

Questions on Notice No.1 – 3

Unfair Dismissals

1. How many unfair dismissal applications by casuals do not proceed because the applicant was not employed on a regular and systematic basis?
2. How many unfair dismissal applications do not proceed because the applicants face an objection that they were independent contractors and not employees and so had no access to unfair dismissal? [please extract the data you referred to at the hearing and provide any information you are able to on those cases]
3. How many unfair dismissal applications do not proceed because the applicant is excluded from access to a remedy because they were employed for a specific period of time for a specific task or for the duration of a specified season? [In relation to section 386(2).]

Fair Work Commission response:

The Fair Work Commission (**Commission**) can provide data on the number of unfair dismissal applications that were dismissed by a Commission Member because a jurisdictional objection on one or more of the following grounds was upheld:

- The applicant was a casual employee not engaged on a regular and systematic basis.
- There was found to be no employment relationship between the applicant and respondent. (This would include, but not be limited to, applications where the applicant was found to be an independent contractor.)
- The applicant was found not to have been dismissed. (This would include, but not be limited to, applications where the applicant was found by operation of s.386(2)(a) of the *Fair Work Act 2009* not to have been dismissed.)

Table 1

Unfair dismissal – respondent jurisdictional objections upheld, 2015-16 to 2018-19

	2018-19	2017-18	2016-17	2015-16
Irregular and/or casual employee	3	1	4	0
No employment relationship	8	5	7	13
Employee not dismissed	20	35	39	52

The limitations of this data are:

- It only relates to unfair dismissal applications that have gone to a Commission Member for formal determination of a jurisdictional objection. These applications comprise fewer than 2% of all unfair dismissal applications annually. For example, in 2018-19, the Commission received 13,928 unfair dismissal applications, in relation to which Commission Members dealt with a total of 207 jurisdictional objections.
- An application may be found to be out of jurisdiction on more than one ground. Accordingly, the number of jurisdictional objections upheld does not necessarily equal the number of applications dismissed.

The data outlined in Table 1 was not reported in the 2019-20 Annual Report following advice from the Department of Finance that, to allow agencies to focus on front-line service delivery, the content of annual reports should be confined to mandatory reporting requirements only.

The Commission is unable to provide the data requested in relation to all unfair dismissal applications lodged. Approximately 80% of unfair dismissal applications are resolved through the Commission's National Conciliation Service without determination by a Member.

In relation to the part of question 2 seeking information on cases where an applicant in an unfair dismissal case was found to be an independent contractor, please see Question on Notice No.4.

Questions on Notice No.4

Ms Gupta's Unfair Dismissal

4. Last week, on Thursday 10 June, in evidence to the inquiry, the national secretary of the Transport Workers Union, Michael Caine, under parliamentary privilege, was required to answer questions raised by the Senate. The sum at which Uber Eats agreed to settle out of court with Amita Gupta in her unfair dismissal claim was \$400,000. They contended that, to avoid the possibility of the court finding she was an employee, not a contractor, the maximum Ms Gupta could potentially be entitled to with an unfair dismissal was \$15,000.

a) Is that correct?

b) Is this the only case in which they've been found to be a contractor and have settled on appeal? Is this the only case that you're aware of? [Please provide details of any cases.]

Fair Work Commission response:

a)

Ms Gupta's unfair dismissal application was dismissed by the Fair Work Commission (Commission) in [Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats \[2019\] FWC 5008](#) on 23 August 2019. Her appeal against that decision was dismissed by a Full Bench of the Commission on 21 April 2020 in [Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats \[2020\] FWCFB 1698](#).

Ms Gupta lodged an application for judicial review of the Commission's two decisions with the Federal Court of Australia on 19 May 2020, and discontinued that application on 17 December 2020.

The Commission cannot advise how it would have determined compensation (if any) had Ms Gupta been found to be an employee and to have been unfairly dismissed.

Section 392 of the *Fair Work Act 2009* sets out the criteria the Commission must take into account in determining the compensation in lieu of reinstatement a person should receive as a remedy for unfair dismissal. Section 392(5) provides that the amount ordered to be paid must not exceed the lesser of:

- the total amount of remuneration received by the person, or to which the person was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, and
- half the amount of the high income threshold immediately before the dismissal.

Ms Gupta's engagement ended in January 2019. In 2018-19, the high income threshold was \$145,400 per annum. The compensation cap at the time her engagement ended was therefore \$72,700. If Ms Gupta earned less than \$145,400 per annum, the maximum potential compensation would have been less than \$72,700.

b)

The Commission understands this question to refer to cases involving applications for an unfair dismissal remedy by workers in the on-demand sector.

In the context of the on-demand sector, the Commission has found an applicant in an unfair dismissal application to be an independent contractor in the following decisions (other than the *Gupta v Portier Pacific Pty Ltd* decisions):

- [Suliman v Rasier Pacific Pty Ltd \[2019\] FWC 4807](#)
- [Pallage v Rasier Pacific Pty Ltd \[2018\] FWC 2579](#)
- [Kaseris v Raiser Pacific V.O.F \[2017\] FWC 6610](#)

None of these decisions have been appealed.

Questions on Notice No.5

Application lodgments and finalisations

5. How many cases have there been, including unfair dismissals and other matters that come before the Fair Work Commission....how many matters have the Fair Work Commission dealt with since 26 March 2021?

Fair Work Commission response:

Between 26 March 2021 and 13 July 2021 (inclusive):

- the Fair Work Commission received a total of 9,816 applications; and
- finalised 10,164 applications.

Note that the number of applications finalised during this period may include applications lodged before 26 March 2021.

