Frequently asked questions

About unfair dismissal

Who is covered by the unfair dismissal laws?

Only employees covered by the national workplace relations system are covered by the unfair dismissal laws. (Other employees may have access to remedies under State legislation). The national workplace relations system covers:

- in Victoria, the Northern Territory and the Australian Capital Territory – all employees
- in New South Wales, Queensland and South Australia – employees of private enterprise
- in Tasmania – employees of private enterprise and local government
- in Western Australia – employees of constitutional corporations (including Pty Ltd companies), this may include some local governments
- employees of the Commonwealth or a Commonwealth authority
- waterside employees, maritime employees and flight crew officers in interstate or overseas trade or commerce.

Who is not covered by the unfair dismissal laws?

The national workplace relations system does not cover:

- in New South Wales, Queensland and South Australia – employees of local and state governments
- in Tasmania – employees of state government
- in Western Australia – employees of state government and non-constitutional corporations (including sole traders, partnerships and Trusts)
- independent contractors
- employees who resign and were not forced to do so by the conduct of their employer
- employees employed under a contract of employment for a specified period of time, a specified task, or the duration of a specified season who are dismissed at the end of the period, task or season
- trainees whose employment was for a specified period of time and who are dismissed at the end of the training arrangement
- employees who have been demoted but have had no significant reduction in their remuneration or duties and who remain employed by the employer who demoted them.

What is harsh, unjust or unreasonable?

In considering whether a dismissal was harsh, unjust or unreasonable, the Fair Work Commission (the Commission) must take into account:
• whether or not there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees)

• whether or not the employee was notified of that reason

• whether or not the employee was given an opportunity to respond to any reason related to their capacity or conduct

• any unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to dismissal

• if the dismissal related to unsatisfactory performance by the employee, whether or not the employee 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.

What is a genuine redundancy?
An employee's dismissal was a genuine redundancy if:

• the employee's employer no longer required the employee'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 in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

An employee's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within:

• the employer's business, or

• the business of an associated entity of the employer.

What is a small business?
A small business is a business that employs fewer than 15 employees.

What is the Small Business Fair Dismissal Code?
The Small Business Fair Dismissal Code (declared by legislation) is for small business employers to follow when dismissing an employee in order to make the dismissal fair. It provides that:

Summary dismissal
It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's misconduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other dismissal
In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity
to do the job.

The employee must be warned verbally or preferably in writing, that he or she is at risk of being dismissed if there is no improvement.

The small business employer must provide the employee with 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.

**Procedural matters**

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist; however, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the code if the employee makes a claim for unfair dismissal to the Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.


**What are the remedies for unfair dismissal?**

If the Commission is satisfied an employee was unfairly dismissed then it may order:

- reinstatement of the employee, together with continuity of service and lost remuneration, or
- payment of compensation for lost wages to the employee (if satisfied that reinstatement is inappropriate).

In some cases, even though a dismissal is found to be unfair, no remedy will be awarded.

**About applications & responses**

**How long do I have to make an application?**

An application must be lodged within 21 days after the dismissal took effect.

The Commission may accept a late application, but only in exceptional circumstances.

**Which application form do I use?**


**Is there an application fee?**

Employees are required to pay an application fee. This fee may be waived on the grounds that its payment would cause serious hardship.
Note: The application fee is adjusted annually on 1 July. 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.

Any application for waiver of the fee should accompany the Form F2 application, and not be submitted separately. A copy of the Fee Waiver form is available on the website at the Forms page (www.fwc.gov.au/resources/forms), and from the Commission’s State or Territory offices. Please refer to the Commission offices page (www.fwc.gov.au/disputes-at-work/how-the-commission-works/commission-offices) of our website.

Note: The fee may also be refunded if the matter is discontinued prior to any determinative conference or hearing being held before a Commission member.

How do I lodge an application?

An application can be lodged by email, fax, post, in person at a Commission office or online using the Commission’s Online Lodgment Service (OLS). The Commission’s contact details are on the Commission’s website.

If you cannot lodge by any of the above means, then an application can be made over the phone on 1300 799 675. However, a telephone application cannot proceed until a complete and signed application is received, along with either payment or a waiver of application.

Which form does the employer complete?


