Making & defending unfair dismissal applications

Deputy President Clancy & Commissioner Bissett

Law Week
15 May 2019
Unfair dismissal applications account for over 40% of matters lodged at the Commission.

Division 3—What is an unfair dismissal

385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

(a) the person has been dismissed; and
(b) the dismissal was harsh, unjust or unreasonable; and
(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.
Who is protected from unfair dismissal?

- National system employee
- Dismissed
- Completed the minimum period of employment
- Earned less than the high income threshold ($145,400)
Who is in the national system?

Key:
Included in national system
Excluded from national system

WA
Included:
Constitutional Corporations
Excluded:
State Govt
Non-Constitutional Corporations

SA
Included:
Private enterprise
Excluded:
State & Local Govt

Qld
Included:
Private enterprise
Excluded:
State & Local Govt

NSW
Included:
Private enterprise
Excluded:
State & Local Govt

Vic
All

ACT
All

Tas
Included:
Private enterprise & Local Govt
Excluded: State Govt

NT
All

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Process overview – Step 1

Employee lodges application
Lodging an application

Form F2—Unfair dismissal application

Fair Work Act 2009 s 394
This is an application to the Fair Work Commission for an unfair dismissal remedy in accordance with Part 3-2 of the Fair Work Act 2009.

The Applicant

These are the details of the person who is making the application. Please make sure you provide a telephone number for the conciliation conference.

Title
First name(s)
Surname
Postal address
Suburb
State or territory
Postcode
Phone number
Fax number
Mobile number
Email address

Note: If you provide a mobile number the Commission may send reminders to you via SMS.

Does the Applicant need an Interpreter?

[ ] Yes—Specify language
[ ] No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

[ ] Yes—Please specify the assistance required
[ ] No

Does the Applicant have a representative?

[ ] Yes—Provide representative’s details below
[ ] No

Fair Work Commission Approved Forms—approved 16 November 2016

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$71.90
or Waiver form
Extension of Time – EOT

- Dismissal takes effect when employee notified of dismissal (s.383(a)(i))
- Application must be lodged within 21 days after the dismissal took effect
- The 21 days does not include the date the dismissal took effect
- If the 21st day falls on a Saturday, Sunday or Public Holiday, then the time is extended to the next business day
- Note: Even if lodged late, a Conciliation will be listed and take place unless Employer objects
Extension of Time – EOT

• Extensions of time can be granted if the Commission is satisfied that there are exceptional circumstances.
• The meaning of ‘exceptional circumstances’ considered in *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975.
• s.394(3) sets out the criteria to be considered in deciding if there are exceptional circumstances.
• **Key requirement for parties:** Address/Respond to the criteria in s.394(3).
Process overview – Step 2

Employee lodges application

Application is checked to ensure it is complete and valid
Process overview – Step 3

- Employee lodges application
- Application is checked to ensure it is complete and valid
- Employer is notified of the application
Responding to an application

Form F3—Employer Response to Unfair Dismissal Application

The Applicant
- Details of the person who is making the application. You can find this information on the application Form F2.

- First name(s)
- Surname
- Commission matter number

The Respondent
- Details of the business or organisation responding to the application.

- Legal name of business
- Trading name of business
- ABN/ACN
- Contact person
- Postal address
- Suburb
- State or territory
- Postcode
- Phone number
- Fax number
- Mobile number
- Email address
- What industry is the Respondent in?

Note: If you provide a mobile number the Commission may send remittances to you via SMS.

Does the Respondent need an interpreter?
- If the Respondent requires an interpreter (other than a friend or family member) in order to participate in conciliation, conferences or hearing, the Commission will provide an interpreter at no cost.
- Yes—Specify language
- No
Dealt with by the FWC pre-conciliation

- Non payment of lodgment fee – s.395
- Incomplete applications
- Certain Jurisdictional objections
Jurisdictional objections by employers

- Application lodged out of time
- Applicant not an employee
- Applicant not dismissed
- Genuine redundancy
- Minimum employment period
- High income threshold
- Small Business Fair Dismissal Code
Jurisdictional Objections
dealt with separately to/before the merits

- Extension of time (s.394)
- Minimum Employment Period (MEP) (s.383)
- Transmission of business – linked to MEP (s.384)
- Casual employee not regular or systematic (s.384)
- High income threshold – where no award or agreement ($145,400) (s.382)
- Dismissal at the end of a specified task or season, dismissal at the end of a training arrangement (s.386)
- Demotion not significant (s.386)
- Multiple applications (s.725)
Minimum Employment Period (MEP)

• 6 months; or 1 year (for a small business) (s.383)
• Measuring time – from commencement to earlier of when given notice and immediately before the dismissal

What counts as service?
• Continuous service (s.22)
• Casual employees and periods of casual employment (s.384(2)(a))
• Transferring employees (s.384(2)(b))
Process overview – Step 4

1. Employee lodges application
2. Application is checked to ensure it is complete and valid
3. Employer is notified of the application
4. The Commission conciliates the application by telephone to try and help the parties resolve it themselves
   - Approx. 80% of conciliations resolve the dispute
Process overview – Step 5

