



Australian Government

Fair Work
OMBUDSMAN

A step by step guide to responding to small claims



If your employee believes you owe them money, they may seek to resolve the debt through a small claim to a court. Employees or former employees can seek to recover up to \$20,000 of their entitlements using the small claims process. A small claim is a simple and affordable solution to resolve work related debts. This guide provides you with an overview of the steps you might need to take if your employee applies for small claims.

There is more detailed information in the Small Claims Guide available at www.fairwork.gov.au/smallclaims



How will I know if my employee has made a small claims application?

To start a small claims matter, your employee has to apply to a court. This is usually the Federal Circuit Court or the magistrates' court in the state or territory that they worked in.

After the employee files their application, the court will send back copies of the application with a court date. The employee has to serve one of these copies on you. The papers can be served on a company at their registered office or in person by giving the documents directly to a director. If you operate as a sole trader or partnership, the papers have to be served in person (such as at your place of business).

On the application, the employee will be called the 'Applicant' and you will be referred to as the 'Respondent'.

When you receive these papers, you need to decide whether to:

- Admit the claim and agree to pay the money as a lump sum.
- Admit the claim and negotiate an agreement about payment, such as an instalment plan.
- Dispute the claim, either in part or in full.

If you admit to the claim, you should pay the money to the employee in full before the court date or agree to instalments with the employee.

If the employee is happy with the resolution you make with them, they should end the small claims process. To do so, they must file a 'Notice of Discontinuance' form with the court. Both you and the employee should sign this form.

If you are not sure whether settlement has been completed, or whether this form has been received by the court, you should still attend court and advise the status of the settlement.



What do I need to do to dispute the small claims application?

If you decide to dispute the claim, either in part or in full, you must file a response with the court and serve a copy of the response on the employee before the court date. The following steps will assist you with this process.



Step 1 – Prepare your response

Before responding to the small claims application, you should:

- Check that the legal entity and the ABN/ACN on the application is the correct employing entity. If there are errors, you should correct them in your response. If you believe your business was not the employer, you should provide an explanation of why.
- Check the employee's entitlements. Are they based on the legal requirements of the Fair Work Act and the award or enterprise agreement? You can check the employee's entitlement using the Pay and Conditions Tool available at www.fairwork.gov.au/pay. If the employee's claim deals with entitlements provided in their contract of employment you should also consider this.
- Check what you have already paid to the employee and gather any supporting documents. This could include timesheets, payslips and contracts of employment. If you have not kept records such as timesheets or pay slips and are unable to provide a reasonable excuse in relation to this, you may have the burden of disproving the employee's allegation in court. This is also known as a reverse onus of proof¹.

It's important to understand not having records may not be a valid defence in court.

1. Section 557C of the *Fair Work Act 2009* (Cth) commenced on 15 September 2017.

- Determine why you don't agree with the claim. For example, you might think the:
 - award or agreement coverage is different to what the employee has stated
 - facts used in the calculation (such as status, work times, leave taken, duties, amounts paid) are different to those that the employee has used
 - employee is claiming things that they're not entitled to
 - calculations are not correct.
- Present your response in an easy to understand format.

It's important that you don't ignore the claim. If you don't respond to the claim, the court might proceed based on the employee's evidence and argument only. This can result in a court order made for you to pay all or some of the money claimed.

It's also important to understand that being unable to afford to pay an amount is not a valid defence. If you or the business is not able to pay the employee what they are owed, you may consider offering a payment plan.



Step 2 - File and serve your response

To respond to the small claims application, you need to:

- Complete the correct response form. You can get this from the court listed on the papers you received from the employee.
- Compile any documents, such as timesheets, payslips or contracts that will support your claim.
- Make three copies of the form and any supporting documents.
- File at least three copies of your response with the court at the address on the papers you received.
- Serve a copy of the response and supporting documentation on the employee. You should serve the papers on the employee at the address they have given on the application, either by post or in person.

Effecting service is a compulsory part of the court process.

If your employee serves you with their small claims application close to the court date, you may not have sufficient time to file a response. In such cases, you should attend court and advise that you haven't received sufficient time to prepare and serve your response. You should still be prepared to present your case as the judge or magistrate may decide to hear the case on the day.

How to serve your response

The time limit for filing a response varies between courts so you should check the relevant time limit with the court. Usually it's at least seven days before the court date, however the Federal Circuit Court requires a response to be filed with the court within 14 days of being served.

You can serve your response on the employee at the address they have given on their application, either by post or in person. You may hire a 'Process Server' to serve your response, if you prefer not to do this yourself. A process server is a business who you pay to serve documents.



