

## Appearing Before the Fair Work Commission

A guide for employers

### **What is the Fair Work Commission?**

The Fair Work Commission is a workplace relations tribunal. While it has many functions, its key responsibility as far as employers are concerned is its ability to hear and adjudicate disputes between employers and employees under the *Fair Work Act 2009*.

### **What is an unfair dismissal claim?**

An unfair dismissal claim is a claim made by an employee that the termination of their employment was harsh, unjust or unreasonable. If the employee succeeds in proving that this was the case, the employee may be entitled to be reinstated to their position. If reinstatement is inappropriate, the employer may be required to pay compensation to the employee.

Not all employees are entitled to make an unfair dismissal claim. Employees will be entitled to make such a claim if:

1. They have worked for the employer for six months, or for a year in the case of a small business employer (having fewer than 15 permanent employees); and
2. One or more of the following apply:
  - a. Their total earnings are under the high-income threshold. The high-income threshold is \$167,500 per annum for claims made in the 2023/2024 financial year; or
  - b. They are covered by an Enterprise Agreement; or
  - c. They are covered by a Modern Award, earn above the high-income threshold and are not covered by a guarantee of annual earnings.

If an unfair dismissal claim is lodged against you, you are required to complete a *Form 3 – Employer Response to Unfair Dismissal Application* and lodge it at the Commission within 7 days of receiving the application.

If you have received an unfair dismissal claim, you may have a jurisdictional objection on the above grounds that the employee is not entitled to make an unfair dismissal claim. Common jurisdictional objections include that the employee was not terminated (i.e. they resigned), or that the employee was not eligible to make a claim under the above provisions.

### **What is a stop bullying application?**

A stop bullying application is a claim made by a worker who reasonably believes that they have been bullied. Bullying is defined under the *Fair Work Act 2009* as persistent unreasonable behaviour towards a worker or group of workers that causes a risk to health and safety. The Commission may make a range of orders requiring the bullying to be stopped if it is satisfied that the worker has been bullied in the past and there is a risk that the bullying will continue in the future. The Commission cannot make a monetary order, although a failure to comply with a stop bullying order may attract a monetary penalty.

If a stop bullying application is lodged against someone at your business, you are required to complete and lodge a *Form F74—Response from an Employer/Principal to an Application for an Order to Stop Bullying* and lodge it at the Commission within 7 days of receiving the application.

Employees will often feel that they have been bullied in the workplace, however they may not be aware what constitutes bullying under the *Fair Work Act 2009*. For example, reasonable management action carried out in a reasonable manner is NOT bullying. If you have received a Fair Work stop bullying application from an employee or even an allegation of bullying in the workplace, you may like to contact us if you are concerned about any allegations of bullying.

## **What is a general protections claim?**

A general protections claim is a claim by an employee that an employer has coerced, induced or unduly influenced an employee to do certain things, or has taken adverse action against an employee because:

1. The employee has a workplace right or has exercised or failed to exercise a workplace right;
2. The employee is a member or is not a member of a union or has engaged or not engaged in various union activities;
3. The employee is of a particular race, colour, sex, sexual preference, age, marital status, nationality, religion or political opinion; or
4. The employee has a physical or mental disability or has family and carer's responsibilities.

If an employee succeeds in a general protections claim, the employer may be required to pay a civil penalty.

An important thing for employers to remember is that the onus of proof in general protections claims is often reversed. This means that if the employee succeeds in proving that a particular action was taken by an employer, it is up to the employer to prove that the action was not taken for one of the prohibited reasons listed above. This underscores the importance of rigorously defending all general protections claims.

The most common type of adverse action (general protections) claims we see is where an employer dismisses an underperforming employee whilst they are on sick leave or maternity leave, or immediately after the employee makes a complaint about their workplace. Similarly, other common claims are where an employer attempts to performance manage an employee or carry out an investigation into allegations of misconduct against the employee and the employee will take sick leave during the process. If you have an employee who is underperforming or may have engaged in conduct warranting dismissal and they have taken sick leave or made a complaint, it can be difficult to manage those employees for fear of having an adverse action claim.

## **What is a mediation?**

A mediation is an informal process in which an officer of the Commission helps the parties to resolve a dispute between themselves. Mediations are voluntary and are used as the first step in the dispute resolution process.

## **What is a conciliation?**

A conciliation is an informal process that is similar to a mediation, in which a conciliator of the Commission helps the parties to resolve a dispute between themselves. Conciliations are voluntary and are conducted generally over the telephone or on occasion, face-to-face. Conciliations involve a number of off-the-record discussions between both parties and the conciliator, and a number of private discussions between the conciliator and each party.

If you would like some assistance or guidance in the conciliation or mediation process, please contact one of our solicitors who are very familiar with the process and can make it a less stressful one for you.

## **What is a case conference?**

A case conference is where the Member will make some orders or directions in regards to the matter prior to a final hearing.

## **What is a hearing?**

A hearing is a formal process in which the parties ventilate their dispute before a Member, who will make a binding order. Hearings are conducted in public at the Commission. If the dispute proceeds to hearing, you will be directed to lodge a number of documents which will be relied on by the Member in making their decision.

You will be given an opportunity to present your evidence orally. When doing so, you should address the Member by their title, such as Deputy President or Commissioner. You must answer any questions that the Member asks.