Additional Question on Notice No.1**FWC Case Management System**

You stated that the Fair Work Commission (FWC) is in the process of replacing your case management system. Can you please provide some information about the new case management system? Specifically, what will it capture?

Fair Work Commission response:

The Fair Work Commission (Commission) is in the process of upgrading to the latest version of its current case management system, called CaseHQ. CaseHQ will initially replicate the current system's functionality and data collection capabilities, while providing enhanced stability and security features.

Following the upgrade, the Commission plans to continue to optimise CaseHQ. Improvements to data collection and reporting capabilities will be considered in developing the forward work program for the system.

Additional Question on Notice No. 2

Record of settlement amounts

Why doesn't the FWC keep records of the settlements for applications that are resolved through conciliation? What records does the FWC have in relation to these applications? Where does the record end?

Fair Work Commission response:

Where known, the Fair Work Commission (Commission) records the following details in relation to unfair dismissal applications dealt with through conciliation:

- Range of monetary value of settlement
- The number of weeks' pay to which the settlement amount may be equivalent
- Whether the resolution includes settlement of other claims or proceedings
- Any non-monetary components of the settlement

Drawing on these records, the Commission's 2018-19 Annual Report includes the following data about outcomes of unfair dismissal conciliations:

- Settled/not settled
- If the parties agreed to a settlement, whether the settlement included:
 - monetary items without reinstatement
 - monetary and non-monetary items without reinstatement
 - non-monetary items without reinstatement
 - reinstatement
 - reinstatement and monetary items
 - reinstatement and non-monetary items
 - reinstatement, monetary and non-monetary items
- If the settlement included monetary items, the range of that amount.

The data was not reported in the 2019-20 Annual Report following advice from the Department of Finance that, to allow agencies to focus on front-line service delivery, the content of annual reports should be confined to mandatory reporting requirements only.

The data that can be captured and reported by the Commission is limited. This is primarily a function of the conciliation process and the time of data collection. Where the parties have apparently reached agreement during a conciliation discussion, conciliators capture and record details as agreed at that point in time. However, agreed outcomes may change as the parties continue to negotiate an outcome and, where relevant, execute terms of settlement. The parties themselves decide on the terms of settlement, which are generally executed after the Commission's role has ended. Parties are not required to (and usually do not) provide the Commission with a copy of any terms of settlement.

Additional Question on Notice No.3

Record of settlement amounts

Will the new case management system record settlements in application resolved through conciliation?

Fair Work Commission response:

The Fair Work Commission (Commission) currently records the following details in relation to unfair dismissal applications dealt with through conciliation:

- Range of monetary value of settlement
- The number of weeks' pay which the settlement amount may be equivalent
- Whether the resolution includes settlement of other claims or proceedings
- Any non-monetary components

The Commission is in the process of upgrading to the latest version of its current case management system, called CaseHQ. CaseHQ will initially replicate the current system's functionality and data collection capabilities, while providing enhanced stability and security features.

Following implementation, the Commission plans to continue to optimise Case HQ. Improvements to data collection and reporting capabilities will be considered in developing the forward work program for the system.

Additional Question on Notice No.4

Determinations and order for groups or categories of workers

What legal and structural changes would be required to facilitate the FWC being able to make determinations and orders for *groups or categories* of workers (e.g. Uber drivers or food delivery cyclists), not just individuals?

Fair Work Commission response:

The Fair Work Commission (Commission) is established under the *Fair Work Act 2009* (Act) to perform the functions set out at s.576 of the Act. The Act limits the performance of each of these functions to certain groups. For example, the Commission can exercise its functions in relation to unfair dismissal in relation to national system employees and national system employers (s.380 and 576(1)(i) of the Act).

For the Commission to have the function of making determinations and orders for groups or categories of workers, that function would need to be conferred on it by a law of the Commonwealth.

Consistent with the Commission's role as the national workplace tribunal, the Commission participates in policy discussions only to identify technical issues that may make administration of the law simpler or practical issues relevant to implementation. Consideration of changes such as those described in the question are a matter for Government.

Additional Question on Notice No.5

Resources for work status function

What additional resourcing would the FWC need if it were required to take on a 'work status determinations' function? Ie: Adjudicating in cases where the status of workers as employees or contractors is borderline, or disputed; and issuing work status of workers determinations to platform businesses with significant non-employee, no-demand workforces (for instance, as proposed in the [Victorian on-demand workforce inquiry report](#), pp. 189–206).

Fair Work Commission response:

The Fair Work Commission (Commission) is not currently in a position to comment on what additional resourcing would be needed if the *Fair Work Act 2009* were to be amended to give the Commission the function of making 'work status determinations'. If such an amendment were proposed, the Commission would work with the Attorney General's Department regarding any additional funding or resources which may be required to enable the Commission to successfully perform additional functions and manage additional workload.

Additional Question on Notice No.6

Setting and enforcing binding minimum standards and conditions

In your role as an arbiter, do you see that there would be any legal or practical impediments to setting and enforcing binding minimum standards and conditions in relation to non-standard forms of work that are not classed as employment (for instance: low-leveraged contractors in the on-demand platform sector)?

Fair Work Commission response:

Chapter 2 of the *Fair Work Act 2009* (Act) deals with terms and conditions of employment for national system employees only. These terms and conditions come from the National Employment Standards in Part 2-2 of the Act, and from modern awards, enterprise agreements and workplace determinations.

The Act does not give the Commission responsibility for enforcing minimum employment standards. This is a responsibility of the Fair Work Ombudsman.

Establishment of minimum standards and conditions in relation to non-standard forms of work not classed as employment is a matter for Government and, ultimately, parliament.