

Terminating Employment and Unfair Dismissal Claims under the Fair Work Act 2009

Step 1

Identify the grounds for dismissing the employee

Has the employee committed serious misconduct?

IF YES

Summary dismissal (without notice)

- Serious misconduct includes theft, fraud, violence and serious OH&S breaches, wilful or deliberate behaviour inconsistent with employment, and intoxication.
- It may also include an employee failing to carry out a lawful and reasonable instruction.

Procedural fairness must be afforded to the employee in an objective investigation.



IF NO

Dismissal with notice

- Written warnings and a fair opportunity to rectify the problem must be provided in most cases before dismissal

Is the dismissal performance related?

Ensure an appropriate and documented performance management process has occurred prior to termination.



Is the dismissal related to misconduct?

Misconduct can include lateness and insubordination.

Ensure that appropriate procedural steps are taken prior to termination, such as opportunities to respond to and rectify the alleged misconduct, warnings and notice (which expressly warns employee that their employment is at risk).



Is the dismissal because of redundancy?

This is not an unfair dismissal.

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Employer has decided it no longer requires anyone to perform employee's role.

Employer has considered and consulted employee about possible redeployment opportunities (including with related entities) and complied with award obligations.

Pay redundancy if more than 14 employees in business and employee completed 1 year.

Step 2

Common reasons for unfair dismissal claim

If the employee believes the grounds for dismissal were unfair, they can make an unfair dismissal claim. Employees may also make a claim if they were explicitly told or were forced to resign – this is called constructive dismissal.

Applications are required to be lodged with the Fair Work Commission (FWC) within 21 days of dismissal.



Step 3

Receive a copy of the application and a Notice of Listing from the FWC



The **Notice of Listing** includes a time and date for conciliation. The application sets out the claims the employer should respond to.



Step 4

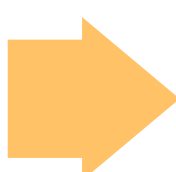
Submit a written response to the FWC

Responses are lodged with the FWC within 7 days of receiving the application.

Employers may make a jurisdictional objection that the employee is not eligible to make the application.

For example:

- Employee hasn't completed qualifying period
- Employee hasn't filed application in time
- Employee resigned
- Employee was made redundant



Are you making jurisdictional objections?

IF YES

A jurisdiction conference/hearing determines the validity of objections.

Depending on the jurisdictional objections, the matter may:

1. Proceed to conciliation [Step 5]
2. Be dismissed [Step 7]

IF NO

Attend conciliation with the FWC & your employee attempt to resolve the matter.

Proceed to Step 5

Step 5

Employer and Employee Conciliation with a FWC Conciliator



Legal practitioners may be permitted (with the permission of the FWC) to represent you during conciliation, helping you to achieve a favourable resolution.

If a settlement is reached at conciliation the matter is finalised, usually under a deed of settlement and release. **Proceed to Step 7**

Step 6

Attend an Arbitration with the employee before a FWC Commissioner

If the matter is not resolved through conciliation, the FWC will hold an Arbitration hearing. Each party will present their case and the Commissioner will make a binding decision.

Legal practitioners must seek permission from the FWC to represent you at the arbitration conference.



Step 7

The application is dismissed or the matter is upheld



If the application is upheld reinstatement and/or compensation may be ordered.

The Deed of Settlement resolves claims between the two parties. It may be used to record the settlement and ensure confidentiality of information, among other purposes. It must be carefully drafted to ensure it has the desired effect.

An appeal against the decision must be made within 21 days. Otherwise the application will be dismissed. Usually, each party will bear their own legal costs, regardless of the outcome.

Common Reasons for Unfair Dismissal Claims

- Dismissal without valid reason, or notice, or warning
- Denying employee procedural fairness eg. opportunity to respond or fair investigation
- Dismissal was disproportionately harsh considering employee's circumstances
- Employee compelled to resign due to harassment, bullying, discrimination or demotion or major change in conditions