Calculating compensation

A guide for employees and employers

Introduction
This guide sets out the steps that the Fair Work Commission (the Commission) takes when deciding how much compensation to order if a person has been unfairly dismissed.

Please note: This differs to the amount of compensation that can be agreed to in a conciliation. To find out more about compensation in conciliation, please refer to Table 2 (Conciliation outcomes) on the Remedies, Results and Outcomes page.

Outcomes for unfair dismissal
There are three possible outcomes that the Commission can order if a person has been unfairly dismissed. These are:

- to order that a person gets their job back (reinstatement)
- to order the payment of money (compensation), or
- to make no order.

About reinstatement
The Commission must decide if reinstatement is possible or suitable before considering an order to pay compensation.

Reinstatement might not be ordered if:

- the business no longer operates
- the employee cannot work because of illness or injury
- the employer and employee cannot work together again due to a break down in their relationship, or
- the employer would just dismiss the employee again.

About compensation
Compensation will only be ordered if considered appropriate by the Commission. This means that even if a person has been unfairly dismissed, they may not get compensation.

Compensation cannot be awarded for shock, distress, hurt or humiliation.

What the Commission looks at
The Fair Work Act 2009 (the Fair Work Act) sets out a series of issues that the Commission must take into consideration when deciding if compensation should be ordered.

These issues are set out in section 392(2) of the Fair Work Act. You can read section 392 of the Fair Work Act below.
**IMPORTANT**

Employees and employers are asked to address these issues in their submissions before the conference, determinative conference or hearing is held.

**Step 1 – Calculate remuneration**

The first step is for the Commission to work out how long it thinks the employee would have remained employed, if they had not been dismissed.

The Commission does this to calculate how much money the employee would have earned if they had not been dismissed.

This amount will be the starting point for the Commission to decide how much compensation to order (if any).

To help with this calculation the Commission must also look at the length of time the employee worked for the employer, and other issues such as their work history and any performance or behaviour issues.

**Employee – what do I need to do?**

You will need to provide proof of what you were earning, including any allowances or regular overtime.

This includes the hours you worked regularly – this is very important if you worked as a casual employee.

All of this information should be on your pay slip. If you don’t have copies of your pay slips you may be able to use your bank records.

**Employer – what do I need to do?**

You can provide proof of what you were paying the employee, and the hours they worked by providing copies of the employee’s time and wages records.

You can also provide the Commission any other relevant documents about the employee’s performance history, such as copies of written warnings.

**What if the employee was on leave?**

If the employee was on leave without pay or was not receiving full pay at the time of their dismissal, their earnings will be calculated as the amount that they would have normally received if the employee had not been on leave.

**Step 2 – Deductions**

**Wages or income earned**

The Commission must next consider any money which the employee earned since the dismissal occurred. This amount will generally be subtracted from the amount calculated in Step 1.

Income support payments (such as Newstart Allowance) are not generally considered to be wages or income and are not included.

Workers’ compensation payments are generally considered to be wages or income and will be deducted.
Note: The Commission can also take into account any income earned between making an order for compensation and the time that the money is paid.

**Employee – what do I need to do?**
You will need to provide the Commission proof of what you have earned since you were dismissed. This can include wages, workers compensation or other forms of income, such as from a home business.

**Viability of employer**
The Commission will also look at what effect an order for compensation may have on the viability of the employer.

**Viability** means the ability for the business to continue to operate.

The employer must present evidence about the financial situation of the business and the likely effect that an order for compensation will have on the viability of the business.

**Employer – what do I need to do?**
If you are seeking to have the viability of your business considered by the Commission then you will need to provide proof of the financial situation of the company, such as bank or financial records.

**Contingencies**
The Commission will also look at “any other matters that it considers relevant”. This is sometimes referred to as **contingencies**. This is a calculation of possible future economic loss or gain.

This may include:
- possible things which may have affected the employee’s earning capacity, such as a lower paying job or increased transport costs
- sickness, accident, unemployment and industrial disputes, and
- possible benefits, such as starting a higher paying job.

**Misconduct**
If the Commission finds that an employee’s misconduct contributed to their dismissal, the Commission must reduce the amount of compensation.

Misconduct after the dismissal may also be taken into account.

Misconduct may involve:
- a breach of workplace health and safety
- negligent culpability
- threats of violence, or
- swearing at management.
Step 3 – Efforts to reduce loss

When the Commission is considering ordering compensation it is necessary for it to consider what steps a person has taken to reduce their loss.

This means that the employee has taken deliberate, positive steps to lessen the effect that the dismissal has had on them, such as trying to find a new job.

What is reasonable depends on the circumstances of the case.

A person is not required to take unreasonable steps to reduce their loss such as:

- spending money, or
- selling their possessions (such as sporting goods, cars, boats, etc).

Offers of re-employment

A person who has made an application for unfair dismissal cannot claim that their dismissal has caused them a loss if they have refused to start a new job with the same employer.

