationship ...'<sup>550</sup> Where trust and confidence have been lost, reinstatement may be impractical.<sup>551</sup> The reason for the loss of trust and confidence must be 'soundly and rationally based'.<sup>552</sup>

An employer who has accused an employee of wrongdoing justifying summary dismissal may be reluctant to change their opinion regardless of a court finding.<sup>553</sup> Consequently it is important to carefully scrutinise any claim by an employer that reinstatement is impractical because of a loss of confidence in the employee.<sup>554</sup>

The fact that it may be difficult or embarrassing for an employer to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct is not necessarily

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<sup>546</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at para. 17; citing *Chelvarajah v Global Protection Pty Ltd* [2004] FCA 1661 (21 December 2004), [(2004) 142 FCR 296].

<sup>547</sup> See for example *Cartisano v Sportsmed SA Hospitals Pty Ltd* [2015] FWCFB 1523 (Hatcher VP, Smith DP, Roe C, 12 March 2015).

<sup>548</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at paras 19–20. See also *Smith v Moore Paragon Australia Ltd* PR942856 (AIRCFB, Lawler VP, Kaufman SDP, Mansfield C, 20 January 2004) at paras 48–54, [(2004) 130 IR 446].

<sup>549</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at para. 17.

<sup>550</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15 (7 February 1997), [(1997) 72 IR 186]; cited in *Nguyen v IGA Distribution (Vic) Pty Ltd* [2011] FWA 3354 (Bissett C, 3 June 2011) at para. 24; **Note:** *Perkins* was decided under legislation with different wording to the current wording, using 'impracticable' rather than 'inappropriate'. The Full Bench in *Australia Meat Holdings Pty Ltd v McLauchlan* Print Q1625 (AIRCFB, Ross VP, Polites SDP, Hoffman C, 5 June 1998), [(1998) 84 IR 1 at p. 18], found that the observations in *Perkins* were still relevant to the question of whether reinstatement was inappropriate.

<sup>551</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15 (7 February 1997), [(1997) 72 IR 186]; cited in *Nguyen v IGA Distribution (Vic) Pty Ltd* [2011] FWA 3354 (Bissett C, 3 June 2011) at para. 40.

<sup>552</sup> *ibid.*

<sup>553</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15 (7 February 1997), [(1997) 72 IR 186 at p. 191].

<sup>554</sup> *ibid.*

indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.<sup>555</sup>

The loss of trust and confidence is a relevant factor to be considered ‘but it is not necessarily conclusive’.<sup>556</sup>

Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.<sup>557</sup>

### ***No positions available***

It is common that, by the time a matter is determined by the Commission, the position that was occupied by the employee is no longer available.<sup>558</sup> This on its own is insufficient for a finding that reinstatement is not appropriate.<sup>559</sup> The unavailability of a job vacancy is just one factor to be taken into account in determining whether reinstatement is appropriate.<sup>560</sup>

It is not appropriate to reinstate an employee to a lower position when a position with terms and condition no less favourable is unavailable.<sup>561</sup> The only appropriate remedy in this case would be compensation.

### ***Sick or injured employee***

Reinstatement of an incapacitated employee will not be appropriate when:

- The employee would be unable to perform their contractual obligations in the future, or would have to perform duties radically different to the terms of their employment contracts.<sup>562</sup>
- It would impose a ‘material future productivity burden’ or some other ‘unreasonable burden’ on the employer.<sup>563</sup>
- It would ‘impose an unreasonable burden on other employees’.<sup>564</sup>

The following matters may be considered in determining whether reinstatement is appropriate:

- The terms of the employment contract; in particular, the inherent requirements of the employee’s contractual position.
- Whether the incapacity prevents the employee from fulfilling the inherent requirements of the employee’s contractual position.

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<sup>555</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at para. 27; citing *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15 (7 February 1997), [(1997) 72 IR 186, 191].

<sup>556</sup> *Australia Meat Holdings Pty Ltd v McLauchlan* [Print Q1625](#) (AIRCFB, Ross VP, Polites SDP, Hoffman C, 5 June 1998), [(1998) 84 IR 1 at p. 17].

<sup>557</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at para. 28.

<sup>558</sup> *Smith v Moore Paragon Australia Ltd* [PR942856](#) (AIRCFB, Lawler VP, Kaufman SDP, Mansfield C, 20 January 2004) at para. 15, [(2004) 130 IR 446].

<sup>559</sup> *ibid.*

<sup>560</sup> *ibid.*

<sup>561</sup> *ibid.*

<sup>562</sup> *ibid.*, at para. 51.

<sup>563</sup> *ibid.*

<sup>564</sup> *ibid.*



- The range of duties or actual job performed by the employee prior to dismissal. When the position covers a wide range of duties and the employee is unable to perform only some of those duties it is less likely incapacity will be determinative against reinstatement.
- Whether modified work arrangements are practical and reasonable. This includes the provision of special equipment or modified duties to enable the employee to make a full or substantial contribution to the employer’s enterprise. It is often impractical or unreasonable for small employers to provide modified duties.
- The likelihood that the employee will substantially recover from the illness or injury.
- Whether the employer had any statutory duties under workers’ compensation or other legislation, and whether those duties were complied with.<sup>565</sup>

These matters are interrelated and cumulative.<sup>566</sup> The list is not exhaustive.<sup>567</sup>

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Case example: **Reinstatement appropriate – Threats of violence to other employees**

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***Galea v Tenix Defence Pty Ltd*** [PR928494](#) (AIRCFB, Giudice J, Lawler VP, Bacon C, 11 March 2003).

The employee was alleged to have threatened a former colleague about to give evidence on behalf of the employer.

The Full Bench found that threats of this nature would usually mean that reinstatement would be inappropriate. In this case the Full Bench found that it would be possible for the relationship between the employer and employee to improve. It also found that the threats were not indicative of future behaviour.

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Case example: **Reinstatement appropriate – Workplace injury and return to work plan**

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***Chetcuti v Coles Group Supply Chain Pty Ltd*** [\[2012\] FWA 6600](#) (Roberts C, 18 September 2012).

The employee sustained an injury at work and undertook a return to work plan to enable him to resume his normal duties. After some discussion between the employee and the employer about the employee providing medical evidence, the employee was dismissed for failing to attend meetings and provide medical certificates.

After concluding that the employee was unfairly dismissed, it was found that the employee was restored to health and willing and capable of resuming his duties. The Commissioner ordered his reinstatement.

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<sup>565</sup> *ibid.*, at para. 54. See for example *Cartisano v Sportsmed SA Hospitals Pty Ltd* [\[2015\] FWCFB 1523](#) (Hatcher VP, Smith DP, Roe C, 12 March 2015).

<sup>566</sup> *ibid.*, at para. 55.

<sup>567</sup> *ibid.*

Case example: **Reinstatement appropriate – Misconduct**

***Regional Express Holdings Ltd T/A Rex Airlines v Richards*** [\[2010\] FWAFB 8753](#) (Giudice J, Kaufman SDP, Ryan C, 12 November 2010).

It was found that the employee had deliberately driven a work vehicle in an unsafe manner and had not been honest in a disciplinary hearing. In the first instance it was found that while there was evidence of misconduct, in the circumstances the dismissal was harsh and reinstatement was ordered.

On appeal the Full Bench upheld the decision at the first instance to reinstate the employee with continuity of service but declined to award payment for remuneration lost.

Case example: **Reinstatement appropriate – Loss of trust and confidence due to dishonesty**

***Balfours Bakery v Cooper*** [\[2011\] FWAFB 8032](#) (Giudice J, Hamberger SDP, Spencer C, 2 December 2011).

The employee suffered a shoulder injury. He made a claim for income protection insurance and had access to 2 years' income protection. He then made a WorkCover claim. The employer dismissed the employee and claimed that the injury prevented him from returning to work and that he had been dishonest in making both the insurance claim and the WorkCover claim.

The Full Bench found that it was open to the member at first instance to conclude there had been no deliberate dishonesty and therefore no breakdown in trust and confidence.

Case example: **Reinstatement appropriate – Workplace injury and subsequent illness**

***Cook v ACI Operations Pty Ltd*** [\[2012\] FWA 140](#) (Hampton C, 22 February 2012).

At the first instance it was found that the employee had been unfairly dismissed. He had been given a full clearance to attend work in relation to the workplace injury.

It was found that the employee could be accommodated back into the workplace without causing the employer unreasonable burden.

Case example: **Reinstatement NOT appropriate – Redundancy**

***Ball v Metro Trains Melbourne T/A Metro Trains*** [\[2012\] FWA 8384](#) (Roe C, 1 October 2012).

The employee's redundancy was found not to be a genuine redundancy because the employer failed to satisfy the requirements for consultation. The employee sought reinstatement.

It was found that there was not an appropriate position in which to reinstate the employee. The Commission ordered compensation instead.

Case example: **Reinstatement NOT appropriate – Occupational health and safety breach**

***Parmalat Food Products Pty Ltd v Wililo*** [2011] FWA FB 1166 (Watson VP, Sams DP, Asbury C, 2 March 2011), [(2011) 207 IR 243].

The employee was dismissed for breaching health and safety policy when he placed his arms, head and torso under an unstable load on a forklift. It was held that this was a valid reason for dismissal amounting to serious misconduct.

Case example: **Reinstatement NOT appropriate – Breakdown of the employment relationship**

***Bellia v Assisi Centre Inc T/A Assisi Centre Aged Care*** [2011] FWA FB 5944 (Drake SDP, Ives DP, Simpson C, 5 September 2011).

The employee was a priest who was dismissed by his employer, an aged care facility. At the first instance reinstatement was ordered.

On appeal reinstatement was found to be inappropriate due to the breakdown in relationship between the employee and the employer and because of the employee's inability to carry out the functions of his pastoral role due to an adverse finding by the Roman Catholic Church.

Case example: **Reinstatement NOT appropriate – Disobeying a clear direction and policy**

***King v Catholic Education Office Diocese of Parramatta T/A Catholic Education Diocese of Parramatta*** [2014] FWC FB 2194 (Hatcher VP, Drake SDP, Bull C, 10 April 2014).


Decision at first instance [2014] FWC 6413 (Lawrence DP, 3 October 2014).

The employee was a teacher, who was dismissed for transporting students in his car on weekends to participate in surf lifesaving activities, contrary to directions issued by the school, and the policy of the Catholic Education Diocese of Parramatta. At first instance reinstatement was held not to be appropriate because of a loss of trust and confidence.

On appeal, it was found that the Commission had erred in not giving consideration to reinstatement to an alternative non-teaching position at another school in the Diocese or the Diocese's head office.

Upon rehearing, the Commission found it was inappropriate to order reinstatement to an alternative position as the positions available were casual or fixed term and at a lower salary level than the teacher's previous position or did not suit the teacher's experience, skills or remuneration. Further, it was held that it was not appropriate to order reinstatement to a party that had not been directly involved in the case.

## Reappointed to their previous position

 See Fair Work Act s.391(1)(a)

Reinstatement means ‘to put back in place’, to restore employment as it ‘existed immediately before the termination’.<sup>568</sup>

‘[T]he employee is to be given back his ‘job’ at the same place and with the same duties, remuneration and working conditions as existed before the termination’.<sup>569</sup>

Reinstatement is ‘meant to be real and practical, not illusory and theoretical’.<sup>570</sup>

## Appointed to another position no less favourable

 See Fair Work Act s.391(1)(b)

The ‘position’ refers to not only pay and other benefits but also to the work performed by the employee.<sup>571</sup>

### Case example: **Appointed to another position no less favourable**

***IGA Distribution (Vic) Pty Ltd v Nguyen*** [\[2011\] FWAFB 4070](#) (Boulton J, O’Callaghan SDP, Ryan C, 9 September 2011), [(2011) 212 IR 141].

In the first instance the employer was ordered to reinstate the employee to his former position. The reason given for not reinstating him to another warehouse in the same area was that the other warehouses came under a different agreement.

On appeal the Full Bench found that while there were some differences between the enterprise agreements at the various sites, it was possible to reinstate the employee to a different site on terms that were ‘no less favourable’. The ‘no less favourable’ requirement does not require terms and conditions to be the same. It is satisfied if the position is an ‘equivalent position’ or a ‘close substitute’.

## Order for reinstatement cannot be subject to conditions

An order for reinstatement **cannot** be made if it is conditional upon a medical, risk or health and safety assessment by a third person after the order has been issued. The Commission must make any required assessment of that nature based on the evidence of the parties. If the Commission cannot be satisfied that the relevant employee is fit to perform the inherent duties of his or her

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<sup>568</sup> *Blackadder v Ramsey Butchering Services Pty Ltd* [\[2005\] HCA 22](#) (27 April 2005) at para 14, [(2005) 221 CLR 539 (McHugh J)].

<sup>569</sup> *ibid.*

<sup>570</sup> *ibid.*, at para. 33.