1. Employee lodges application

2. Application is checked to ensure it is complete and valid

3. Employer is notified of the application

4. The Commission conciliates the application by telephone to try and help the parties resolve it themselves

5. The unresolved applications are determined by the Commission following a conference or hearing
What is an Unfair dismissal – recap

Division 3—What is an unfair dismissal

385 What is an unfair dismissal

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(a) the person has been dismissed; and
(b) the dismissal was harsh, unjust or unreasonable; and
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Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.
Determining an Unfair Dismissal case

Parties often do not address/fulsomely address:

- All of the criteria of s.387 – harsh, unjust, unreasonable
- Whether a dismissal was consistent with the Small Business Fair Dismissal Code (s.388(2))
- Question of Reinstatement and orders to maintain continuity and restore lost pay (s.391)
- The Compensation criteria (s.392)
  - The role of misconduct
  - Compensation cap
Some merit and jurisdictional objection issues heard together – same sort of evidence required

- Resignation (s.385(a))
- No dismissal (s.385(a))
- Small Business Fair Dismissal Code (s.385(c) & s.388(2))
- Genuine Redundancy (s.385(d) & s.389)
- Not an employee (independent contractor)
- Not the employer
- Frivolous and Vexatious
- No reasonable prospects of success
When has a person been dismissed? – s.385(a)

- Terminated at the employer’s initiative
- Forced to resign because of the employer’s conduct
Was the dismissal harsh, unjust or unreasonable (s.385(b)) – s.387

- Was there a valid reason?
- Was employee notified of reason?
- Was there an opportunity to respond?
- Refusal of support person
- Any warnings – unsatisfactory conduct?
- Size of business
- Human resources experience
- Any other relevant matters
Valid reason – s.387(a)

- The reason must be ‘sound, defensible or well founded.’ A reason which is ‘capricious, fanciful, spiteful or prejudiced’ cannot be a valid reason [Selvachandran v Peteron Plastics Pty Ltd]
- ‘[T]he reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.’ It will not be enough for an employer to say that they acted in the belief that the termination was for a valid reason. [Rode v Burwood Mitsubishi]
- 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 [Miller v University of New South Wales; see also Walton v Mermaid Dry Cleaners Pty Ltd]
Notification – s.387(b)

Notification of a valid reason for termination should be given to an employee protected from unfair dismissal before the decision is made, in explicit terms and in plain and clear terms.

[Crozier v Palazzo Corporation Pty Ltd (2000) 98 IR 137; and Previsic v Australian Quarantine Inspection Services Print Q3730]
Opportunity to respond – s.387(c)

- Ordinarily, an employee must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person.
- The opportunity to respond is to be provided before a decision to terminate is made [Crozier v Palazzo Print S5897].
- This criterion to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality [RMIT v Asher (2010) 194 IR 1].
Support person – any unreasonable refusal – s.387(d)

- Where an employee has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.
- There is no positive obligation on an employer to offer an employee the opportunity to have a support person.

[Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1542]]
If unsatisfactory performance – any warnings? – s.387(e)

• Where an employee is dismissed for the reason of unsatisfactory performance, the employer should warn the employee about that unsatisfactory performance before the dismissal.

• Unsatisfactory performance is more likely to relate to an employee’s **capacity** than their conduct.

[Annetta v Ansett Australia Ltd (2000) 98 IR 233]
The Commission must take into account the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal, and the degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal.

[see Johnson v Northwest Supermarkets Pty Ltd [2017] FWCFB 3897, footnote 15]
Any other matter – s.387(h)

This criterion provides the Commission with a broad scope to consider any other matters it considers relevant, for example:

• Age
• Length of service
• Employment prospects
• Past disciplinary record
• Proportionality of the dismissal to the conduct that is the subject of a valid reason
• Consistency of approach
Remedies for unfair dismissal

- **Reinstatement**
- **Compensation**
- **No Remedy**
Remedy – Reinstatement

• Reinstatement is primary remedy for unfair dismissal (but only if sought)

• The ‘test’ to be applied is that of appropriateness – a natural corollary to the requirement to order compensation only if reinstatement is not appropriate

• The Act does not identify any particular matters that are required to be considered in assessing appropriateness giving the member considerable latitude
Reinstatement – Appropriateness

• A relevant consideration as to appropriateness is if trust and confidence can be restored although this is not the sole or a necessary criteria for determining appropriateness

• Claims for the loss of trust and confidence must be rationally and soundly based

Remedy – 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.

The Fair Work Act sets out a series of issues that the Commission must take into consideration when deciding if compensation should be ordered.
Calculating Compensation – further matters

- Address Misconduct (s.392(3)) – may reduce the amount
- Exclude shock, distress, humiliation, other analogous hurt (s.392(4))
- Address whether there needs to be any increase or decrease in the amount
- Apply the compensation cap
Compensation Cap – $72,700 Maximum

The compensation cap for unfair dismissal claims 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

• half the amount of the high income threshold immediately before the dismissal

The high income threshold is currently $145,400 so the compensation cap is $72,700
Common issues & defects in applications

Forms and signatures

Signature and content requirements – missing signature, full name, authority of the signatories or date

Incomplete answers to questions on Form F2:
- Date employment commenced
- Date notified of dismissal
- Date dismissal took effect
- Identity of employer
Common issues & defects in applications

Application fees

When applicant lawyers/paid agents or unions lodge Form F2 by email providing generic contact details – can cause delays in obtaining payment

Applicant Representatives need to provide details of authorised individual in payment section of Form F2
Common issues & defects in both Applications and Responses

Contact Details

Many Representatives provide generic contact details when representing either applicants or employers.

