Unfair Dismissal – Guide 5

Objecting to an application

Employers can object to an unfair dismissal application if they believe that the Fair Work Commission (the Commission) does not have jurisdiction to hear the matter, or if they believe the employee was not protected from unfair dismissal under the *Fair Work Act 2009* (FW Act).

**Important note**

Making a jurisdictional objection will not stop an unfair dismissal application.

Jurisdictional objections must be determined by the Commission. This is done by a member holding a conference or hearing and making a formal decision.

**What is jurisdiction?**

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

**What is a jurisdictional objection?**

A jurisdictional objection can be made by an employer who believes that the Commission does not have the jurisdiction to deal with the unfair dismissal application, or that the person is not eligible to make the application.

The Commission does not have jurisdiction to deal with an application if:

- the application was lodged more than 21 days after the dismissal took effect, unless there were exceptional circumstances for not lodging the application on time
- the employee dismissed worked for the employer for less than six months, or less than one year if the employer was a small business employer

*Note:* A *small business employer* is defined as an employer who employs fewer than 15 employees, including casual employees engaged on a regular and systematic basis.

- the employee was not a national workplace relations system employee
- the application was made against an entity who is not the employer
- the employee’s employment was for a specified period, task, seasonal contract or traineeship arrangement, and was dismissed at the end of the period, task, season or arrangement
- the employee made multiple applications regarding the dismissal
- the employee was a casual employee but was not regularly and systematically employed and had no reasonable expectation of continuing employment
- the applicant was not an employee (eg the applicant was a contractor), or
- the employee dismissed was earning more than the high income threshold and was not covered by an award or enterprise agreement.
**Note:** The high income threshold is adjusted annually on 1 July and does not include superannuation guarantee contributions. Please refer to the Lodge an application page (www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodge-an-application) of our website for the current amount.

An employee is NOT protected by unfair dismissal laws if one or more of the following objections apply:

- the dismissal was a case of genuine redundancy
- the employer is a small business and complied with the Small Business Fair Dismissal Code
- the employee was not dismissed or the employee resigned voluntarily, or
- the employee was demoted, but not significantly, and they remain employed by the employer.

**How can an employer make an objection?**

An employer may make one or more objections to an application by:

- noting their objections in their Form F3 – Employer response to unfair dismissal application, or
- completing a Form F4 – Objection to application for unfair dismissal remedy, at any time before the Fair Work Commission has determined the application.

Forms F3 and F4 can be downloaded from the Forms page on the Commission’s website at www.fwc.gov.au/resources/forms. You should notify the Commission of your objection as soon as possible.

**The conciliation process**

Conciliation is an informal method of resolving an unfair dismissal application. An independent conciliator can help the parties explore options for a resolution without the need for a conference or hearing.

As a part of the general procedure followed by the Commission the unfair dismissal application will have already been listed for conciliation. These details will be contained in the Notice of Listing sent to the parties.

**Does conciliation still go ahead if objections have been made?**

Yes, the Commission will proceed with conciliation unless there is a request by the employer to have any objections heard prior to conciliation.

When objections are received the Commission will contact the employer to ask if they would like to participate in the listed conciliation before the objections are determined.

**Is it beneficial to proceed with conciliation if objections have been made?**

Yes, conciliation is valuable even if objections have been made, for the following reasons:

- the employee may only become aware of the objection when they receive a copy of the Employer’s response form (Form F3) or the Objection to application form (Form F4)
- the parties may disagree about whether the Commission has jurisdiction to determine the application or whether an employee is protected from unfair dismissal. The conciliation conference will provide the first opportunity for any objections to be discussed
• the conciliation may assist the parties to understand the law as it relates to the objection, and
• after having the opportunity to discuss the issues, the employee may decide to withdraw the application or the employer may withdraw their objection.

What if the employer requests for objections to be dealt with prior to conciliation? OR What if the matter is not resolved at conciliation?

If the employer requests to have any objections heard prior to conciliation, or has participated in an unsuccessful conciliation, the matter will progress to a conference or hearing with a member of the Commission.


How are objections to applications for unfair dismissal managed?

Depending on the nature of the objections raised, the Commission will either:

• hold a conference or hearing to determine the jurisdictional objections first, and deal with the objections independently of the merits of an application. The Commission refers to this as a Jurisdiction conference or hearing.
• hold a conference or hearing that deals with the jurisdictional objections and the merits of the an application together or one after the other. The Commission refers to this as a Jurisdiction and arbitration conference or hearing’.