<sup>571</sup> *Blackadder v Ramsey Butchering Services Pty Ltd* [\[2005\] HCA 22](#) (27 April 2005) at para 14, [(2005) 221 CLR 539]; cited in *IGA Distribution (Vic) Pty Ltd v Nguyen* [\[2011\] FWAFB 4070](#) (Boulton J, O’Callaghan SDP, Ryan C, 9 September 2011) at para. 35, [(2011) 212 IR 141].

former position, or those of an alternative position that is no less favourable, then reinstatement is not an appropriate remedy.<sup>572</sup>

This does not mean that a reinstatement order may not contain ancillary provisions additional to the requirement that the employee be reinstated to the identified position. For example, a reinstatement order will usually identify a date by which the order is to be complied with; and other necessary ancillary provisions may be included provided that the order is one which retains the essential character of effecting the reinstatement of the employee.<sup>573</sup>

Case example: **Order for reinstatement conditional – Capacity to safely undertake the inherent requirements of previous position**

*Cartisano v Sportsmed SA Hospitals Pty Ltd* [2015] FWCFB 1523 (Hatcher VP, Smith DP, Roe C, 12 March 2015).

Decision at first instance [2014] FWC 4928 (O’Callaghan SDP, 29 July 2014).

The employee was dismissed on medical incapacity grounds arising from a shoulder injury she had sustained in a motor vehicle accident. At first instance the Commission ordered the reinstatement of the employee ‘subject to a risk assessment to be conducted by Sportsmed’ (the Order).

The Full Bench considered that the words ‘subject to’ clearly conditioned the requirement to reinstate the employee upon a satisfactory outcome of the risk assessment. The Full Bench held that the Order was therefore not one which reinstated the employee and was beyond power. The Full Bench ordered that the employee be reinstated to her previous position with no conditions.

## Order to maintain continuity

 See Fair Work Act s.391(2)

The Fair Work Act provides that the Commission may, where appropriate, make an order to maintain continuity of employment in addition to reinstatement.<sup>574</sup>

An order for continuity is an exercise of discretion ‘separate and distinct from the decision to reinstate the employee’.<sup>575</sup> This means that a person may be reinstated with or without an order for continuity of employment.<sup>576</sup>

An order for continuity ‘ensures that the period specified is taken into account in determining any entitlement to service related benefits.’<sup>577</sup>



**Continuity of employment** is where a person is considered to have remained as an employee during the period of time between the date of dismissal and the date of re-employment.

<sup>572</sup> *Cartisano v Sportsmed SA Hospitals Pty Ltd* [2015] FWCFB 1523 (Hatcher VP, Smith DP, Roe C, 12 March 2015) at para. 46.

<sup>573</sup> *ibid.*, at para. 45; citing *Transport Workers’ Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 (6 March 2008) at paras 37–38, [(2008) 171 IR 84].


<sup>574</sup> Fair Work Act s.391(2).

<sup>575</sup> *Kenley v JB Hi Fi* [Print S7235] (AIRCFC, Ross VP, Watson SDP, Holmes C, 22 June 2000) at para. 27.

<sup>576</sup> *ibid.*

<sup>577</sup> *ibid.*, at para. 34.

## Order to restore lost pay

 See Fair Work Act ss.391(3) and 391(4)

The Fair Work Act provides that the Commission may, where appropriate, make an order for lost wages in addition to reinstatement.<sup>578</sup>

Section 391(4) of the Fair Work Act sets out the matters that the Commission must take into account:

- any remuneration earned by the employee between the dismissal and making the order, and
- any remuneration likely to be earned between making the order for reinstatement and the actual reinstatement.

An order to restore lost pay is discretionary. The Commission may take into account ‘all of the circumstances of the case, including the conduct’ of the employee that led to the dismissal.<sup>579</sup>

### **Factors that may affect amount ordered**

Social security or Centrelink payments will generally not be deducted as ‘remuneration’ for the purpose of determining the amount for lost pay.<sup>580</sup> Whether an employee who has received social security payments is obliged to repay those benefits is a matter between the employee and social security and is not a relevant consideration for the purpose of determining the amount of lost pay ordered.<sup>581</sup>

Workers’ compensation payments may be deducted from the amount ordered.<sup>582</sup>

Any misconduct by the employee that has led to the dismissal may reduce the amount ordered.<sup>583</sup>

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<sup>578</sup> Fair Work Act s.391(3).

<sup>579</sup> *Kenley v JB Hi Fi* [Print S7235](#) (AIRC FB, Ross VP, Watson SDP, Holmes C, 22 June 2000) at para. 36.

<sup>580</sup> *Steggels Ltd v West* [Print S5876](#) (AIRC FB, Watson SDP, Williams SDP, Smith C, 11 May 2000) at para. 21]; citing *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRC FB, Munro J, Duncan DP, Jones C, 24 December 1998), [(1998) 88 IR 21]; citing *Shorten v Australian Meat Holdings* [Print N6928](#) (AIRC, Ross VP, 28 November 1996), [(1996) 70 IR 360, at p. 376].

<sup>581</sup> *Jarvis v Crystal Pictures Pty Ltd* [\[2010\] FWA 3674](#) (Cloghan C, 25 May 2010) at para. 74.

<sup>582</sup> *Steggels Ltd v West* [Print S5876](#) (AIRC FB, Watson SDP, Williams SDP, Smith C, 11 May 2000) at para. 21; citing *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRC FB, Munro J, Duncan DP, Jones C, 24 December 1998), [(1998) 88 IR 21]; citing *Shorten v Australian Meat Holdings* [Print N6928](#) (AIRC, Ross VP, 28 November 1996), [(1996) 70 IR 360, at p. 376].

<sup>583</sup> *Kenley v JB Hi Fi* [Print S7235](#) (AIRC FB, Ross VP, Watson SDP, Holmes C, 22 June 2000) at para. 36.

Case example: **Order for lost pay granted**

***Lawrence v Coal & Allied Mining Services Pty Ltd*** [2010] FWAFB 10089 (Lawler VP, O’Callaghan SDP, Roberts C, 24 December 2010), [(2010) 202 IR 388]

The employee had breached the safety policy of the employer by removing another person’s safety lock.

On appeal the majority of the Full Bench found that the dismissal was manifestly harsh due to the employee’s long record of exemplary service. The Full Bench ordered that the employee be reinstated and made an order for lost remuneration. However, 3 months’ pay was deducted from the order in light of the breach of the employer’s safety policy.

Case example: **Order for lost pay granted**

***Eng v Goodman Fielder Limited*** [2011] FWA 317 (Gooley C, 18 January 2011).

The employee was dismissed for urinating into a drain in the loading zone of his employer’s food manufacturing business.

Given the existence of a medical condition and the show of contrition by the employee, the dismissal was found to be harsh, unjust or unreasonable.

The employee was reinstated and the employer was ordered to restore lost pay for the full period since the dismissal, less any amount earned by the employee in that period. No reduction was made for the employee’s conduct.

Case example: **Order for lost pay granted**

***Presbury v Australian Rail Track Corporation Limited*** [2010] FWA 2282 (Watson VP, 31 March 2010).

The employee was dismissed for misconduct on a work trip. The employer alleged the employee breached the Code of Conduct Principles of Behaviour and the Drug and Alcohol Policy.

The Commission found that termination of employment was not a reasonable response to the conduct of the employee. It was found that the dismissal was harsh, unjust or unreasonable because the employer could not establish that the conduct relating to the Drug and Alcohol Policy had occurred.

The employee was reinstated and an order for lost pay was made, however it was limited to a period of 3 months. The reduction had regard to the amount received during the intervening period, the reasonable efforts that should have been made to find alternative employment and the nature of the employee’s conduct that led to the dismissal.

Case example: **Order for lost pay NOT granted**

*Serafini v Holcim (Australia) Pty Ltd* [2011] FWA 4214 (Connor C, 4 July 2012).

Appeal upheld in [2011] FWA 7794 (Drake SDP, Sams DP, Cloghan C, 10 November 2011), [(2011) 216 IR 1].

The employee was dismissed for aggressive and dangerous driving and a breach of safety rules. It was found on balance that the employee's conduct did not warrant dismissal.

The employee was reinstated but no order for lost pay was granted. It was found that his conduct merited some punishment.

This decision was upheld on appeal.

## Compensation

 See Fair Work Act s.392

Compensation may be considered only after the Commission is satisfied that reinstatement is inappropriate.<sup>584</sup> Compensation will only be ordered where the Commission considers it appropriate.<sup>585</sup> It is designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal.<sup>586</sup>

Compensation cannot be awarded for shock, distress or humiliation, or other analogous hurt, caused to a dismissed employee by the manner of the person's dismissal.<sup>587</sup>

### Criteria for deciding amounts

Section 392(2) of the Fair Work Act sets out the criteria for determining the amount of compensation that may be ordered.

The Commission is to take all circumstances into account, including:

- the effect of the order on the viability of the employer's enterprise
- the length of the person's service with the employer
- the remuneration that the person would have received, or would have been likely to receive, if they had not been dismissed
- the efforts of the person (if any) to mitigate the loss suffered because of the dismissal
- the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

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<sup>584</sup> Fair Work Act s.390(3)(a); see for example *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWC 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014).

<sup>585</sup> Fair Work Act s.390(3)(b); see for example *Turner v Dawsons Haulage* [2015] FWC 3058 (Hamilton DP, 19 May 2015).

<sup>586</sup> *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWC 3512 (Catanzariti VP, Watson VP, Gostencnik DP, 22 May 2015) at para. 17.


<sup>587</sup> Fair Work Act s.392(4).



- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation, and
- any other matter that the Commission considers relevant.<sup>588</sup>

No one consideration 'is to be regarded as paramount but regard must still be had to each of them'.<sup>589</sup>


### The effect of the order on the viability of the employer's enterprise

 See Fair Work Act s.392(2)(a)

The employer must 'present evidence and/or argument as to the financial situation' of the business and 'the likely effect that an order for compensation' will have on the viability of the business.<sup>590</sup>

'A mere submission that difficulties for the business will occur' is not sufficient.<sup>591</sup> Evidence should be produced in order for the Commission to properly consider this issue.


### Length of service

 See Fair Work Act s.392(2)(b)

A short period of service 'on its own is not a powerful force making for a compensation remedy (or a compensation order of significant quantum)'.<sup>592</sup>

A period of 20 months' employment has been considered not to be a lengthy period of time but in those particular circumstances did not incline the Commission to reduce any order for compensation.<sup>593</sup>

### Calculating compensation

 See Fair Work Act ss.392(2)(c), 392(2)(e) and ss.392(5)–(6)

The formula set out in *Sprigg v Paul's Licensed Festival Supermarket*<sup>594</sup> (the Sprigg formula) is commonly used in working out the appropriate amount of compensation. The Sprigg formula has been refined with use.

The Sprigg formula was decided under previous legislation but it has continued to be applied under the Fair Work Act.<sup>595</sup>

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<sup>588</sup> Fair Work Act s.390(2).

<sup>589</sup> *Tempo Services Ltd v T.M. Klooger* [PR953337](#) (AIRC FB, Williams SDP, Cartwright SDP, Larkin C, 19 November 2004), [(2004) 136 IR 358].

<sup>590</sup> *D.A. Moore v Highpace Pty Ltd* [Print Q0871](#) (AIRC FB, Boulton J, Watson SDP, Whelan C, 18 May 1998).

<sup>591</sup> *K. Beames v BDRP Falconer P/L* [PR916075](#) (AIRC, Hamilton DP, 28 March 2002) at para. 49.

<sup>592</sup> *Davidson v Griffiths Muir's Pty Ltd* [\[2010\] FWA 4342](#) (Richards SDP, 23 June 2010) at para. 140.

<sup>593</sup> *Varani v Independent Advocacy in the Tropics Incorporated T/A Independent Advocacy Townsville* [\[2011\] FWA 1633](#) (Richards SDP, 22 March 2011) at para. 92.

<sup>594</sup> *Sprigg v Paul's Licensed Festival Supermarket* [Print R0235](#) (AIRC FB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 35, [(1998) 88 IR 21].

<sup>595</sup> See *Wright v Cheadle Hume Pty Ltd T/A Macedon Spa* [\[2010\] FWA 675](#) (Lewin C, 10 February 2010).

The Full Bench of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages*<sup>596</sup> set out the approach to be taken under the Fair Work Act regarding the determination of compensation.<sup>597</sup>

If, when applied, the Sprigg formula ‘yields an amount which appears either clearly excessive or clearly inadequate’ then the Commission should reassess the assumptions made in reaching that amount.<sup>598</sup> Compensation should be appropriate having regard to all of the circumstances of the case.<sup>599</sup>

#### The Sprigg formula<sup>600</sup>

1. Estimate the **remuneration** the employee would have received if they had not been dismissed. Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment i.e. the anticipated period of employment.
2. Deduct any **remuneration** earned by the employee since their dismissal until the end of the anticipated period of employment. Workers compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.
3. Deduct an amount for **contingencies**. This is a calculation of future economic loss.
4. Consider the impact of **taxation** and adjust the figure accordingly.
5. Assess the figure against the **compensation cap**. If the amount is more than the compensation cap it should be reduced to the compensation cap.

#### How is ‘remuneration’ estimated in step 1?

The assessment of remuneration lost is a necessary element in determining an amount to be ordered in lieu of reinstatement.<sup>601</sup> Such an assessment is often difficult, but it must be done.<sup>602</sup>

In circumstances where the Commission forms the view that the employee would have stayed in the former job for a number of years then remuneration that would have been received over that period is calculated. This may include long service leave and potential bonuses.<sup>603</sup>

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<sup>596</sup> *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge* [2013] FWCFB 431 (Acton SDP, Smith DP, Ryan C, 4 February 2013).