## **What is a conference?**

A conference is similar to a hearing, although it will be conducted in private. Just like a hearing, a Member will consider the evidence and submissions of both parties before making a decision either on that day or at some later date.

## **Can lawyers help me with matters before the Fair Work Commission?**

Unless the Commission says that you cannot, you are able to engage lawyers to help you:

1. Prepare written applications or submissions;
2. Lodge written applications or submissions;
3. Correspond with the Commission on your behalf; and
4. Participate in conciliation and mediation processes in relation to a stop bullying application.

## **Can lawyers appear on my behalf at a hearing?**

Ordinarily, parties are expected to represent themselves in proceedings before the Fair Work Commission. Lawyers are only permitted to appear on your behalf if the Commission has given permission for them to do so. The Commission may give permission for lawyers to represent you if it is necessary to ensure that you are given a fair hearing. For example, you may be allowed to obtain legal representation if you are a small business employer with no specialist human resources staff who is required to defend a case against an employee who is represented by a union. Generally, the Commission will only grant permission for lawyers to appear at a hearing if the matter is sufficiently complex that it would enable it to be dealt with more efficiently. As an employer, if the applicant does not have a lawyer, it may be difficult for permission to be granted on the basis of fairness. In any event, we can still assist you in preparing for the hearing in ensuring that you are best equipped to represent yourself.

## **Can I bring a support person?**

You are entitled to bring a support person (sometimes referred to as a McKenzie friend) to hearings to provide you with support and assistance. A support person cannot make submissions on your behalf or intrude in oral argument but can make notes and to make suggestions to you during the course of the hearing.

## **Incurring legal costs**

The Fair Work Commission rarely orders unsuccessful parties to pay the costs of another party. Generally, the Commission can only order costs against a party if the application was made

vexatiously, without reasonable cause, or if the application had no reasonable prospects of success. Also, costs can generally only be ordered if one party caused another party to incur costs as a result of an unreasonable act or omission.

On this basis, employers who wish to engage lawyers to assist them must be prepared to pay their own legal costs. It is highly unlikely that the Commission will order an employee to pay the costs of an employer.

## **What documents will I need for the hearing?**

If you are unrepresented, the Fair Work Commission will give directions prior to the hearing for you to lodge:

1. Respondent's outline of argument: merits;
2. Respondent's statement(s) of evidence;
3. Respondent's document list; and
4. (If necessary) Respondent's outline of argument: objection.

The above documents are available on the Fair Work Commission's website.

## **How should I present my argument?**

Your argument is generally presented by way of written submissions. For example, if you are responding to an unfair dismissal application, you will need to respond to the application's allegations as to why they have been unfairly dismissed. If the applicant is saying that they were denied procedural fairness, you will need to say why you did give them procedural fairness, by providing the following information:

- Did you tell the employee why you were dismissing them?
- Did you notify the employee of the reason for the dismissal prior to the dismissal?
- Did you give the employee an opportunity to respond to the reason(s)?
- Did the employee ask to have a support person present at any meetings or discussions relating to the dismissal and if so, was the request for a support person granted or refused?
- How many employees you have and whether you have a human resources management specialist or expert.

If an employee was terminated for poor performance, you will need to say how you had notified the employee of their shortcomings and given them an opportunity to improve. If the employee was dismissed for misconduct; you will need to say how you gave the employee an opportunity to contest the allegations and/or provide an explanation for their behaviour.

It is a good idea to refer to sections of the *Fair Work Act 2009* and any cases in which you intend to rely in your written submissions. Further information can be found on the Fair Work website or contact one of our lawyers who can assist you in preparing your argument for hearing.

## **How should I present evidence in writing?**

The Fair Work Commission is not bound by the ordinary rules of evidence that would otherwise apply in Civil or Criminal Court proceedings however they are relevant and will not be ignored. In this sense, the way that your evidence is presented is in a less formal manner than more formal Court proceedings. Evidence should be about your knowledge and/or observations based on facts, not emotions. It is often helpful to start with a timeline of events and flesh that out based on both your knowledge and the knowledge of your witnesses.

Evidence can be presented by way of a written witness statement sworn by the relevant witness. For example, you may have another employee or member of management who can support your version of events that transpired. Both you and this witness will have to give separate witness statements. Be

mindful that any person who does give a witness statement may be required to be cross-examined at a hearing so you will need to ensure that you advise any witness to be available on the date of the hearing.

It is a good idea to cross check your statements with your outline of arguments and written submissions.

Another form of written evidence is where you wish to present a document, such as an email, a contract or any other form of documentation. Prior to the hearing you will need to submit a list of your witnesses and copies of all of the documents you wish to rely on.

## **How should I orally present evidence?**

Oral evidence is generally presented during cross-examination where a witness takes an oath or affirmation. Any person who gives a statement can be required to be cross-examined by you or the applicant and the Member may ask that witness various questions. Likewise, you may cross-examine the applicant and any witnesses who have provided statements.

## **What next?**

If you would like to speak to someone about appearing before the Fair Work Commission, call us on (02) 9199 8597 or email us at [wehelp@jfmlaw.com.au](mailto:wehelp@jfmlaw.com.au).

Further information can also be found on our website at [www.jfmlaw.com.au](http://www.jfmlaw.com.au).