## Respondent’s Outline of arguments: merits

The matter has been listed for a conference. In order for you to prepare for the conference, you have received requirements directing you to complete and lodge:

* an **Outline of argument: merits** (this document)
* a **Statement of evidence**
* a **Document list**, and
* if you have an objection, an **Outline of argument: objections**.

Each of the documents that you complete must contain information that you can prove to be true. Ensure that you include all the issues and concerns that you wish to raise in relation to your unfair dismissal application.

The information you provide will be relied on by the applicant (the employee) and the Commission Member at the conference. You cannot keep information secret to surprise the applicant or the Commission Member on the day of the conference or hearing.

### What is an Outline of argument: merits?

An **Outline of argument: merits** is a summary of the facts that are relevant to the Commission Member in deciding whether the applicant (the employee) was unfairly dismissed.

The **Outline of argument: merits** will help you answer the questions that the Commission Member will have about the employee’s claim.

If you have raised an objection to the unfair dismissal application, you should also complete the **Outline of argument: objections**.

### What to do with your completed documents?

Once all your documents are completed, make sure you send a copy to both the Commission and the applicant (the employee) by the date and time that is noted in the requirements as set out by the Commission. The documents should be sent to:

1. the postal or email address of the applicant as set out in their F2—Unfair dismissal application, and
2. the postal or email address of the chambers of the Commission Member as set out in the requirements.

On the day of the conference, make sure you bring a copy of all the material that has been lodged by you and the applicant (the employee).

### Matter details

|  |  |
| --- | --- |
| **Matter number** (e.g. U2015/12345) |  |
| **Applicant** (the employee) |  |
| **Applicant’s representative** (if any) |  |
| **Respondent** (you, the employer) |  |
| **Respondent’s representative** (if any) |  |
| **Date of conference or hearing** |  |

### 1. The applicant’s employment

1a. When did the applicant (the employee) start working for the business?

|  |
| --- |
|  |

1b. What was the employee’s job title?

|  |
| --- |
|  |

1c. Was the employee full-time, part-time or casual?

|  |
| --- |
|  |

1d. What hours did the employee work?
(E.g. 38 hours per week, 20 hours per fortnight, variable hours)

|  |
| --- |
|  |

*Now go to question 2*

### 2. The applicant’s pay

2a. How much was the applicant (the employee) paid per hour or week?
 (E.g. $18 per hour, $650 per week)

|  |
| --- |
|  |

2b. Did the employee’s earnings vary throughout the year?

|  |  |
| --- | --- |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—How much did the employee earn over the last: |
|  | 6 months? |  |
|  |  |  |
|  | 12 months? |  |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—What was the employee’s annual income? |
|  |  |

2c. Was the employee receiving a remuneration package?
 (E.g. A package that included a car, a phone, superannuation, etc.?)

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3 |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details of the package |
|  |  |

 *Now go to question 3*

### 3. The dismissal

3a. What date was the applicant (the employee) notified of their dismissal?

|  |
| --- |
|  |

3b. What date did the dismissal take effect?

|  |
| --- |
|  |

3c. What was the reason(s) for the dismissal?

[ ]  Misconduct or serious misconduct

[ ]  Poor work performance

[ ]  I didn’t give the employee a reason

[ ]  Other—Describe the reason below

|  |
| --- |
|  |

3d. Did you tell the employee why you were dismissing them?

|  |  |
| --- | --- |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Describe below what you told the employee and how you told them. Then go to question 3e. |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Describe below why you didn’t tell the employee the reason. Then go to question 3g. |
|  |  |

3e. Did you notify the employee of the reason for the dismissal **prior** to the dismissal?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3f |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

3f. Did you give the employee an opportunity to respond to the reason(s) you have identified above?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3g |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

3g. Did the employee ask to have a support person present at any meetings or discussions relating to the dismissal?

|  |  |
| --- | --- |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Go to question 3h |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3i |

3h. Was the request for a support person granted or refused?