<sup>597</sup> See also in *Smith v Fearon Howard Real Estate Pty Ltd T/A Ray White (Balmain)* [2021] FWCFB 581 (Catanzariti VP, Anderson DP, Bissett C, 5 February 2021) at para. 18.

<sup>598</sup> *Smith v Moore Paragon Australia Ltd* [PR942856](#) (AIRC FB, Lawler VP, Kaufman SDP, Mansfield C, 20 January 2004) at para. 32, [(2004) 130 IR 446].

<sup>599</sup> *ibid.* See also *Haigh v Bradken Resources Pty Ltd* [2014] FWCFB 236 (Watson VP, Sams DP, Riordan C, 24 January 2014) at para. 12, [(2014) 240 IR 366].

<sup>600</sup> Sprigg formula as refined in *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRC FB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 31; discussed in *Smith v Fearon Howard Real Estate Pty Ltd T/A Ray White (Balmain)* [2021] FWCFB 581 (Catanzariti VP, Anderson DP, Bissett C, 5 February 2021) at paras 16–19.

<sup>601</sup> *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRC FB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 35, [(1998) 88 IR 21].

<sup>602</sup> *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRC FB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 33.

<sup>603</sup> *Shorten v Australian Meat Holdings* [Print N6928](#) (AIRC, Ross VP, 28 November 1996), [(1996) 70 IR 360, at p. 376]; citing *Slifka v J W Sanders Pty Ltd* [1995] IRCA 281 (8 June 1995), [(1996) 67 IR 316, at p. 327].

### **What is deducted as ‘remuneration’ in step 2?**

Remuneration earned in other employment.

Social security payments are not generally considered to be ‘remuneration’.<sup>604</sup> Whether an employee who has received social security payments is obliged to repay those benefits is a matter between the employee and social security and is not a relevant consideration.<sup>605</sup>

Workers’ compensation payments are generally considered to be ‘remuneration’ and will be deducted.<sup>606</sup>

The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.<sup>607</sup>



- **Related information**
- Compensation
- Mitigation

### **What are the ‘contingencies’ referred to in step 3?**

In *Ellawala v Australian Postal Corporation*<sup>608</sup> the Commission made the following points in relation to contingencies:

- Step 3 involves the deduction of an amount from the total remuneration for situations that may have arisen and which ‘might have brought about some change in the earning capacity or earnings’.<sup>609</sup>
- A 25% discount for contingencies was applied in *Sprigg*.<sup>610</sup> This amount was decided on the basis of the facts of that case.<sup>611</sup> It is not a statement of an amount that is generally appropriate.<sup>612</sup>
- In assessing the impact of contingencies it is necessary for the Commission to exercise broad discretion and this involves considering both favourable and unfavourable contingencies.<sup>613</sup>
- Contingencies only apply to the anticipated period of employment.<sup>614</sup>

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<sup>604</sup> *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRCFCB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 26, [(1998) 88 IR 21]; see also *McCulloch v Calvary Health Care Adelaide* [\[2015\] FWCFB 2267](#) (Ross J, Hatcher VP, Gostencnik DP, 15 April 2015) at paras 32–35.

<sup>605</sup> *Jarvis v Crystal Pictures Pty Ltd* [\[2010\] FWA 3674](#) (Cloghan C, 25 May 2010) at para. 74.

<sup>606</sup> *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRCFCB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 26, [(1998) 88 IR 21].

<sup>607</sup> *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRCFCB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 26, [(1998) 88 IR 21].

<sup>608</sup> *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000).

<sup>609</sup> *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 36.

<sup>610</sup> *Sprigg v Paul’s Licensed Festival Supermarket* [Print R0235](#) (AIRCFCB, Munro J, Duncan DP, Jones C, 24 December 1998), [(1998) 88 IR 21].

<sup>611</sup> *ibid.*

<sup>612</sup> *ibid.*

<sup>613</sup> *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 39.

<sup>614</sup> *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001) at para. 39; citing *Ellawala v Australian Postal Corporation* [Print S5109](#) (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 43.

Case example: **Contingencies**

**Enhance Systems Pty Ltd v Cox** [PR910779](#) (AIRC FB, Williams SDP, Acton SDP, Gay C, 31 October 2001).

In this case it was found that the discount for contingencies should only be applied to that part of the anticipated period of employment that is not actually known – that is the period between the date of the decision and the end of the anticipated period of employment.

The Full Bench dismissed an appeal of the decision and considered the amount ordered in lieu of reinstatement was appropriate.

Any discount for contingencies depends upon the circumstances of the case. In this case, the Full Bench stated that for the period from the date of the termination of employment until the hearing of the application by the Commission, the economic effect of the termination of employment is known and capable of calculation. There is considerable force in the argument that any discount for contingencies should only be applied in respect to an ‘*anticipated period of employment*’ that is not actually known, ie a period that is prospective to the date of the decision. There is no discount for the period actually known.

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**What are the taxation considerations in step 4?**

The compensation amount is reduced by the tax the employee would have paid if they had received the amount as wages, this gives the **net amount**.<sup>615</sup>

The net amount is then increased by the amount of tax liability on the compensation as ordered. This is usually taxed as an employment termination payment.<sup>616</sup>

**What is the compensation cap in step 5?**

The compensation cap is set in s.392(5) of the Fair Work Act. The amount ordered to be paid by the Commission must not exceed the lesser of:

- the total amount of remuneration either received by the person, or to which the person is entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, and
- half the amount of the high income threshold immediately before the dismissal.<sup>617</sup>

From 1 July 2022, the high income threshold was \$162,000 per annum and from 1 July 2023 it is \$167,500. Therefore, the compensation cap is:

- \$81,000 for a dismissal that occurred on or after 1 July 2022 and before 1 July 2023, and
- \$83,750 for a dismissal that occurred on or after 1 July 2023.


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<sup>615</sup> *Shorten v Australian Meat Holdings* [Print N6928](#) (AIRC, Ross VP, 28 November 1996), [(1996) 70 IR 360, at p. 378].

<sup>616</sup> *ibid.* It should be noted that tax legislation now refers to ‘eligible’ termination payments.

<sup>617</sup> The high income threshold is referred to in the Fair Work Act at s.382(b)(iii), and is discussed in more detail in this Benchbook.

## Mitigation

 See Fair Work Act s.392(2)(d)

When considering ordering compensation it is necessary to consider what steps a person has taken to mitigate their loss.<sup>618</sup>

This means that a person must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.<sup>619</sup>

What is reasonable depends on the circumstances of the case.<sup>620</sup>

A person is not required to take unreasonable steps to mitigate their loss such as:

- expending money, or
- destroying or sacrificing their property rights.<sup>621</sup>



**Mitigation** means the employee has taken deliberate, positive steps to lessen the effect that the dismissal has had on them, such as by seeking new employment.

### Offers of re-employment

The general position is that a wrongfully dismissed person cannot claim a loss which would have been avoided by accepting a reasonable offer of new employment.<sup>622</sup> The refusal of another position with the employer at the same rate of pay may amount to a failure to mitigate.<sup>623</sup>

The following circumstances may not amount to a failure to mitigate when re-employment is offered:

- the refusal of another position with the employer at the same rate of pay but with lesser status, or<sup>624</sup>
- the refusal of a position with the employer where the employee has lost trust and confidence.<sup>625</sup>

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<sup>618</sup> Fair Work Act s.392(2)(d).

<sup>619</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 34; citing *Lockwood Security Products Pty Limited v Sulocki and Ors* [PR908053](#) (AIRCFCB, Giudice J, Lacy SDP, Blair C, 23 August 2001) at para. 45.

<sup>620</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 34; citing *Payzu Ltd v Saunders* [\[1919\] 2 KB 581](#).

<sup>621</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 35; citing *Burns v MAN Automotive (Aust) Pty Ltd* [\[1986\] HCA 81](#) [(1986) 161 CLR 653 at pp. 659, 677]; *Jewelowski v Propp* [\[1944\] 1 All ER 483](#) at p. 484 (Lewis J); and *Elliot Steam Tug v Shipping Controller* [\[1922\] 1 KB 127](#) at pp. 140–141.

<sup>622</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 45; citing *Williamson v Commonwealth* [\[1907\] HCA 60](#) (Higgins J, 29 November 1907), [(1907) 5 CLR 174 at p. 185].

<sup>623</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 45; citing *Brace v Calder* [\[1895\] 2 QB 253](#) (30 May 1895).

<sup>624</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 48.

<sup>625</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002) at para. 47; citing *Bostik (Australia) Pty Ltd v Gorgevski (No. 1)* [\[1992\] FCA 209](#) (14 May 1992), [(1992) 36 FCR 20, at p. 32].

Case example: **Employee mitigated loss – Re-employment offer**

***Owens v Allied Express Transport Pty Ltd*** [2011] FWA 1058 (Hampton C, 28 February 2011).

The applicant's refusal to accept was in effect an offer of reinstatement immediately after dismissal was held not to constitute a failure to mitigate loss, given that the employer's prior conduct in seeking unilaterally to reduce the employee's salary represented 'a further major breach of the fabric of the employment relationship'. The applicant, who was pregnant, had gained some short-term employment prior to giving birth.

There was no reduction of compensation for any failure to mitigate loss. The employer's application to appeal was refused.

Case example: **Employee mitigated loss – Medical incapacity**

***Hillbrick v Marshall Lethlean Industries Pty Ltd*** [2010] FWA 7704 (Cribb C, 15 October 2010).

The employee was unable to mitigate his losses for a period of time between being dismissed and recovering from surgery.

He obtained employment soon after he was given medical clearance. It was found that it was reasonable for the employee not to mitigate his loss for the recovery period. No amount was deducted for failure to mitigate.

The Commissioner ordered 10 weeks' payment in lieu of reinstatement.

Case example: **Employee mitigated loss – Alternative employment**

***SB v FC Pty Ltd*** [2010] FWA 4179 (Hampton C, 16 June 2010).

The employee gained alternative employment 10 days after her dismissal.

No amount was deducted as it was found that she had actively taken steps to mitigate her loss.

Case example: **Employee did NOT mitigate loss – Re-employment offer**

***Bechara v Gregory Harrison Healey & Co*** [1996] IRCA 258 (3 June 1996), [(1996) 65 IR 382].

The employee was dismissed by her employer. The following day she was offered reinstatement and given the option of negotiating the terms. The employee declined the offer as she had already decided to start her own practice.

It was found that, while there was no valid reason for dismissal, the employee could have reasonably accepted the bona fide offer of re-employment.

No compensation was ordered due to the employee refusing to mitigate her loss.

Case example: **Employee did NOT mitigate loss – Delay in seeking job**

***Robot v Iveco Trucks Australia Ltd*** [2011] FWA 2915 (Lewin C, 16 May 2011).

The employee did not make any substantial effort to seek employment until some months after the dismissal.

The period in which the employee was not looking for work was deducted from the compensation amount.

## Remuneration

 See Fair Work Act ss.392(2)(e) and (f)

The Commission may take into account any remuneration earned by the employee between the dismissal and making the order for compensation.<sup>626</sup>

The Commission may take into account any income earned between the order for compensation and the receipt of the compensation.<sup>627</sup>

Case example: **Employee earned other remuneration**

***McKerrow v Sarina Leagues Club Incorporated T/A Sarina Leagues Club*** [2012] FWA 6684 (Asbury C, 7 August 2012).

The time between the issuing of the order and the actual receipt of compensation received would be 21 days.

The Commission found that the employee had commenced new employment since the dismissal which paid a fortnightly gross salary of \$1,882.69 and fortnightly superannuation contributions of \$169.44.

The Commission deducted the amounts of \$2,824.00 and \$254.16 from the compensation ordered (in addition to amounts deducted for amounts earned between dismissal and the date of the compensation order). These amounts were the wages and superannuation likely to be earned during the 21 day period.

## Any other matters that the Commission considers relevant

 See Fair Work Act s.392(2)(g)

The Commission can consider any other factors that it deems relevant to the consideration of ordering compensation for an unfair dismissal.<sup>628</sup>

<sup>626</sup> Fair Work Act s.392(2)(e).

<sup>627</sup> Fair Work Act s.392(2)(f).

<sup>628</sup> Fair Work Act s.392(2)(g).

Case example: **Consideration of other relevant factors**

**Hillbrick v Marshall Lethlean Industries Pty Ltd** [2010] FWA 7704 (Cribb C, 15 October 2010).

The employee was able to find new employment; however the employment was casual labour hire and less secure and reliable, and the rate of pay was slightly lower, than his employment with his previous employer. The employee was also 48 years of age and suffered a medical condition which rendered him unable to seek alternative employment for a number of months. These factors were taken into account, along with the other factors under s.392, in calculating the amount of compensation to be ordered.