The form is also available from any Commission State or Territory office. Please refer to the Commission offices page (www.fwc.gov.au/disputes-at-work/how-the-commission-works/commission-offices) of our website.

How do I serve a document?

Serving a document means sending a copy of the document to the other party or their representative. You can serve a document by:

- sending the document by express post to the other party or representative in the proceedings (and keeping the sender’s copy of the identifying barcode)
- sending the document by registered post to the other party or representative in the proceedings, or
- sending the document by email to the email address of the other party or representative in the proceedings.

What documents do I need to send to the other party?

You must send to the other party (or their representative) any document that you are required to serve on them.

Generally, you must also send to the other party (or their representative) a copy of any correspondence or document you send to the Commission. If you do not do so, the Commission may forward a copy to the other party (or their representative).

If you are concerned about correspondence or a document being forwarded by the Commission to the other party or their representative (for example, if it contains personal medical details or other confidential information) you should contact the Commission to discuss your options before sending it to the Commission.
Who will see my documents?

Generally, you should assume that the other party (and their representative) will see any documents you file with the Commission and any correspondence or documents that you send to the Commission. Members and staff of the Commission who need access to your file in order to process your application will also see your correspondence and documents.

See further the question above ‘What documents do I need to send to the other party?’ and the question below ‘How is my privacy protected?’

How can the Fair Work Commission assist me?

Commission staff can provide you with information over the telephone or at one of our offices. The Commission cannot provide legal advice or advice on how best to run a case. However, the Commission can give information on:

- processes in the Commission
- how to make an application to the Commission and how to respond to an application that is made against you
- how to fill out forms
- where to find useful documents such as legislation and decisions, and
- other organisations which may be able to assist you.

Visit the Commission’s website www.fwc.gov.au for a range of information that can assist in preparing for a hearing or conference including:

- forms (www.fwc.gov.au/resources/forms)
- contact details (www.fwc.gov.au/about-us/contact-us)

About conciliation, conferences & hearings

What is conciliation?

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 formal conference or hearing. Participating in conciliation is voluntary.
Most unfair dismissal cases are resolved in this way, with an agreement made between the parties at this informal stage.

**Who are the conciliators?**

Conciliators are Commission staff who are trained and experienced in conciliation, workplace relations and unfair dismissal law.

**What happens at conciliation?**

On the day of conciliation:

- The conciliation is usually held by telephone and takes approximately 90 minutes.
- A conciliator will call the parties (and their representatives if represented) on a conference call.
- The conciliator will explain the process, and then:
  - ask the parties to briefly summarise why the dismissal was unfair/fair
  - holds an open discussion between the parties
  - holds private discussions with each party to discuss ways in which the matter can be resolved
  - discusses proposals for resolution.
- If the parties reach an in-principle agreement, the conciliator can prepare a written agreement for the parties to sign.
- If the parties do not reach an agreement, the conciliator will explain the next steps in the process.

**Conciliators:**

- actively help the parties to reach a resolution
- can lead discussions and provide guidance
- may explore the issues
- may challenge views expressed, explore alternatives and comment on possible outcomes
- do not represent or advocate for either employees or employers
- do not give legal advice or make decisions.

**What if I am not available on the date of the conciliation?**

If you are not available on the date of the conciliation you may request an adjournment (i.e. a request for a change of time or date). Adjournment requests must be made in writing to the Commission and will only be granted if the Commission considers there are substantial grounds. Any requests should be made as early as possible before the conciliation date. Requests on the basis that a particular representative is unavailable on the conciliation date are not usually considered sufficient grounds for an adjournment.

**How do I prepare for conciliation?**

Conciliation works best if the parties prepare well. Use the following list as your guide:

- have an idea of what you want to achieve
- write down the key issues and possible solutions
be flexible and prepared to negotiate
listen and consider other points of view
focus on the issues, not on the emotions
have a pen, paper and relevant documents ready (eg payslips, contracts of employment)
arrange a private place without interruptions to take the call
use a hands-free fully charged phone or mobile phone if possible
be realistic about the likely outcome
request an interpreter beforehand, if needed
request disability assistance beforehand, if needed.

What if there is no agreement after conciliation?
Most conciliations result in agreement, but if there is no agreement the matter will progress to a formal conference or hearing. A Commission member will then conduct a formal conference or hearing and make a binding decision.