The refusal to take another job with the employer at the same rate of pay may amount to a failure to reduce loss.

The following circumstances may not amount to a failure to reduce loss when re-employment is offered:

- the refusal of another job with the employer at the same rate of pay but with lesser status, or
- the refusal of a position with the employer where the employee has lost trust and confidence in the employer or the workplace.

Employee – what do I need to do?

You will need to provide proof of what steps you have taken to reduce the impact of the dismissal.

Step 4 – Compensation cap

An order for compensation will be reduced if the amount calculated is more than the limit set by the compensation cap.

Calculating the compensation cap

The compensation cap is the lower amount between:

- half of the employee’s annual wage, and
- $74,350 (as at 1 July 2019).

Note: The compensation cap is updated each year from 1 July. The compensation cap for dismissals taking effect between 1 July 2018 and 30 June 2019 was $72,700.

Calculating the total amount of compensation

The total amount of compensation that the Commission can order is the lower amount between:

- the amount calculated in Step 1, removing any deductions from Steps 2 & 3, and
- the compensation cap calculated above.
Note about calculating the cost of compensation

The following examples relate directly to the compensation cap, they are provided to explain how maximum compensation is calculated by Commission Members as a part of a determinative conference or hearing.

Where a settlement involves money, the compensation in the majority of matters is under $10,000. Less than 0.4% of applicants receive the maximum amount of compensation. This applies both to compensation agreed to at a conciliation, as well as the amounts ordered at a determinative conference or hearing.

Example 1 – Michael

Michael earned $50,000 per year before he was dismissed. Michael’s compensation cap is therefore $25,000, because this is the lower amount between half his annual salary, and the current compensation limit.

The Commission calculates Michael’s compensation as $17,000. Because this is less than his compensation cap of $25,000, the Commission orders that Michael is paid $17,000.

Example 2 – Vivienne

Vivienne also earned $50,000 per year before she was dismissed. Vivienne’s compensation cap is also $25,000, because this is the lower amount between half of her annual salary, and the current compensation limit.

The Commission calculates Vivienne’s compensation as $33,000. Because this is more than Vivienne’s compensation cap of $25,000, the Commission orders that Vivienne is paid $25,000.

Example 3 – Kushalya

Kushalya earned $160,000 per year before she was dismissed. Even though Kushalya earned above the high income threshold she was protected from unfair dismissal because she was covered by an enterprise agreement.

Half of Kushalya’s annual wage is $80,000 – above the current compensation limit of $74,350. This means that any amount of compensation ordered by the Commission cannot be more than $74,350.

The Commission calculates Kushalya’s compensation as $83,000. Because this is more than the compensation limit, the Commission orders that Kushalya is paid $74,350.
### Compensation checklist

<table>
<thead>
<tr>
<th>Step</th>
<th>Details</th>
<th>What do I need to do?</th>
</tr>
</thead>
</table>
| **Step 1** | Calculate remuneration  
The Commission will calculate how much money the employee would have earned if they had not been dismissed. | **Employee**  
Provide proof of what you were earning.  
**Employer**  
Providing copies of the times and wages record and any formal warnings or other relevant documents. |
| **Step 2** | Deductions  
**Wages or income**  
The Commission will consider any money which the employee has earned since the dismissal occurred.  
**Viability of employer**  
The Commission will look at what effect an order for compensation may have on the viability of the employer.  
**Contingencies**  
The Commission will also look at ‘any other matters that it considers relevant’.  
**Misconduct**  
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. | **Employee**  
Provide proof of what you have earned since you were dismissed.  
**Employer**  
Provide proof of the financial situation of the company. |
| **Step 3** | Efforts to reduce loss  
The Commission will consider what steps a person has taken to reduce their loss. | **Employee**  
Provide proof of what of what steps you have taken to reduce the impact of the dismissal. |
| **Step 4** | Compensation cap  
The Commission will compare the amount of compensation calculated to the compensation cap.  
The smallest amount is what can be ordered. |
The legislation – section 392 of the Fair Work Act

“392 Remedy – compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person’s employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer’s enterprise; and
(b) the length of the person’s service with the employer; and
(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
(e) 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; and
(f) 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
(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer’s decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person’s dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and
(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or
(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.”
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. The National Association of Community Legal Centres Inc (NACLC) I need legal help page (www.naclc.org.au/need_legal_help.php) can assist with finding the nearest community legal centre. Please note that the NACLC does not itself offer legal advice.

Further information


You can also refer to the full set of unfair dismissal guides available on the Unfair dismissal page (www.fwc.gov.au/termination-of-employment/unfair-dismissal) on 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 (https://www.fwc.gov.au/resources/benchbooks/unfair-dismissals-benchbook).

If you require further information or help, please visit the Contact us page (www.fwc.gov.au/about-us/contact-us) on our website.

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This guide is not intended to be comprehensive, but is designed to help employers and employees gain an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.