Case example: **Consideration of other relevant factors**

**McKerrow v Sarina Leagues Club Incorporated T/A Sarina Leagues Club** [2012] FWA 6684 (Asbury C) 7 August 2012.

The dismissed employee submitted she was unable to obtain employment within 45km of her home due to her reputation being tarnished by the respondent after the dismissal. The Commission found this was a relevant factor when calculating the amount of compensation to order.

The Commission used the Australian Tax Office formula for business travel as a guide to come to an amount that should be added per week to the compensation as a consequence of her additional travel.

## Misconduct reduces amount of compensation

 See Fair Work Act s.392(3)

If the Commission finds that an employee's misconduct contributed to their dismissal, the Commission must reduce the amount of compensation by an appropriate amount.<sup>629</sup>

Misconduct after the dismissal may be taken into account in assessing remedy.<sup>630</sup>

Misconduct may involve:

- A breach of workplace health and safety<sup>631</sup>
- negligent culpability<sup>632</sup>
- threats of violence,<sup>633</sup> or
- swearing at management.<sup>634</sup>

<sup>629</sup> Fair Work Act s.392(3).

<sup>630</sup> *Tenix Defence Pty Ltd v Galea* [PR928494](#) (AIRCFB, Giudice J, Lawler VP, Bacon C, 11 March 2003).

<sup>631</sup> *Tabro Meat Pty Ltd v Heffernan* [2011] FWA 1080 (Acton SDP, Hamilton DP, Cribb C, 16 March 2011), [(2011) 208 IR 101, at pp.109–110].

<sup>632</sup> *Robot v Iveco Trucks Australia Ltd* [2011] FWA 2915 (Lewin C, 16 May 2011) at para. 64.

<sup>633</sup> *Tenix Defence Pty Ltd v Galea* [PR928494](#) (AIRCFB, Giudice J, Lawler VP, Bacon C, 11 March 2003).

<sup>634</sup> *Tabro Meat Pty Ltd v Heffernan* [2011] FWA 1080 (Acton SDP, Hamilton DP, Cribb C, 16 March 2011), [(2011) 208 IR 101, at pp.109–110].



Case example: **Misconduct by employee**

**Tabro Meat Pty Ltd v Heffernan** [2011] FWA 1080 (Acton SDP, Hamilton DP, Cribb C, 16 March 2011), [(2011) 208 IR 101],

The employee had committed a serious breach of health and safety policy by incorrectly driving a forklift. The employee also later swore at a Director of the employer.

On appeal, the amount of compensation ordered was reduced by 15% on account of the misconduct of the employee which contributed to this dismissal.


Case example: **Misconduct by employee**

**Tenix Defence Pty Ltd v Galea** PR928494 (AIRCFB, Giudice J, Lawler VP and Bacon C, 11 March 2003).

The employee was found to have engaged in threatening behaviour towards colleagues on 2 occasions after his dismissal.

The Full Bench found that although threats of this nature will often mean that reinstatement is inappropriate, in the present case the relationship between the employee and employer could improve if the employee was reinstated as the threats were ‘a product of his frustration’ and not indicative of his likely future conduct. However, it was found that the threats against a witness were not ‘idle’ and were serious in nature and for this reason reduced the amount ordered for lost remuneration.

## Shock, distress etc disregarded

 See Fair Work Act s.392(4)

The Commission can only make an order to compensate for lost remuneration. The amount cannot include an element for shock, distress or humiliation (or any other similar hurt) caused by the manner of the employee’s dismissal.<sup>635</sup>

This reflects the common law position that shock, distress or humiliation resulting from dismissal is not compensable.<sup>636</sup>

## Compensation cap

 See Fair Work Act ss.392(5) and (6)

Orders for compensation will be reduced if the amount exceeds the compensation cap. The compensation cap is the lesser of:

- the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal, or

<sup>635</sup> Fair Work Act s.392(4).

<sup>636</sup> *Addis v Gramophone Co Ltd* [1909] AC 488; and *Baltic Shipping Company v Dillon* [1993] HCA 4 (10 February 1993), [(1993) 176 CLR 344]; as cited in Explanatory Memorandum to Fair Work Bill 2008 at para. 1564.


- half the amount of the high income threshold immediately before the dismissal.<sup>637</sup>

If the employee was on leave or was not receiving full pay, the amount of remuneration will be calculated with reference to reg 3.06 of the Fair Work Regulations.<sup>638</sup>

From 1 July 2022, the high income threshold was \$162,000 per annum and from 1 July 2023 it is \$167,500. Therefore, the compensation cap is:

- \$81,000 for a dismissal that occurred on or after 1 July 2022 and before 1 July 2023, and
- \$83,750 for a dismissal that occurred on or after 1 July 2023.

### Monetary orders may be in instalments

 See Fair Work Act s.393

An order by the Commission to pay compensation may permit the employer concerned to pay the amount required in instalments.<sup>639</sup>

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<sup>637</sup> Fair Work Act ss.392(5) and 396(6)(a).

<sup>638</sup> Fair Work Act s.392(6)(b).

<sup>639</sup> See for example *Miller v Urbanite Bikes Pty Ltd T/A Urban Pedaler* [2018] FWC 7035 (Bissett C, 20 November 2018).

## Part 9 – Associated applications

### When can the Commission dismiss an application?



Contains issues that may form the basis of a jurisdictional issue



See Fair Work Act ss.399A and 587

An application for an unfair dismissal remedy can be dismissed by the Commission for a number of reasons.

#### General power to dismiss

The Commission can dismiss an application under s.587(1) on its own motion or upon application.<sup>640</sup>

The Commission can dismiss an application on the following grounds:

- the application is not made in accordance with the Fair Work Act
- the application is frivolous or vexatious, or
- the application has no reasonable prospects of success.<sup>641</sup>

Generally, the Commission will not dismiss an application if there is a real question to be answered on the facts or the law.<sup>642</sup>

The power of the Commission to dismiss an application should be used sparingly and approached with caution.<sup>643</sup>

#### Other grounds for dismissing applications

If an employee enters into a binding settlement agreement their application may be dismissed.<sup>644</sup>

This is because the cause of action forming the basis of the application no longer exists after settlement is reached.<sup>645</sup>

If a party fails to prosecute their case their application may be dismissed.



In this context **prosecute** means to follow up or carry on with the case once it has begun.

<sup>640</sup> Fair Work Act s.587(3).

<sup>641</sup> Fair Work Act s.587(1).

<sup>642</sup> *Shortland v The Smiths Snackfood Co Ltd* [2010] FWA 5709 (Lawler VP, Drake SDP, Lewin C, 16 September 2010) at para. 19, [(2010) 198 IR 237]; citing *Dey v Victorian Railways Commissioners* [1949] HCA 1 (22 February 1949), [(1949) 78 CLR 62, at p. 91].

<sup>643</sup> *Resta v Myer Pty Ltd* [2013] FWC 7080 (Gostencnik DP, 17 September 2013) at paras 32, 39. See also *Kora v Cardno Staff Pty Ltd T/A Cardno* [2015] FWC 4699 (Richards SDP, 14 July 2015) at para. 9.

<sup>644</sup> See *Howey v Mars Australia Pty Limited t/a Mars Petcare Australia* [2012] FWA 6259 (Sams DP, 15 August 2012) at para. 97; and *Tomas v Symbion Health* [2011] FWA 5458 (Gooley C, 23 August 2012) at para. 59.

<sup>645</sup> *ibid.*

### Example

If an applicant refuses to respond to directions or attend a conference or hearing in relation to a case that they have started, the Commission can dismiss the case.

### ***Frivolous or vexatious***

An application will be considered frivolous or vexatious where the application:

- is so obviously untenable that it cannot possibly succeed
- is manifestly groundless
- is so manifestly faulty that it does not admit of argument
- discloses a case which the Commission is satisfied cannot succeed, or
- does not disclose a cause of action.<sup>646</sup>

### ***No reasonable prospect of success***

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.<sup>647</sup>

The party raising the objection does not need to prove that the other party's case is hopeless or unarguable.

The Commission must use a critical eye to see whether the evidence of the party responding to the objection has sufficient quality or weight to succeed.

The party responding to the objection does not need to present their entire case, but must present a sufficient outline to enable the Commission to reach a preliminary view on the merits of their case.

The real question is not whether there is any issue that could arguably be heard, but whether there is any issue that should be *permitted* to be heard.<sup>648</sup>

An application can be dismissed on the basis that it has no reasonable prospects of success after the Commission has heard the applicant's case but before the respondent has started to present its case. However, if a respondent applies at that point for the applicant's case to be dismissed, it may be required to elect not to call any evidence.<sup>649</sup>

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<sup>646</sup> *Micheletto v Korowa Anglican Girls' School* [PR940392](#) (AIRCFCB, Giudice J, Hamilton DP, Deegan C, 11 November 2003) at para. 17, [(2003) 128 IR 269]; citing *General Steel Industries Inc v Commissioner for Railways (NSW)* [\[1964\] HCA 69](#) (9 November 1964), [(1964) 112 CLR 125, p. 128–130].

<sup>647</sup> *Wright v Australian Customs Services* (AIRCFCB, Giudice J, Williams SDP, Foggo C, 23 December 2002) [PR926115](#) at para. 23.

<sup>648</sup> *Applicant v Respondent* [\[2010\] FWA 1765](#) (McCarthy SDP, 4 March 2010) at para. 15; citing *Wang v Anying Group Pty Ltd* [\[2009\] FCA 1500](#) (14 December 2009) at para. 43; and *Davis v Insolvency and Trustee Service Australia (No 3)* [\[2010\] FCA 69](#) (12 February 2010) at para. 15.

<sup>649</sup> *Townsley v State of Victoria (Department of Education & Early Childhood Development)* [\[2013\] FWCFB 5834](#) (Hatcher VP, Hamilton DP, Wilson C, 20 September 2013) at paras 17–24.

Case example: **No reasonable prospect of success – Ongoing criminal matter**

***Lynch v Reward Hospitality*** [2021] FWC 304 (Simpson C, 29 January 2021).

This unfair dismissal application was lodged on 25 May 2018. The applicant advised he was involved in criminal proceedings before the Northern Territory Supreme Court. The applicant requested an adjournment of the Unfair Dismissal application on the basis the outcome of the criminal trial would be relevant to these proceedings. The Commission granted the request and adjourned the proceedings pending the outcome of the criminal trial.

The applicant was subsequently convicted and was on remand. In September 2018 the Commission was advised the applicant was appealing his conviction and requested the matter be adjourned pending the outcome of his appeal. The Commission was contacted by the applicant's partner in August 2020 who advised the applicant was seeking to proceed with his unfair dismissal application. At a mention in October 2020 the applicant advised the Commission that his appeal to the Criminal Court of Appeal was unsuccessful and that the full-time length of his sentence would be a release date in 2026.

The Commission expressed concerns regarding the practicality of proceeding with the application given the applicant's criminal conviction was going to involve him being incarcerated until 2026. The Commission advised the applicant that his primary remedy of reinstatement may be problematic on the basis it would be inappropriate to issue the respondent with an Order that they could not comply with. The applicant agreed and said he now sought compensation of 16 weeks' pay to reimburse him from the time he was stood down without pay until he obtained full-time employment. The Commission put the applicant on notice that it did not have power to award compensation for periods prior to the dismissal itself.

The Commission expressed its concerns that this application had no reasonable prospect of success, given neither of the remedies for this application appear to be obtainable, and it was therefore not appropriate to conduct a hearing for this matter when the purpose of this application could not be achieved.

The Commission found that the application was manifestly untenable and groundless and therefore had no reasonable prospects of success. The application was dismissed.

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## Binding settlement agreements

When an employee seeks to pursue an application:

- after an executed settlement agreement has been reached between the parties, and
- the settlement has been paid;

the application can be dismissed for being frivolous or vexatious or for having no reasonable prospect of success.<sup>650</sup>



An **executed settlement agreement** is an agreement where all of the specific terms and requirements have been met.

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<sup>650</sup> *Banister v Queensland Rail Limited* [2012] FWA 3973 (Asbury C, 9 May 2012) at paras 25–26; citing *Australian Postal Corporation v Gorman* [2011] FCA 975 (25 August 2011) at paras 31–33; and *Butler v Fairclough* [1917] HCA 9 (29 March 1917), [(1917) 23 CLR 78].

### **When is a binding agreement made?**

A key issue is whether the parties intended to be bound by a verbal agreement or whether the parties intended for the agreement to be put into writing and signed.<sup>651</sup>

The question of whether there is a binding agreement or not depends upon the intention disclosed by the language the parties have used.<sup>652</sup>

The parties may agree that a negotiated agreement will only be binding once it is seen in its final written form and signed, whether this was the parties intention will depend on the true construction of the evidence.<sup>653</sup>

A binding settlement agreement can still be found to exist even if some aspects of the agreement were not finalised at the time.<sup>654</sup>

### **Failure to prosecute**

The general principles for dismissing applications due to a defaulting party's failure to attend proceedings, may be summarised as follows:

- the defaulting party must be given an opportunity to explain the reasons why the Commission should not dismiss his/her claim for a failure to attend the proceedings
- the reasons (if any are given) must be considered in the context of ensuring the proper administration of justice and fairness to both parties
- the defaulting party should be made aware that an application to dismiss his/her substantive application is to be considered by the Commission
- the defaulting party should be warned that a failure to attend the hearing of such an application, without a reasonable explanation, may result in the substantive application being dismissed, and
- the Commission should ensure that all reasonable steps are taken to give an absent party every opportunity to present themselves for hearing.<sup>655</sup>



**A defaulting party** may be either the applicant or the respondent.

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<sup>651</sup> *Masters v Cameron* [1954] HCA 72 (30 November 1954), [(1954) 91 CLR 353, at pp. 360–362]; see for example *Badcock v N & HM Cooper Motor Search (SA) & Car Clearance Centre (SA) T/A Motor Search* [2018] FWC 6978 (Hampton C, 26 November 2018).