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

What is a conference or hearing?
A determinative conference is a proceeding which is conducted in private, where only the parties are allowed to attend and results in a decision. 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. The preparation for conferences differs from the preparation for a hearing.

A hearing is a proceeding which is generally conducted in public, resulting in a decision. Hearings are more formal than conferences and the preparation required for the hearing reflects this.

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

How will I be notified of the determinative conference or hearing?
The Commission will notify the parties in writing of the time, date and location of the determinative conference or hearing. This is called a Notice of Listing. The notice will also provide any requirements or directions to the parties.

What happens at a hearing?
At a hearing each party will have an opportunity to present their case by:
- providing witness evidence under oath or affirmation
- providing relevant documents (evidence) to support their case
- challenging or cross-examining the other party’s evidence.

A Commission member, after hearing and considering all of the evidence and submissions, will provide a written, legally binding decision either in favour of the employee (applicant) or in favour of the employer (respondent).
Do I have to be represented by someone?

Conciliations

Employees or employers (the parties) do not need to be represented at conciliation, but may have a support person or a representative (including a lawyer) with them if they prefer. No formal permission from the Commission needs to be granted to be represented during the conciliation.

Conferences & hearings

There is no requirement for you to be represented by another person when you appear in proceedings at the Commission. You will need the permission of the Commission member dealing with your case if you wish to be represented by a lawyer or paid agent, unless that person is:

- one of your employees or officers (if you are an employer)
- employed by a union or employer organisation, a peak union or peak employer body.

If you decide to represent yourself in proceedings it will be easier for you if you are well prepared. You may consider bringing one or more individuals with you for support. There is generally no objection to you doing so although in private conferences you should be prepared to tell the Commission member why you would like the presence of such individuals.

Do my witnesses have to attend court?

Yes, a person who provides a witness statement needs to be available at the hearing to give sworn verbal evidence and be available to be cross-examined by the other party.

Who pays my costs?

An employee and employer involved in an unfair dismissal case before the Commission must generally meet their own costs.

The Commission may order an employee or employer to bear pay some or all of the costs of the other party if the unfair dismissal application or response to it:

- was frivolous, vexatious or made without reasonable cause
- had no reasonable prospect of success, or
- caused costs to be incurred by the other party because of an unreasonable act or omission in connection with the conduct or continuation of the matter.

In certain circumstances, the Commission may also order costs against a lawyer or paid agent representing a party in an unfair dismissal case.

What if I need an interpreter?

Parties can request an interpreter before the day of the conference or hearing at no cost. Any request should be made well in advance of the hearing and can be made to any of the contact numbers or email addresses provided on the Notice of Listing.

How do I find my conference or hearing?

Before you attend a conference or hearing at the Commission you should check the hearings and conferences list. The list identifies all of the cases for a particular day, together with the Commission members dealing with them, the times of the hearings and conferences and the location details (eg the floor and the room number).
The list is published in capital city newspapers and on the Commission website each day. Please refer to the Hearings and conferences page (www.fwc.gov.au/disputes-at-work/how-the-commission-works/hearings-and-conferences). Printed copies of the list can also be found at the Commission’s public counters, near the courtrooms or, in some of the Commission’s premises, on the building’s ground floor. If your hearing or conference is in a regional courthouse you may have to ask for information at the inquiry counter.

**Tips about hearings and conferences**

- make sure you arrive early for the conference or hearing because proceedings begin on time
- notify Commission staff when you arrive by approaching them in the hearing or conference room
- if you are delayed it is important that you make contact with the appropriate Commission staff before the hearing is due to start
- switch off your mobile phone or other electronic devices in the conference or hearing room
- address the Commission member by his or her title (e.g. Deputy President or Commissioner)
- in a hearing, stand when you are addressed by the Commission member or to question a witness
- bring enough copies of documents so everyone involved can have a copy (e.g. three copies one for you, one for the other party, and one for the Commission member).

**How is my privacy protected?**

In general, unfair dismissal case files and discussions in private conferences are confidential. Details will usually only be disclosed to the parties directly involved or their representatives, unless a person who has been granted leave by the General Manager to inspect the case file, or the Commission is required by law to disclose the details.

The Commission is required to publish its decisions, and does so by reproducing them on its website.

**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 Dismissal, termination and redundancy 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).