[ ]  Granted—Go to question 3i

[ ]  Refused—Describe below why the request was refused

|  |
| --- |
|  |

3i. How many employees does the business have?
 (Include employees in any associated entities)

|  |
| --- |
|  |

3j. Do you believe that the size of the business had any impact on the procedures you followed in dismissing the employee?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3k |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

3k. Does the business have a human resources management specialist or expert?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 3l |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—End of question 3 |

3l. Do you think that **not** having a human resources management specialist or expert had any impact on the procedures that you followed in dismissing the employee?

|  |
| --- |
|  |

*End of question 3*

### 4. Dismissed for misconduct or serious misconduct

|  |
| --- |
| Was the applicant (employee) dismissed for misconduct or serious misconduct?[ ]  Yes—Complete question 4.[ ]  No—**Do not complete question 4.** Go to question 5. |

4a. What was the alleged misconduct?

|  |
| --- |
|  |

4b. When do you allege the misconduct occurred?

|  |
| --- |
|  |

4c. Describe the circumstances leading up to the misconduct.

|  |
| --- |
|  |

4d. Did anyone see or hear what happened?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 4e |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

4e. How did you become aware of the misconduct?

|  |
| --- |
|  |

4f. What steps did you take to investigate the misconduct?

|  |
| --- |
|  |

*End of question 4*

### 5. Dismissed for poor work performance

|  |
| --- |
| Was the applicant (employee) dismissed because of their work performance?[ ]  Yes—Complete question 5.[ ]  No—**Do not complete question 5.** Go to question 6. |

5a. Describe the work performance issues that resulted in the dismissal.

|  |
| --- |
|  |

5b. Did you warn the employee, either verbally or in writing, about the performance issues?

|  |  |
| --- | --- |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Explain below why not |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Provide details of the warnings below |
|  |  |

5c. Did you keep any records of warnings or of any discussions you had with the employee about their performance?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Go to question 5d |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

5d. How much time, if any, did you give the employee to improve?

|  |
| --- |
|  |

5e. Did you offer or provide the employee with any training or other assistance to help them improve their performance?

|  |  |
| --- | --- |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—End of question 5 |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Provide details below |
|  |  |

 *End of question 5*

### 6. Remedy

6a. If the applicant (the employee) asks for their job back, or to be reinstated to another position in your business, do you think this would be appropriate?

|  |  |
| --- | --- |
| **N:\_Member Support Team\UD materials\Images\yes.jpg** | **Yes**—Please set out your reasons and any evidence you have to support your reasons below |
| N:\_Member Support Team\UD materials\Images\no.jpg | **No**—Please set out your reasons and any evidence you have to support your reasons below |
|  |  |

6b. If the applicant seeks compensation, what compensation do you say the Commission should order?

Please set out any evidence you have in response to the matters the Commission must consider. This may include, for example, documents that show the financial state of your business.

|  |
| --- |
| The Commission must consider the criteria set out in section 392 of the *Fair Work Act 2009* in deciding the amount of compensation, if any, it may order you to pay the applicant. The Commission Member must consider:* if compensation is ordered, the effect this would have on your business
* the length of the applicant's service at your business
* the amount the applicant would have earned if they were not dismissed
* the efforts of the applicant to find other work.
 |

|  |
| --- |
|  |

*End of* ***Outline of argument: merits***

### Legal advice

The Commission cannot provide legal advice.

As part of the unfair dismissal application process, parties may choose to obtain their own independent legal advice.

### There are community legal centres in each state and territory. Community Legal Centres Australia legal help page ([clcs.org.au/index.php/findlegalhelp](https://clcs.org.au/index.php/findlegalhelp) ) can assist with finding the nearest community legal centre. Please note that Community Legal Centres Australia does not itself offer legal advice.

### Further information

For eligibility information, refer to the Unfair dismissal—Am I eligible to apply? page on the Commission's website ([www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/about-unfair-dismissal/check-eligibility-unfair-dismissal](http://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/about-unfair-dismissal/check-eligibility-unfair-dismissal)).

You can also refer to the full set of unfair dismissal guides available on the Unfair dismissal page ([www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal](http://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal)) of our website.

1. Overview of the unfair dismissal laws

2. Flowchart on the process

3. Making an application

4. Responding to an application

5. Objecting to an application

6. Preparing for conciliation

7. Preparing for a conference or hearing

8. Frequently asked questions

9. Glossary of common terms

The Unfair Dismissals Benchbook can also assist parties lodging or responding to unfair dismissal applications ([www.fwc.gov.au/benchbook/unfair-dismissals-benchbook](http://www.fwc.gov.au/benchbook/unfair-dismissals-benchbook)).

If you require further information or help, please refer to the Contact us page on the Commission's website ([www.fwc.gov.au/about-us/contact-us](http://www.fwc.gov.au/about-us/contact-us)).

© Commonwealth of Australia 2022

This guide is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.