<sup>652</sup> *ibid.*, [(1954) 91 CLR 353 at p. 362].

<sup>653</sup> *ibid.*, [(1954) 91 CLR 353 at p. 360].

<sup>654</sup> *Zoiti-Licastro v Australian Taxation Office* [2006] AIRC 45 (Kaufman SDP, 25 January 2006) at para. 12, [(2006) 154 IR 1].

<sup>655</sup> *Carter v The Hanna Group Pty Ltd* [2011] FWA 31 (Sams DP, 14 January 2011) at para. 6; summarising the authorities in *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (9 November 1964), [(1964) 112 CLR 125]; *Kioa v West* [1985] HCA 81 (18 December 1985); [(1985) 159 CLR 550]; *Re Australian Railways Union; Ex parte Public Transport Corporation* [1993] HCA 28 (20 October 1993), [(1993) 51 IR 22]; and *Grimshaw v Dunbar* [1953] 1 All ER 350.

## Section 399A of the Fair Work Act

 See Fair Work Act s.399A

Section 399A of the Fair Work Act provides that the Commission may, on application by the employer, dismiss an application where the applicant has unreasonably:

- failed to attend a conference or hearing at the Commission
- failed to comply with a direction or order of the Commission, or
- failed to discontinue the application after a settlement agreement has been reached.<sup>656</sup>

### Case example: **Application dismissed – Frivolous or vexatious**

***West v Hi-Trans Express t/as NSW Logistics Pty Ltd*** [PR974807](#) (AIRC, Hamberger SDP, 4 December 2006).

An application by an employee who admitted to negligently driving a forklift into a building support column was dismissed as being frivolous, vexatious or lacking in substance.

### Case example: **Application dismissed – Frivolous or vexatious**

***Taminiau and Thomson v Austin Group Limited*** [PR974223](#) (AIRC, Harrison C, 5 October 2006).

The employees were dismissed for using their employer's trademarks for an improper purpose. It was found that the employees actions in using the employer's trademarks for improper potential gain was a clear breach of good faith, fiduciary duty and was an indication of a conflict of interest which could not have any place in a direct employment relationship. The applications were not arguable in fact or law. The applications were dismissed as being frivolous and vexatious.

### Case example: **Application dismissed – No reasonable prospect of success**

***Applicant v Respondent*** [\[2010\] FWA 1765](#) (McCarthy SDP, 4 March 2010).

An application by an employee dismissed for sexual harassment and victimisation of other employees was found to have no evidence of sufficient quality or weight to be able to succeed.

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<sup>656</sup> Fair Work Act s.399A(1)(c).

Case example: **Application dismissed – Binding settlement agreement**

***Curtis v Darwin City Council*** [2012] FWAFB 8021 (Ross J, Smith DP, Gooley C, 17 September 2017), [(2012) 224 IR 174].

The employee's employment was terminated due to her inability to meet the inherent requirements of her role. A draft deed of settlement based on an oral agreement between the parties was prepared but never executed by the parties. The employee sought to have the matter arbitrated.

The Full Bench confirmed on appeal that there was a binding settlement agreement. There was nothing to suggest that what was agreed to was not intended to be a contract, rather than simply a basis for a future contract. Permission to appeal was refused and the appeal dismissed.

Case example: **Application dismissed – Binding settlement agreement**

***Zoiti-Licastro v Australian Taxation Office*** [2006] AIRC 45 (Kaufman SDP, 25 January 2006), [(2006) 154 IR 1].

A draft deed of settlement based on the verbal agreement between the parties was prepared by the employer's representative. The employee contended there was no completed agreement as the mutual release provision included in the draft deed was not discussed (let alone agreed upon) and, secondly, that any agreement which had been made was conditional on written terms being agreed.

The Full Bench confirmed on appeal that, even though the draft deed included mutual release terms beyond those the employee discussed or agreed to, there was still a binding settlement agreement. Permission to appeal was refused and the appeal dismissed.

Case example: **Application dismissed – No reasonable prospects of success**

***Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern*** [2010] FWA 3389 (Harrison DP, 28 April 2010).

An employee was dismissed for taking sick leave on New Year's Eve. The employee supported his application for sick leave with a medical certificate. The employer refuted the assertion of genuine illness and provided a photograph from a Facebook page showing the employee participating in New Year's Eve celebrations.

It was found that the employee had failed to put any case to meet the assertion of misleading conduct, to explain the inconsistency of his actions, or to refute the evidence of the employer. The application was dismissed as one which had no reasonable prospect of success.



Case example: **Application dismissed – Failure to prosecute**

***Morton v Peregrine Corporation Pty Ltd T/A On the Run*** [2011] FWA 4812 (Bartel DP, 22 July 2011).

The employee in this matter failed to attend a jurisdictional hearing, failed to comply with directions of the Commission and was unable to be contacted.

As the Commission did not have the details it needed to determine the merits of the case for the employee there could be no finding that the matter was frivolous or vexatious. It was found that the failure to provide evidence in support of the application could give rise to a finding of ‘no reasonable prospect of success’.

Case example: **Application dismissed – Failure to comply with directions [s.399A]**

***Aragon v Aegis Safety Pty Ltd T/A Techinspect*** [2013] FWC 5993 (Spencer C, 30 August 2013).

The applicant failed to comply with directions issued on three separate occasions to file material in relation to his application and jurisdictional objections. The applicant was offered a further opportunity to provide submissions or reasons for his failure to comply.

While the Commission acknowledged the hardships expressed by the applicant, they were not considered exceptional. Most applicants appearing before the Commission in termination matters have financial difficulties and are not trained lawyers or have industrial relations expertise.

Case example: **Application dismissed – Failure to attend non-compliance hearing [s.399A]**

***Young v Balustrade Installations Pty Ltd*** [2013] FWC 4032 (Gooley DP, 24 June 2013).

The applicant failed to comply with directions to file material and subsequently failed to attend a non-compliance hearing. He was given a further opportunity to explain his absence but did not respond.

Case example: **Application dismissed – Failure to discontinue application after settlement agreement concluded [s.399A]**

***Milochis v Detmold Packaging Pty Ltd*** [2013] FWC 3647 (O’Callaghan SDP, 6 June 2013).

An agreed position was reached at a telephone conference. The applicant did not complete and return the Deed of Settlement or lodge a Notice of Discontinuance despite material being sent to him on two separate occasions. The applicant failed to attend a further telephone conference or submit a Notice of Discontinuance following further requests for him to do so.

Case example: **Application dismissed – Failure to prosecute**

*Kora v Cardno Staff Pty Ltd T/A Cardno* [2015] FWC 4699 (Richards SDP, 14 July 2015).

The employee in this matter failed to comply with directions of the Commission and was unable to be contacted. The application was dismissed because the applicant failed to prosecute her claim despite being afforded an opportunity to do so. The Commission was also satisfied that the materials provided by the employer indicated that the employer had a defence to the claim.

Case example: **Application NOT dismissed – Dispute over deed of release – Facts in dispute**

*Kalloor v SGS Australia Pty Ltd* [2009] AIRC 682 (Harrison C, 10 July 2009).

The employee alleged he was coerced into signing a Deed of Settlement releasing the employer from any claims arising from his employment and dismissal. The employer denied the allegation and asserted that contrary to being placed under duress, the employee freely negotiated a resignation package.

The Commission found that there were major factual differences in the case and that evidence needed to be properly given and tested. The application was not dismissed and was listed for hearing.

Case example: **Application NOT dismissed – Facts in dispute**

*Perrella v ITW Australia Pty Ltd T/A Hobart Food Equipment Service and Sales* [2009] AIRC 107 (Williams C, 3 February 2009).

The employee was dismissed for poor performance. There were fundamental disagreements between the parties on the facts of the matter.

The Commissioner was not able to decide which of the two conflicting versions was correct based on the parties written submissions alone. The Commissioner was not satisfied that the application was frivolous, vexatious or lacking in substance such that it should be dismissed without any further hearing.

Case example: **Application NOT dismissed – Employee negotiated terms of his termination – No release from further legal action was discussed**

*Turton v FMC Australasia Pty Ltd* [2011] FWA 8903 (Hampton C, 22 December 2011).

An employee negotiated and agreed to the terms upon which he was to leave the business of the employer. However, in reality his only choice was to resign (as part of the agreed package) or be dismissed.

It was found that the agreement did not change the legal character of the dismissal. The application was not dismissed and the case proceeded to conciliation.

Case example: **Application NOT dismissed – Applicant’s explanations accepted [s.399A]**

***Cross v National Australia Bank T/A NAB*** [2013] FWC 3352 (Wilson C, 28 May 2013).

The applicant failed to comply with directions to file material and was unable to attend a non-compliance hearing. The applicant wrote to the Commission explaining that she was under financial pressure, seeking representation and was not aware that she was required to attend the non-compliance hearing. The applicant’s reasons were accepted by the Commission.

## Evidence

 See Fair Work Act ss.590 and 591

Section 590 of the Fair Work Act provides the ways in which the Commission may inform itself including:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation
- by conducting inquiries or undertaking research, or
- by holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Although the Commission is not bound by the rules of evidence, they are relevant and cannot be ignored to the extent that it causes unfairness between the parties.<sup>657</sup>

Commission members are expected to act judicially and in accordance with ‘notions of procedural fairness and impartiality’.<sup>658</sup>

Commission members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.<sup>659</sup>

The rules of evidence ‘provide general guidance as to the manner in which the Commission chooses to inform itself’.<sup>660</sup>

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<sup>657</sup> *Re: Construction, Forestry, Mining and Energy Union* [PR935310](#) (AIRC, Ross VP, 25 July 2003) at para. 36.

<sup>658</sup> *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 25, [(2011) 192 FCR 78]; Fair Work Commission, ‘[Member Code of Conduct](#)’ (1 March 2013) at p. 2.

<sup>659</sup> *ibid.*

<sup>660</sup> *Australasian Meat Industry Employees’ Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847 (Lawler VP, Hamberger SDP, Gay C, 17 June 2011) at para. 28, [(2011) 209 IR 1]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR948938](#) (AIRC FB, Ross VP, Duncan SDP, Bacon C, 12 July 2004) at paras. 47–50, [(2004) 143 IR 354].

Case example: **Following rules of evidence – Employer used illegally obtained evidence for allegation of theft**

*Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2010] FWA 9440 (Thatcher C, 8 December 2010).

The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee's vehicle without the employee's authority in order to have it tested. It was held that the evidence of the sample was unlawfully obtained and that the evidence should not be admitted.

## False or misleading evidence

 See Fair Work Act s.678



### Important

Giving false or misleading evidence, or inducing or coercing another person to give false or misleading evidence carries a penalty of imprisonment for 12 months.

## Giving false or misleading evidence

A person (the **witness**) commits an offence if:

- the witness gives sworn or affirmed evidence, and
- the witness gives the evidence as a witness:
  - in a matter before the Commission, or
  - before a person taking evidence on behalf of the Commission for use in a matter that the witness will start by application to the Commission; and
- the evidence is false or misleading.<sup>661</sup>



A person will not commit an offence if the person carries out the conduct constituting the offence under duress (see section 10.2 of the Criminal Code).


## Inducing or coercing another person to give false or misleading evidence

A person (the **offender**) commits an offence if:

- another person (the **witness**) has been, or will be, required to appear as a witness in a matter before the Commission (whether the person is to appear before the Commission or a delegate of the Commission), and
- the offender induces, threatens or intimidates the witness to give false or misleading evidence in the matter.

<sup>661</sup> See for example *Durado & Isugan v Foot & Thai Massage Pty Ltd* [2019] FWC 1533 (Kovacic DP, 8 March 2019) at paras 41–42.

## Costs

 See Fair Work Act ss.400A, 401, 402, 611

People who incur legal costs in a matter before the Commission generally pay their own costs.<sup>662</sup>

The Commission has the discretion to order one party to an unfair dismissal matter to pay the other party's legal or representational costs, but only where the Commission is satisfied the matter was commenced or responded:

- vexatiously or without reasonable cause, or
- with no reasonable prospect of success.<sup>663</sup>

Costs may be awarded to one party if the Commission is satisfied that the costs were incurred as a result of an unreasonable act or omission of the other party (but only for dismissals taking effect from 1 January 2013, when the section commenced).<sup>664</sup>

Costs may also be ordered against legal representatives.

This is called a 'costs order' and it will only be granted in certain situations.

### What are costs?

Costs are the amounts a party to a matter before a court or tribunal has paid to a lawyer or paid agent for advice and representation.

If a party is ordered to pay another party's legal costs it will not usually be for the whole amount of legal costs incurred.