Jurisdiction

A jurisdiction conference or hearing is held if the employer has made an objection which, if valid, would mean the Commission would not have the authority to deal with the application. These objections include:

• whether or not an extension of time to lodge an application should be granted
• the employee did not complete the minimum employment period
• the employer named on the application is not the actual employer
• the employer is not a national system employer
• the applicant’s earnings exceed the high income threshold
• demotion – the applicant was demoted in employment but the demotion did not involve a significant reduction in their remuneration or duties and the applicant remains employed by the employer
• the dismissal was at the end of a specified period of employment, task or season
• the dismissal was at the end of a training arrangement, or
• multiple applications – the applicant has made other applications about the dismissal (such as an application to deal with a general protections dispute, or a complaint under another law), which has not been withdrawn, or has been determined.
Jurisdiction with arbitration

A Jurisdiction and arbitration conference or hearing may be held if the employer objects to certain information provided by the person on their application form. These types of objections may be scheduled to be heard at the same time as the merits of an application because the nature of the evidence provided is often the same as that which would be considered by the Commission member in a conference or hearing about the merits of an application. These objections include:

- genuine redundancy – a genuine redundancy was the reason for the applicant’s dismissal
- small business code – the Small Business Fair Dismissal Code was complied with
- no dismissal – the applicant was not dismissed on the employer’s initiative
- resignation – the applicant resigned and was not forced to do so because of the employer’s conduct, or
- the applicant was not an employee – e.g. the applicant is an independent contractor.

In a Jurisdiction and arbitration conference or hearing, a member of the Commission will consider all the information provided by the parties, including evidence and submissions, and will make a final decision on the issue.

The member will deal with the jurisdictional objection first and, if valid, the employee’s unfair dismissal application will be dismissed. If the jurisdictional objection is dismissed, the member of the Commission will determine the merits of the application.

Applications to dismiss

An employer who believes that the Commission should not deal with the unfair dismissal application because:

- the matter has already been settled by the parties
- the applicant has not complied with the requirements or directions of the Commission
- the unfair dismissal claim was made for a frivolous or vexatious reason, or without reasonable cause, or
- the application has no reasonable prospect of success

can apply under section 587 or section 399A of the FW Act to have the application dismissed. Please refer to the Federal Register of Legislation to access the FW Act (www.legislation.gov.au/Series/C2009A00028).

Depending on the grounds of dismissal, the application to dismiss may be heard at the same time as the merits of the case or separately. If the objection is valid, the employee’s unfair dismissal application will be dismissed and no further action will be taken.

What if the employer has made more than one objection?

If an employer has made more than one objection to an application, the Commission will look at each objection in turn to see if the jurisdictional objections exclude the employee from making an application.
Notice of Listing

A Notice of Listing is a formal notification which details the time, date and location for a conference or hearing. The Notice of Listing will also include any instructions to the parties in relation to the lodgment of supporting information. These instructions are called ‘Directions’ for conferences and hearings and ‘Requirements’ for determinative conferences.

Both parties are provided an opportunity to lodge submissions and evidence to support their case. If the matter is being dealt with as a hearing, it could also include examination and cross-examination of witnesses.

For information on conferences and hearings, refer to Guide 7 – Preparing for a conference or hearing, available on the Unfair dismissal page (www.fwc.gov.au/termination-of-employment/unfair-dismissal) of our website.

Possible outcomes

If the Commission decides that the employer’s jurisdictional objection is valid, the employee’s unfair dismissal application will be dismissed and no further action will be taken.

If a Jurisdiction conference or hearing is held, and a Commission member determines that the employer’s jurisdictional objection is not valid (i.e. that the Commission does have jurisdiction to deal with the employee’s unfair dismissal application), the member will dismiss the objection. The matter will then be relisted for arbitration at a later date.

If a Jurisdiction and arbitration conference or hearing is held, and a Commission member determines that the employer’s jurisdictional objection is not valid (i.e. that the Commission does have jurisdiction to deal with the employee’s unfair dismissal application), the Member will dismiss the objection. The Member will then consider the facts and submissions (merits of the application), and the information provided during the hearing (evidence), before issuing a decision.

Where the Commission issues a decision, the matter is finalised, subject to any appeal.

Note: The parties may reach a settlement at any time before or during the process.

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) 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) 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/resources/benchbooks/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).