Without details of the particular authorised representative, there can be delays in listing the matter, making directions and having it heard.
Common issues & defects in Employer responses

Jurisdictional Objections

If an employer or its representative does not file a Response to the application (Form F3):
- in a timely manner; and/or
- accurately identifying any jurisdictional objections

there can be delays in correctly listing the matter and making the appropriate directions.
Timeliness Benchmarks

• Termination Date (Day 1)
• 21 days to file application (within 3 weeks after)
• Conciliation within 5 weeks of filing (~ 8 weeks)
• Hearing within 10 weeks of Conciliation (~18 weeks post termination)
• Decision within 8 weeks of Hearing (~26 weeks)
An Applicant is entitled to have his/her case heard but:

• It is in the interests of everyone that an application is resolved in a timely manner. The FWC’s timeliness benchmarks are designed to ensure this.

• FWC Directions must be complied with. Repeated failure to do so can result in the application being dismissed.

Directions may be varied and hearings can get adjourned – this is the exception rather than the rule.
Adjournments & Extensions

**Applicant & Respondent Unavailability**

- The unavailability of the Applicant or Respondent is relevant to seeking an adjournment.
- The Fair Work Commission requires supporting documentation to process a request for an adjournment on this basis.
- By way of example, relevant documents may include travel itineraries, booking confirmations or medical reports/other records.

**Representative Unavailability**

- Pursuant to section 596 of the *Fair Work Act 2009* (Cth), a person may be represented in a matter before the Fair Work Commission by a lawyer or paid agent only with the permission of the Fair Work Commission.
- An adjournment request based on representative unavailability is not sufficient grounds for an adjournment, except where exceptional circumstances apply.

**Witness Unavailability**

- Witness unavailability may construct reasonable grounds for an adjournment insofar as the witness is important to serving the Applicant's or Respondent's case.
- This varies on a case by case basis.
- Similar documentary evidence required by the Fair Work Commission on the unavailability of an Applicant, is also required to validate the unavailability of a witness.
- However, the test for an adjournment on this basis is two-fold, that is, the relevance of the witness to the proceedings must first be satisfied.
Production of documents

Guiding principles:

• Words of s.590 – ‘FWC may…inform itself’

• Establishing **Valid Reason**?

• Relevance – must persuade the FWC Member

• Timing of Request and FWC Timeliness Benchmarks
Permission to be represented – s.596

• A party may only be represented by a lawyer or paid agent with the permission of FWC (s.596(1))

• It is a matter of discretion as to whether a lawyer or paid agent is given permission

• The approach of Commission members differs

• Criteria in s.596(2) must be addressed
Key unfair dismissal statistics 2017–18

Unfair dismissal applications: 13,595
- 2379 applications withdrawn before conciliation: 11,216
- 10,491 Conciliations, 79% settle: 10,491
- Finalised by FWC decision: 779
- FWC decisions on the merits – 2%: 263

Source: Fair Work Commission Annual Report 2017–18, p.31, Tables 2, 3 & D6
263 decisions on the merits – Results

- 104/39.5% Applications dismissed (dismissal fair)

Balance:
- 110 orders for Compensation
  - 68% of Compensation orders less than $10k
  - 15% of Compensation orders between $10k-$20k
- 6 orders for Reinstatement
- 17 orders for reinstatement and lost remuneration
- 7 Applications granted but no remedy awarded
- 19 Applications granted, with remedy to be determined
Unfair dismissal

Introduction

A person has been dismissed from their employment when:
• their employment has been terminated at the initiative of the
employer
• they have resigned their employment but the resignation was
forced

If you have been dismissed from your employment you may be able
to bring a claim under unfair dismissal or general protections dismissal
laws. Applications to the Commission must be made within 21 days of your
dismissal taking effect. To understand the key differences between these
applications you can see the Termination of employment page.

If eligible, you can make an application to the Fair Work Commission:
• take our Unfair dismissal quiz to see if you may be eligible
• use our Online lodgement service

Further information – fwc.gov.au
Commission website – fwc.gov.au

The Commission’s website provides tools to help self represented parties understand the process and how the *Fair Work Act* applies to their case, including:


- **The Workplace Advice Service** – which is a program that enables the Commission to expand its provision of free legal assistance to unrepresented individuals and small business employers
Workplace Advice Service

• The Workplace Advice Service is a free legal assistance program for small business employers and self represented individuals
• Offers advice on unfair dismissal, general protections and workplace bullying cases
• We will connect you with a lawyer who can help you with your case
• These lawyers work at law firms and other legal organisations, they are completely independent of the FWC
Questions?