



# Unfair Dismissal Claims under the Fair Work Act 2009 (Cth)

## 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, insubordination or other bad behaviour.

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.

- 1 Employer has decided it no longer requires anyone to perform employee's role.
- 2 Employer has considered possible redeployment opportunities (including with related entities) and consulted with employee, and has complied with award obligations.
- 3 Pay redundancy if more than 14 employees in business and the employee has completed at least 1 year.

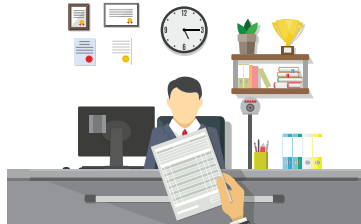
## STEP 2

Common reasons for unfair dismissal claim

If the employee is unhappy with what has happened, they may 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 conference held by FWC.

**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 in some cases.

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 (some employers choose to participate in conciliation even though they make an objection).

Depending on the jurisdictional objections, the matter may:

1. Proceed to conciliation (**Step 5**)
2. Be dismissed (**Step 7**)

### IF NO

Attend the conciliation with the FWC and the employee to attempt to resolve the matter.

Proceed to Step 5

## STEP 5

Employer and Employee Conciliation with 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 hearing.

## STEP 7

Finalisation



#### Arbitration

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

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.

#### Agreed Settlement

The deed of settlement and release resolves claims between the parties. It may be used to record the settlement agreement and ensure confidentiality of information, among other purposes.

It must be carefully drafted to ensure it has the desired effect.

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