The Commission may order that a proportion of the costs be paid. This is often called 'ordering costs' which may be either on a party-party basis or on an indemnity basis.

### Party-party costs

Party-party costs are the legal costs that are deemed necessary and reasonable.<sup>665</sup>

The Commission will look at whether the legal work done was necessary and will decide what a fair and reasonable amount is for that work.<sup>666</sup>

### Indemnity costs

Indemnity costs are also known as solicitor-client costs.

Indemnity costs are all costs including fees, charges, disbursements, expenses and remuneration as long as they have not been unreasonably incurred.<sup>667</sup>

Indemnity costs involve a larger proportion of the legal costs.

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<sup>662</sup> Fair Work Act s.611(1).

<sup>663</sup> Fair Work Act s.611(2).

<sup>664</sup> Fair Work Act s.400A(1).

<sup>665</sup> *Butterworths Australian Legal Dictionary*, 1997, 852.

<sup>666</sup> *ibid.*

<sup>667</sup> *Butterworths Australian Legal Dictionary*, 1997, 586.

They may be ordered when there has been an element of misconduct or delinquency on the part of the party being ordered to pay costs.<sup>668</sup>



**Party-party costs** are the costs that one side pays to the other side in legal proceedings. They are the result of the Commission ordering that one party pay costs to the other party.

**Indemnity costs** are the costs that you pay to your solicitor for the work that they perform for your matter. The basis of these costs is a costs agreement between you and your solicitor.

## Applying for costs

Parties may apply for costs in accordance with s.402 of the Fair Work Act if they can show the other party acted vexatiously or without reasonable cause, or that the application or a response to it had no reasonable prospect of success.<sup>669</sup> Applications for costs **must be made within 14 days** after:

- the Commission determines the matter, or
- the matter is discontinued.<sup>670</sup>

## What costs may be recovered?

The Fair Work Regulations include a ‘schedule of costs’ which sets out appropriate rates for common legal services. The schedule provides the Commission with guidance when exercising its jurisdiction to make an order for costs.<sup>671</sup>

The Commission is not limited to the items in the schedule of costs, but cannot exceed the rates or amounts if an item is relevant to the matter.<sup>672</sup>

## When are costs ordered?



See Fair Work Act s.611

Section 611 of the Fair Work Act sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party’s costs if it is satisfied:

- that the person’s application or response to an application was made **vexatiously** or **without reasonable cause**, or
- it should have been reasonably apparent that the person’s application or response to an application had **no reasonable prospect of success**.

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<sup>668</sup> *Oshlack v Richmond River Council* [1998] HCA 11 (25 February 1998) at para. 44, [(1998) 193 CLR 72]; cited in *Goffett v Recruitment National Pty Ltd* [2009] AIRCFB 626 (Lacy SDP, Hamilton DP, Larkin C, 28 August 2009) at para. 50, [(2009) 187 IR 262]; and *Stanley v QBE Management Services Pty Limited T/A QBE* [2012] FWA 10164 (Jones C, 18 December 2012) at para. 24.

<sup>669</sup> Fair Work Act s.611(2).

<sup>670</sup> Fair Work Act s.402.

<sup>671</sup> Fair Work Regulations reg 3.08; sch 3.1.

<sup>672</sup> Fair Work Regulations reg 3.08; sch 3.1.

The power to award costs is discretionary. It is a two stage process:

- decide whether there is power to award costs, and
- if there is power, consider whether the discretion to award costs is appropriate.<sup>673</sup>

### Vexatiously

Vexatious means that:

- The main purpose of an application (or response) is to harass, annoy or embarrass the other party.<sup>674</sup>
- There is another purpose for the action other than the settlement of the issues arising in the application (or response).<sup>675</sup>

The question of whether an application was made ‘vexatiously’ looks to the motive of the applicant in making the application. It is an alternative ground to the ground that the application was made ‘without reasonable cause’ and may apply where there is a reasonable basis for making the application.<sup>676</sup>

### Without reasonable cause

The test for ‘without reasonable cause’ is that the application (or response):

- is ‘so obviously untenable that it cannot possibly succeed’
- is ‘manifestly groundless’
- is ‘so manifestly faulty that it does not admit of argument’
- ‘discloses a case which the Court is satisfied cannot succeed’, or
- ‘under no possibility can there be a good cause of action’.<sup>677</sup>

The Commission may also consider whether, at the time the application (or response) was made, there was a ‘substantial prospect of success.’<sup>678</sup> It is inappropriate to find that an application (or response) was without reasonable cause if success depends on the resolution of an arguable point of law.<sup>679</sup>

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<sup>673</sup> *McKenzie v Meran Rise Pty Ltd t/as Nu Force Security Services* [Print S4692](#) (AIRCFB, Giudice J, Watson SDP, Whelan C, 7 April 2000) at para. 7.

<sup>674</sup> *Nilsen v Loyal Orange Trust* [\[1997\] IRCA 267](#) (11 September 1997), [(1997) 76 IR 180, at p. 180]; citing *Attorney-General v Wentworth* [\(1988\) 14 NSWLR 481](#), at p. 491; cited in *Holland v Nude Pty Ltd T/A Nude Delicafe* [\[2012\] FWA FB 6508](#) (Harrison SDP, Richards SDP, Blair C, 3 August 2012) at para. 7, [(2012) 224 IR 16].

<sup>675</sup> *ibid.*

<sup>676</sup> *Church v Eastern Health* [\[2014\] FWC FB 810](#) (Ross J, Hatcher VP, Wilson C, 4 February 2014) at para. 29, [(2014) 240 IR 377].

<sup>677</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* [\[1964\] HCA 69](#) (9 November 1964), [(1964) 112 CLR 125, at p. 129]; cited in *Walker v Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [\[2011\] FWA 2225](#) (Thatcher C, 14 April 2011) at para. 17, [(2011) 210 IR 370].

<sup>678</sup> *Re Joseph Michael Kanan v Australian Postal and Telecommunications Union* [\[1992\] FCA 366](#) (31 July 1992), [(1992) 43 IR 257]; cited in *Dryden v Bethanie Group Inc* [\[2013\] FWC 224](#) (Williams C, 11 January 2013) at para. 20.

<sup>679</sup> *ibid.*

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.<sup>680</sup>

A proceeding is not to be classed as being instituted without reasonable cause simply because it fails, but rather in circumstances where on the applicant's own version of the facts, it is clear that the proceeding must fail.<sup>681</sup>



In simple terms, **without reasonable cause** means that an application (or response) is made without there being any real reason, basis or purpose.

### No reasonable prospect of success

Whether it should have been reasonably apparent that an application (or response) had no reasonable prospect of success is an **objective test**.<sup>682</sup>

A finding that an application (or response) has no reasonable prospects of success should be reached with extreme caution and should only be reached when an application (or response) is 'manifestly untenable or groundless'.<sup>683</sup>



An **objective test** considers the view of a reasonable person. In this case it looks at whether it would have been apparent to a *reasonable person* that an application or response had no reasonable prospect of success. This is the appropriate test.

A **subjective test** would look at the view of the person themselves. A subjective test would look at whether it would be reasonably apparent to the person that their application or response had no reasonable prospect of success. This is not the appropriate test as the person has a vested interest in the matter being decided in their favour, this can influence how the person will look at the issues.

### Additional circumstances for costs orders against parties



See Fair Work Act ss.400A, 402

Section 400A of the Fair Work Act sets out additional circumstances in which the Commission can make costs orders against parties in unfair dismissal matters. Orders under this section can only be made if a party has lodged an application in accordance with s.402 of the Fair Work Act. The Commission may order costs against a party to an unfair dismissal if the first party caused the second party to incur costs:

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<sup>680</sup> *R v Moore; Ex Parte Federated Miscellaneous Workers' Union of Australia* [1978] HCA 51 (14 December 1978), [(1978) 140 CLR 470, at p. 473]; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2011] FWA 2225 (Thatcher C, 14 April 2011) at para. 20, [(2011) 210 IR 370].

<sup>681</sup> *Zornada v St John Ambulance Australia (Western Australia) Inc.* [2013] FWCFB 8255 (Catanzariti VP, Cloghan C, Hampton C, 22 October 2013) at para. 35, [(2013) 237 IR 48].

<sup>682</sup> *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Wodonga Rural City Council v Lewis* PR956243 (AIRCFB, Watson SDP, Lloyd SDP, Gay C, 4 March 2005) at para. 6, [(2005) 142 IR 188, at p. 191].

<sup>683</sup> *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Deane v Paper Australia Pty Ltd* PR932454 (AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) at para. 7.



- because of an unreasonable act or omission, or
- in connection with the conduct or continuation of the matter.

An unreasonable act or omission can include a failure to discontinue an unfair dismissal application or a failure to agree to terms of settlement.<sup>684</sup> What is unreasonable will depend on the circumstances.<sup>685</sup> It is intended that costs only be ordered where there is clear evidence of unreasonable conduct.<sup>686</sup>

Case example: **Following rules of evidence – Employer used illegally obtained evidence for allegation of theft**

*Walker v Mittagong Sands Pty Ltd T/A Cowra Quartz* [2010] FWA 9440 (Thatcher C, 8 December 2010).

The Commission found that the employer dismissed the employee based on a false allegation of theft of oil. The employer had based the decision to dismiss the employee on evidence obtained by a manager of the employer. The manager was found to be an unreliable witness, having knowingly sent a false sample of oil for testing. It was held that it should have been reasonably apparent to the employer, after the employee's tests results were known, that the case had no reasonable prospect of success. Indemnity costs were ordered against the employer.

Case example: **Costs ordered against employee – Employee appealed a decision with no proper basis**

*Timmins v Compass Security t/a Compass Integrated Security Solutions* [2012] FWAFB 1093 (Boulton J, Richards SDP, Bissett C, 21 February 2012), [(2012) 219 IR 5].

The employee's unfair dismissal application was dismissed as he had not met the minimum period of employment. On appeal the employee appeared to try and change the application to an unlawful termination application and did not contest that he had not met the minimum period of employment. The Full Bench found that the application to appeal was made without reasonable cause and had no reasonable prospects of success, and that some order for costs was justified.

<sup>684</sup> Explanatory Memorandum to Fair Work Amendment Bill 2012 at para. 170.

<sup>685</sup> Explanatory Memorandum to Fair Work Amendment Bill 2012 at para. 171.

<sup>686</sup> Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 234.

Case example: **Costs ordered against employer – Employer did not attend hearing and then appealed**

***Cremona (formerly trading as Frooty Fresh) v Lane*** [2011] FWA FB 6984 (O’Callaghan SDP, Kaufman SDP, Lewin C, 13 October 2011).

The employer objected to the unfair dismissal application on the basis that it was frivolous and vexatious, but did not attend the hearing and did not provide an acceptable reason for his absence. The matter was decided in the employer’s absence in the employee’s favour. The employer appealed the decision. The appeal was dismissed.

Costs were granted in relation to the appeal which was found to be without merit and manifestly untenable.

Case example: **Costs ordered against employee – Applicant had not been dismissed**

***Mijaljica v Venture DMG Pty Ltd*** [2012] FWA 2800 (Watson SDP, 3 April 2012).

Due to a misunderstanding about arrangements concerning light duties, an employee believed her employment had been terminated and lodged an application for unfair dismissal.

After the application was lodged the employer sent evidentiary materials and correspondence confirming the employee was still employed, yet the employee did not discontinue the matter once she was made aware of this.

Costs were ordered for the period from when the employer’s correspondence was lodged up to and including the hearing for costs.

Case example: **Costs ordered against employee – Appeal application made vexatiously**

***Church v Eastern Health t/as Eastern Health Great Health and Wellbeing*** [2014] FWC FB 810 (Ross J, Hatcher VP, Wilson C, 4 February 2014), [(2014) 240 IR 377].

An appeal application filed by the employee was held to be made for the improper collateral purpose of delaying the first instance hearing. The employer then sought an order for the payment of its costs incurred in relation to the appeal.

The Full Bench decided to exercise its discretion and ordered that the employee pay the employer’s costs on a party-party basis, in respect of the appeal application. The terms of s.611 of the Fair Work Act only permit the making of costs orders against a party, not their representative. However, the Full Bench stated that in this case, the fault clearly lay with the employee’s representative and accordingly it expected the representative to meet its obligations to the employee and to pay the costs on her behalf.

Case example: **Costs NOT ordered – Seeking compensation for lost wages is not a collateral purpose**

*Holland v Nude Pty Ltd T/A Nude Delicafe* [2012] FWAFB 6508 (Harrison SDP, Richards SDP, Blair C, 3 August 2012), [(2012) 224 IR 16].

The employees were dismissed and subsequently lodged applications for unfair dismissal. Discussions between the representatives were ongoing up until the afternoon prior to the matter being heard, when the applicants discontinued their applications.

The employer sought costs and costs were granted on the grounds that the employees were seeking a collateral advantage, being payment of wages for lost wages while they were out of work, and that the application had no reasonable prospects of success. On appeal the Full Bench overturned the costs order. It held that the application was arguable, and that seeking compensation for lost wages is not a collateral purpose as it is a remedy for unfair dismissal.

Case example: **Costs NOT ordered – Employee withdrew application after conciliation conference and before arbitration**

*Ross-Davis and Anor v JD Pty Ltd T/A Daniel Lightfoot Studios* [2011] FWA 3767 (Asbury C, 15 June 2011).

Applications for unfair dismissal were made by an employee and her daughter. The employer claimed that the daughter had never been an employee of the employer. After unsuccessful conciliation, the applications were discontinued 18 days before the employer was due to file its materials. The employer sought costs, but this was rejected. The withdrawal of the application did not mean necessarily that they were vexatious, and there was no basis to conclude that it should have been apparent to the applicants that their applications had no reasonable prospects of success.

Case example: **Costs NOT ordered – Employee failed to attend hearing and discontinued her application after the scheduled hearing dates**

*Dryden v The Bethanie Group Inc* [2013] FWC 224 (Williams C, 11 January 2013).

The applicant refused offers of settlement, failed to attend the hearing because of alleged illness, failed to supply medical certificates in respect of this illness, and then discontinued her application. The employer sought costs on the basis that the application was filed vexatiously and had no reasonable prospect of success. The application for costs was rejected.

Case example: **Costs NOT ordered – Employee appealed a decision refusing an extension of time**

***Baker v Salva Resources Pty Ltd*** [2011] FWA 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011).

The employee filed an appeal against an original decision to refuse to extend to make an application. The appeal was unsuccessful and the employer sought costs. This was rejected. The appeal was properly characterised as contending that no or insufficient regard was had to medical reasons for the delay. The Full Bench was not satisfied that it should have been reasonably apparent to the employee that her appeal had no reasonable prospect of success.

Case example: **Costs NOT ordered – Employee dismissed before Fair Work Act came into force**

***Expanse Pty Ltd t/as Expanse Search and Selection v Mocsari*** [2010] FWA 7124 (Acton SDP, Cartwright SDP, Thatcher C, 17 September 2010), [(2010) 197 IR 303].

The employee was found to have been dismissed before the Fair Work Act came into operation, and because of the size of the employer was therefore not protected from unfair dismissal. The employer applied for a costs order against the employee. The Commission dismissed the application on the basis that employee's case that the dismissal occurred after the Fair Work Act took effect was arguable and not manifestly untenable. The employer appealed that decision and the appeal was refused.

Case example: **Costs NOT ordered – Employee applied for costs more than 14 days after the matter had been determined**

***Lindsay v Department of Finance and Deregulation*** [2011] FWA 6115 (Williams C, 9 September 2011).

The employee made an application for costs on 29 July 2011 against her employer following a decision issued on 14 July 2011 in which the employee was successful. The application for costs needed to have been lodged by 28 July 2011. The Commission found that it had no discretion to extend the time for lodging an application for costs. The application was dismissed.

Case example: **Costs NOT ordered – Union sought costs against employer**

***Keogh v P & R Mitchell Contractors (Vic) Pty Ltd*** [2011] FWA 5070 (Gooley C, 17 August 2011).

The employee was represented by his union, which sought a costs order against the employer. The Commission found that the employer's conduct warranted a costs order. However, there was insufficient evidence that the union had actually charged any costs to the employee. Unless evidence was provided as to an enforceable costs agreement between the employee and the union, the costs application would be dismissed.

Case example: **Costs NOT ordered – Applicant entitled to ascertain exact reasons for termination [s.400A]**

***Mowlam v R I Brown Pty Ltd*** [2013] FWC 5770 (Blair C, 21 August 2013).

The Commission found that there was a valid reason for the applicant’s termination. But it only did so after dealing with several issues set out in the Form F3 that were never put to the applicant and were not identified in his letter of termination. The respondent refused to attend conciliation and therefore the applicant did not have clarification on the reasons for his termination. The applicant was entitled to continue with his application to ascertain the exact reason for his termination and he was entitled to conduct it in the manner that he did.

### Costs against representatives

 See Fair Work Act s.401

The Commission may make an order for costs against a representative for costs incurred by the other party to the matter if satisfied that the representative caused those costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter, or
- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

Representatives are not required to be granted permission to appear before the Commission can make an order for costs.<sup>687</sup>

The Commission cannot make an order under s.401 for costs incurred in an appeal of an unfair dismissal decision.<sup>688</sup>

#### ***Encouraging the person to start, continue or respond to the matter etc.***

This requires a positive act on the part of the lawyer or paid agent, not merely an absence of discouragement.<sup>689</sup>

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<sup>687</sup> Explanatory Memorandum to Fair Work Amendment Bill 2012 at para. 179.

<sup>688</sup> *Selcuk v Maddison & Associates Pty Ltd* [2015] FWC 4390 (Ryan C, 30 June 2015); *Church v Eastern Health* (2014) 240 IR 377.

<sup>689</sup> *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* [2011] FWA 651 (Bartel DP, 31 January 2011) at para. 22.

Case example: **Costs against representatives ordered – No reasonable prospects of success**

***Rainshield Roofing Pty Ltd T/A Rainshield Roofing and Anor v Paerau*** [2014] FWC 3777 (Wilson C, 6 June 2014).

An application for costs was sought against an employee and his paid agent. The Commission found that the employee was aware that the contended reason for his dismissal was misconduct and of the full weight of the case against him and acted vexatiously or without reasonable cause in commencing and continuing the unfair dismissal application.

The Commission further held that a reasonable representative would have formed the view that the case had no reasonable prospects of success. It was found that the representative caused costs to be incurred by the employee by: encouraging him to continue his application; to fail to settle the matter on the terms offered by the employer; or to advise the employee his application did not have a reasonable prospect of success. Costs orders were issued, 67% to be paid by the employee and 33% by the paid agent.

Case example: **Costs against representatives ordered – Unfair dismissal pursued where no termination of employment**

***Lock v Aged Care & Housing Group Inc T/A ACH Group*** [2013] FWC 4717 (O’Callaghan SDP, 16 July 2013).

The applicant argued that the respondent encouraged her client to start and continue his unfair dismissal application when it should have been reasonably apparent that there was no reasonable prospect of establishing he had been dismissed. The Commission was satisfied that costs should be awarded against her.

Case example: **Costs against representatives ordered – Conduct of negotiations**

***Alexander M Pty Ltd v Lloyd; McDonald Murholme Solicitors*** [2013] FWC 8795 (Hamilton DP, 19 December 2013).

An application for costs was sought against an employee and his legal representative. The Commission held that the conduct of negotiations by the employee’s legal representative made a settlement beneficial to both sides extremely difficult, led to costs being incurred which could have been avoided, and led to possibly unnecessary proceedings.

The Commission was satisfied that the conduct of the employee’s legal representative went beyond ‘hard bargaining’ and into the realm of disadvantaging both employer and employee when it should have been reasonably apparent that settlement on the terms offered would have been beneficial. An order for costs was made against the employee’s legal representative.

Case example: **Costs against representatives NOT ordered – Application after alleged forced resignation not unreasonable**

***Sun Health Foods Pty Ltd v Just Relations - Consultants*** [2014] FWC 2280 (Wilson C, 7 April 2014).

An employee was held not to have been unfairly dismissed because she had resigned. The employer made an application for costs against the employee and her representative. The employer argued it should have been reasonably apparent to the employee and her representative that the application for unfair dismissal, alleging a forced resignation, had no reasonable prospects of success.

The Commission did not find that the application, at the time it was made, had no reasonable prospects of success because it was manifestly groundless or that it could not possibly succeed. The application for costs was dismissed.

Case example: **Costs against representatives NOT ordered – Employer claimed that the employee’s representative failed to analyse the jurisdictional basis of employee’s claim**

***Andrews v Cooperative Research Centre for Advanced Composite Structures Ltd T/A Advanced Composite Structures – Australia*** [2011] FWA 2575 (Blair C, 3 May 2011).

The employer sought indemnity costs from the employee, and also from the employee’s representative on the basis that he had failed to analyse the jurisdictional basis for the claim. In relation to the representative, it was found that the application was lodged before the representative was engaged, and that the representative did nothing more than represent the interests of his client in a professional manner and in reliance on material provided by the applicant. Costs were refused.


Case example: **Costs against representatives NOT ordered – Discontinuance after assessing evidence not unreasonable**

***Department of Education and Early Childhood Development v A Whole New Approach Pty Ltd*** [2011] FWA 8040 (Gooley C, 29 November 2011).

An application for costs was made against an employee’s paid agent. A conciliation conference was unsuccessful, and a notice of discontinuance was filed by the paid agent on the day the parties were required to file materials in relation to the determination of jurisdictional objections. The employer argued that it should have been reasonable apparent to the paid agent that the claim had no reasonable prospects of success and the agent had caused costs to be incurred by filing the notice of discontinuance on the day that the parties were due to file their material.

The Commission found that it would not have been reasonably apparent there was no reasonable prospect of success until after the paid agent had made a detailed analysis of evidence, which was not undertaken until after the conciliation conference. The Commission held that it was not an unreasonable act or omission to wait until after the conciliation conference to undertake this detailed forensic examination of the evidence and reach the conclusion that the claim should be dismissed. The Commission found that, if the paid agent had permission to appear, it would not have ordered the paid agent to pay the employer’s costs.

## Security for costs

 See Fair Work Act s.404 and Fair Work Commission Rules r 55

Security for costs is when the Commission orders that one party pay an amount to be held in trust before a matter proceeds to a hearing. Until the amount ordered is paid, the matter will be adjourned.

Section 404 of the Fair Work Act allows the Commission, through its Rules, to provide for security of costs. Rule 55 sets out the relevant rules.

### **Discretion**

There is no absolute rule as to when the Commission will exercise the discretion to order security for costs.<sup>690</sup> Whether an order should be made depends on the circumstances of the case and ‘what is required by the justice of the matter’.<sup>691</sup>

In *Zornada v St John Ambulance Australia (Western Australia) Inc.* the Full Bench stated that:

*...costs orders in this jurisdiction are extraordinary, and security for costs orders even more so. This is because the Act reflects the longstanding principle that costs will not be awarded against parties in industrial proceedings, other than in exceptional circumstances.*

....

*Accordingly the Commission should award security for costs only in the rarest of circumstances, once the Commission has balanced the merits of the application, the financial position of the parties, and what is just in the circumstances.*<sup>692</sup>

### **Financial position**

The financial position of the party against whom the order is sought may be relevant in the circumstances.<sup>693</sup> There is no absolute rule that security for costs should be ordered against a party who is suffering financial hardship.<sup>694</sup> There is a general rule, however, that poverty should not prevent a party from having their matter determined by the Commission.<sup>695</sup>

Simply because an applicant is able to satisfy a security for costs order does not mean that an order is justified.<sup>696</sup>

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<sup>690</sup> *Merribee Pastoral v ANZ Banking Group* [1998] HCA 41 (16 June 1998), [(1998) 193 CLR 502, at p. 513]; cited in *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 7.

<sup>691</sup> *ibid.*

<sup>692</sup> *Zornada v St John Ambulance Australia (Western Australia) Inc.* [2013] FWCFB 8255 (Catanzariti VP, Cloghan C, Hampton C, 22 October 2013) at para. 35, [(2013) 237 IR 48].

<sup>693</sup> *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 8.

<sup>694</sup> *Merribee Pastoral v ANZ Banking Group* [1998] HCA 41 (16 June 1998), [(1998) 193 CLR 502, at p. 513]; cited in *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 8.

<sup>695</sup> *ibid.*

<sup>696</sup> *Zornada v St John Ambulance Australia (Western Australia) Inc.* [2013] FWCFB 8255 (Catanzariti VP, Cloghan C, Hampton C, 22 October 2013) at para. 39, [(2013) 237 IR 48].



## Merits

The strength of the case of the party against whom the order is sought may also be relevant.<sup>697</sup> This may require a tentative evaluation of the party's prospects of success.<sup>698</sup> A case which is hopeless and bound to fail may be a reason to order security for costs.<sup>699</sup>

Whether the case raises issues of general public importance may also be relevant to whether security for costs are ordered.<sup>700</sup>

Repeated non-compliance of, or disregard to, practices, procedures and rulings may be indicative of vexatiousness.<sup>701</sup> This could result in the Commission dismissing the application for security of costs.

Case example: **Security for costs ordered – Employer sought security for costs – Employee failed to comply with directions**

***O'Reilly v SA Waste Management Pty Ltd*** [\[2011\] FWA 4229](#) (Steel C, 4 July 2011).

The employee failed to attend a directions conference, repeatedly failed to comply with directions, and then failed to attend the hearing on security of costs. It was found that the employee had put the employer to considerable expense preparing for hearings, and ordered security for costs.

Case example: **Security for costs ordered – Employer sought security for costs – Employee failed to demonstrate he had met the minimum period of employment**

***Russell v Due Easy Pty Ltd T/A Hard Rock Excavations*** [\[2011\] FWA 7052](#) (Macdonald C, 22 December 2011).

The employer raised jurisdictional objections to the application, including that the employee had not met the minimum 12 month period of employment required for small business employees. The employee's own application identified that he had less than 12 months' service, but he later contradicted this. Security for costs was ordered on the basis that the applicant's application asserted service less than the required minimum period of employment.

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<sup>697</sup> *Merribee Pastoral v ANZ Banking Group* [\[1998\] HCA 41](#) (16 June 1998), [(1998) 193 CLR 502, at p. 513]; cited in *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [\[2011\] FWA 2910](#) (Asbury C, 12 May 2011) at para. 10.

<sup>698</sup> *ibid.*

<sup>699</sup> *ibid.*

<sup>700</sup> *Devenish v Jewel Food Stores Pty Ltd* [\[1990\] HCA 35](#) (15 August 1990); cited in *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [\[2011\] FWA 2910](#) (Asbury C, 12 May 2011) at para. 12.

<sup>701</sup> *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [\[2011\] FWA 2910](#) (Asbury C, 12 May 2011) at para. 21.

Case example: **Security for costs ordered – Employer sought security for costs – Employee had pleaded guilty in the Magistrates’ Court**

***Keel v State of Victoria (Department of Education and Early Childhood Development)*** [2010] FWA 8499 (Smith C, 4 November 2010).

The employer sought security for costs on grounds including the fact the employee had plead guilty to the conduct she was dismissed for in other proceedings, had reneged on settlement, had failed to comply with directions of the Commission, and had failed to attend the hearing on security of costs. It was ordered that the employee pay security for costs and the matter adjourned until such time as the security was paid.

Case example: **Security for costs NOT ordered – Employer sought security for costs – Employee dismissed for alleged work credit card use**

***Harris v Home Theatre Group*** [2011] FWA 2910 (Asbury C, 12 May 2011).

The applicant employee was dismissed for the alleged private use of the work credit card. The employee case was that there was an accepted practice of using the work credit card for private use, subject to repayment.

The employer sought security for costs. This was rejected, because there was no evidence that the applicant was impecunious, and there was no basis upon which it could be said her case was hopeless or bound to fail. The applicant’s case was more difficult because the Small Business Fair Dismissal Code applied, but that did not mean it was doomed to failure. Even if the employer succeeded, it would not automatically obtain an order for costs.

Case example: **Security for costs NOT ordered – Employer sought security for costs – Employer did not supply material in support to the Commission**

***Hosking v Millennium Hi-Tech Group Pty Ltd*** [2012] FWA 4058 (Asbury C, 11 May 2012).

The employer objected to the employee’s application on the grounds that the employee had not met the minimum period of employment. It also sought security for costs. The employer did not supply the Commission with any material in support of either the jurisdictional objection or the security for costs order.


The Commission found that there was nothing indicating that the application was made vexatiously or without reasonable cause, and it did not appear to be hopeless or bound to fail; nor was there any evidence that the employee could not meet an order for costs if granted. Security for costs was refused.

Case example: **Security for costs NOT ordered – Employer sought security for costs – employee dismissed for poor performance – evidence of misconduct found post-dismissal**

*Smith v OSD Pty Ltd* [2012] FWA 4591 (Gooley C, 28 May 2012).

The employer’s argument for costs was that the employee had no reasonable prospect of success. However, it was found that although the applicant’s case seemed weak, it was not one where there was no reasonable prospect of success or one that was lodged vexatiously or without reasonable cause. It was also relevant that an order for security of costs would be likely to frustrate the applicant’s right to litigate her claim, and that if the employer was successful in defending the claim that an order for costs might not be made. The application for security for costs was dismissed.

## Appeals

 See Fair Work Act ss.400, 604



The following information is limited to providing general guidance for **appeals against unfair dismissal decisions**.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the [Appeal proceedings practice note](#).

## Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.<sup>702</sup>

A **person who is aggrieved** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as, in some circumstances, a union or an employer association.<sup>703</sup>

In determining whether a person is a ‘person aggrieved’ for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.<sup>704</sup>

### Intervention

There is no provision of the Fair Work Act expressly dealing with intervention however the Commission has used the broad procedural power in s.589(1) to empower it to permit intervention in an appropriate case.<sup>705</sup>

<sup>702</sup> Fair Work Act s.604(1).

<sup>703</sup> See for example *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).

<sup>704</sup> *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).

<sup>705</sup> *J.J. Richards & Sons Pty Ltd v Transport Workers’ Union of Australia* [2010] FWAFB 9963 (Lawler VP, O’Callaghan SDP, Bissett C, 23 December 2010) at para. 9.

## Time limit for appeal – 21 days

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.<sup>706</sup> If an appeal is lodged late, an application can be made for an extension to the time limit.<sup>707</sup>



### Related information

- What is a day?

## Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

## Permission to appeal

The general requirements relating to appeals are altered in the case of appeals against unfair dismissal decisions.

The Fair Work Act generally provides that the Commission **must** grant permission to appeal if it is satisfied that it is in the public interest to do so.<sup>708</sup> However in relation to an unfair dismissal matter the opposite is true. Permission to appeal an unfair dismissal decision **must not** be granted unless the Commission is satisfied that it is in the public interest to do so.<sup>709</sup>

If the error that is alleged is an error of fact, then the person making the appeal must persuade the Full Bench that it is a **significant** error of fact.<sup>710</sup>

### *Public interest*

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.<sup>711</sup>

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of decisions so that guidance from a Full Bench of the Commission is required
- where the original decision manifests an injustice or the result is counter intuitive, or

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<sup>706</sup> Fair Work Commission Rules r 56(2)(a)–(b).

<sup>707</sup> Fair Work Commission Rules r 56(2)(c).

<sup>708</sup> Fair Work Act s.604(2).

<sup>709</sup> Fair Work Act s.400(1).

<sup>710</sup> Fair Work Act s.400(2).

<sup>711</sup> *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].

- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.<sup>712</sup>

The public interest test is not satisfied simply by the identification of error or a preference for a different result.<sup>713</sup>

## Grounds for appeal

### *Error of law*

An error of law of law may be a jurisdictional error, which means an error concerning the tribunal's power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.<sup>714</sup>

### *Significant error of fact*

In unfair dismissal cases, if the error that is alleged is an error of fact, then the appellant must demonstrate that it is a **significant** error of fact.<sup>715</sup>

An error of fact can exist where the Commission makes a decision that is 'contrary to the overwhelming weight of the evidence'.<sup>716</sup>

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.<sup>717</sup> If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.<sup>718</sup>

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.<sup>719</sup> The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.<sup>720</sup>



#### Link to form

- [Form F7 – Notice of appeal](#)

All forms are available on the [Forms](#) page of the Commission's website.

<sup>712</sup> *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA FB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].

<sup>713</sup> See for example *Qantas Airways Limited v Carter* [2012] FWA FB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 57, [(2012) 223 IR 177]; *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWC FB 3512 (Catanzariti VP, Watson VP, Gostencnik DP, 22 May 2015); *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 18.

<sup>714</sup> *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

<sup>715</sup> Fair Work Act s.400(2).

<sup>716</sup> *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.

<sup>717</sup> *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

<sup>718</sup> *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499].

<sup>719</sup> *ibid.*

<sup>720</sup> *ibid.*

Case example: **Permission to appeal granted – Duty of the Commission to provide adequate reasons for decisions**

***Dianna Smith T/A Escape Hair Design v Fitzgerald*** [2011] FWA 1422 (Acton SDP, Cartwright SDP, Blair C, 15 March 2011).

Decision at first instance [2010] FWA 7358 (Bissett C, 24 September 2010).

The appellant argued that there were a number of significant errors of fact in the original decision. The Full Bench found that there were no errors warranting review on appeal on the decision-making process on unfair dismissal. However, in failing to give adequate reasons for the decision as to remedy, there was error such that it was in the public interest to grant permission to appeal. The appeal was allowed and the decision as to remedy was quashed and remitted to the first instance decision-maker.

Case example: **Permission to appeal granted – Misapplication of statutory test**

***Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski*** [2011] FWA 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

Decision at first instance [2010] FWA 9958 and order PR505584 (Ryan C, 30 December 2010).

In deciding the initial application, the Full Bench determined that there had been a failure to properly consider whether there was a valid reason for termination in accordance with s.387(a). This misapplication of the statutory test was significant and productive of a plainly unjust result. The preservation of public confidence in the administration of justice was a matter of public interest and could be undermined by decisions that were manifestly unjust. The appeal was allowed, the order quashed, and the matter re-heard.

Case example: **Permission to appeal granted – Interpretation of provisions of the Fair Work Act**

***Ulan Coal Mines Limited v Honeysett*** [2010] FWA 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010), [(2010) 199 IR 363].

Decision at first instance [2010] FWA 4817 (Raffaelli C, 12 July 2010).

These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies. The Full Bench found that, because these appeals concerned the interpretation of an important section of the Fair Work Act which had not been considered by a Full Bench before, it was in the public interest to grant permission to appeal. However, the Full Bench concluded that the Commission's decision was open on the evidence and other material before it and did not involve any error in interpretation of the section.


Case example: **Permission to appeal refused – Significant error of fact established but not in public interest to grant permission to appeal**

***Qantas Airways Limited v Carter*** [2012] FWA FB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012), [(2012) 223 IR 177].

Decision at first instance [2011] FWA 8025 and order PR517011 (Spencer C, 25 November 2011).

These were appeals from a decision that there was no valid reason for the employee’s dismissal, that the dismissal was unfair and that the employee be reinstated. The Full Bench found that the Commission was in error in failing to find that the employer had a valid reason to dismiss the employee. However, permission to appeal was not granted, because the matter turned on its particular facts, and raised no wider issue of principle or of general importance, and no issue of jurisdiction or law.

## Staying decisions

 See Fair Work Act s.606

If the Commission hears an appeal from, or conducts a review of a decision, the Commission may order that the operation of the whole or part of the decision be stayed by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

## Role of the Court

### Enforcement of Commission orders

It is a criminal offence to not comply with an order of the Commission.<sup>721</sup>

A person to whom a reinstatement or compensation order applies must not contravene a term of the order.<sup>722</sup>

If a person does contravene an order then:

- a person affected by the contravention
- a union or an employer organisation,

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<sup>721</sup> Fair Work Act s.675.

<sup>722</sup> Fair Work Act s.405.

- or an inspector;

may seek enforcement of the Commission’s order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit and Family Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.<sup>723</sup>

Failure to comply with an order may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.



#### Related information

- Powers of the Commission

#### Case example: **Commission order enforced by Court**

***Meadley v Sort Worx Pty Ltd*** [\[2013\] FCA 1012](#) (8 October 2013).

The employee was found to have been unfairly dismissed and the Commission ordered that she be reinstated and awarded compensation of \$24,143 in May 2013. By June, when the company still hadn’t reinstated or compensated her, the employee sought Federal Court orders requiring it to do so, plus pecuniary penalties. The company paid the compensation but still did not reinstate the employee.

The Court held that the company’s managing director had made a ‘deliberate decision’ not to reinstate the employee or pay her compensation for lost wages until the end of its appeals process, despite both the Commission and the company’s employer association making it clear it had to comply with the Commission’s orders.

The company was fined \$10,000 and the employee was awarded a further \$15,045 in redundancy pay, lost wages, notice and accrued leave entitlements, plus interest.

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<sup>723</sup> Fair Work Act s.539, table item 13.



### Case example: **Commission order enforced by Court**

***Fair Work Ombudsman v Indian Food Catering Pty Ltd & Anor*** [2019] FCCA 1471 (30 May 2019).

The employee was found to have been unfairly dismissed and in September 2018 the Commission ordered compensation of \$18,000.00 (less applicable taxation) in six instalments. Those instalments were to take place from September 2018 to February 2019. The respondent did not make payments as required in accordance with the order and an application was made by the Fair Work Ombudsman to the Court in March 2019.

At the time the application was made to the Court, only a sum of \$5,000.00 had been paid. Since the making of the Court's orders in April 2019, an additional payment was made bringing the total to \$7,000.00. Applying the applicable taxation rate the balance outstanding under the order made by the Commission was \$5,008.00.

The Court held that when order was made by the Commission, the respondent was already in a position of considerable financial difficulty, and was the reason why the payment was to be made in instalments. The employee was also obviously a vulnerable employee and the outstanding balance would be of considerable significance to him.

The Court has also taken into account the admitted deliberateness of the conduct by the respondent, however accepted that there had been genuine contrition by the respondent in respect of the failure to comply with the Commission order. The Court also accepted that there had been real and genuine cooperation with the enforcement authorities in relation to the financial difficulties in complying with the Commission order, and that there has been cooperation in relation to the proceedings that were then brought by the Fair Work Ombudsman to ensure that the Commission's order was complied with.

The respondent was ordered to pay the employee the outstanding \$5,008.00, plus interest, and was fined \$5,000.00.

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## Types of order made by the Court

 See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit and Family Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Orders the Federal Court or Federal Circuit and Family Court may make include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest), or
- an order for reinstatement of a person.

## Pecuniary penalty orders

The Federal Court, the Federal Circuit and Family Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in section 539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.



A **penalty unit** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening section 405 of the Fair Work Act (which prohibits a person contravening an order made under Part 3-2) is 60 penalty units.

From 1 July 2023 a penalty unit was \$313.<sup>724</sup>

- for an individual – 60 penalty units = \$18,780
- for a body corporate – 5 x 60 penalty units = \$93,900

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

### Costs orders by the Court

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

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<sup>724</sup> *Crimes Act 1914* (Cth) s.4AA.