Step 3 – Attend the court

If the matter has not been resolved, you must attend court. What happens on this day depends on the court and the magistrate. On the first date the court may:

- hear the case and make a decision
- ‘adjourn’ the case to a later date
- ask you and the employee to attend a mediation to try to resolve the case without a hearing.

Whatever happens, you should be ready with your evidence to present your case on the first court date. This means you should have copies of the court papers and your supporting evidence, even though the court may already have these documents.

You must follow the court’s orders about how it will hear your case. You can’t be represented by an external lawyer in court unless the court allows it. However, you can use lawyers for advice. You can also seek advice from your employer association.

You may also take a support person but that person cannot speak for you.

If you can’t attend court on the required date, you need to advise the court and the other party as soon as possible. The court generally won’t allow dates to be changed without good reason.

If you do not attend court at the required time, the case may be heard without you. This means that a decision will be made on the basis of the evidence provided by the employee.

If the employee doesn’t attend court at the required time without good reason, the case may be dismissed. If this is the case, the court will tell you this.

What’s it like in court?

Courts are run by a judge or magistrate, who you call ‘your Honour’.

Sitting near the judge or magistrate is the court officer (called the ‘clerk,’ or ‘associate’) who assists the court. If you have anything to hand to the court, the court officer will usually come and get it from you, and may give you instructions or answer questions on the day.

Off to one side will be the witness ‘box’ or ‘stand’ where you or witnesses may give evidence.

In front of the judge or magistrate is the bar table. You should sit at this table when your case is being heard. Stand when the judge is talking to you and when you are speaking. Sit when the other party is speaking.

The public gallery is usually at the back or to the side. This is where you sit and wait for your case to be called by the court officer. When you enter and leave the court, you must bow slightly to the judge or magistrate.

Remember to treat everyone with respect in the courtroom and outside, and listen carefully when you are being asked questions or given directions. If you don’t understand something, say so.

If you need an interpreter or have extra accessibility requirements, you should contact the court as soon as possible to check and allow the court to make arrangements.



Step 4 – Participate in the hearing

You will need to take part in the hearing of your matter. At the hearing:

- The judge or magistrate will ask both you and the employee to present the case and evidence. Both parties will need evidence to prove their case, such as pay slips, bank statements, contracts and calculations, and must give copies to the other party to consider before court. It is a good idea to prepare some notes of what you want to say and bring extra copies of your documents.
- The employee usually presents their case first. You will then present your case.
- The judge or magistrate may ask you to give evidence supporting your claim from the witness stand. If this happens, your employee has a right to ask you questions about your evidence.
- If you have witnesses, they need to be at court and available to give evidence. You should be ready to ask questions of any witnesses that may be relevant to your case. This includes any witnesses called by the employee.
- The judge or magistrate may ask questions and may need time to look at the evidence before making a decision.
- The judge or magistrate may make a decision about the case. This is called an order. This may happen on the day of the hearing or at a later time.
- The judge or magistrate may order that the whole or a part of the debt be paid or that nothing should be paid. It may also make orders about superannuation obligations and interest if your employee seeks this payment. 'Costs' (where the unsuccessful party has to pay the legal costs of the successful party) will only be ordered in exceptional cases.

The court may make orders based on your evidence only. This is possible if the employee does not attend court on the required day.

If a party can't attend court on the required date, they need to advise the court and the other party as soon as possible.



Step 5 – Pay the amount ordered (if any)

If the court decides that you owe the employee money, it will make an order for the amount to be paid and the due date.

The order may also include other amounts such as reimbursement of the filing fee and interest.

You should take note of how you should pay the money. Sometimes it has to be paid to the court to be forwarded to the employee; sometimes it has to be paid to the employee directly.

If you don't pay the amounts set out in the order, the employee can enforce the orders through the court. Some options include seizing property, forcing bankruptcy and winding up a company.

If a party doesn't agree with the court's decision, they can appeal. However, parties can only appeal on very limited grounds, such as a mistake in how the law was applied. You can't appeal if you simply don't like or agree with the decision.

If the court dismissed the case or made an order against a party because they didn't attend, they can seek advice about re-listing the case if there was good reason for non-attendance.



Have you tried to resolve the dispute?

Most workplace issues occur because people don't know what the law is, or because communication has broken down. The quickest, cheapest and most effective way for you to resolve a workplace issue is to find out what the law is and then work with your employee to fix the problem.

At any time during the small claims process, you can seek to resolve the matter directly with your employee. If you are able to resolve the matter directly with your employee, they should end the small claims process.



Small Claims Checklist



Response

- I have checked the employee's entitlements under the award or enterprise agreement, the Fair Work Act and employment contract.
- I have evidence to support my response and can show how I have calculated the employee's entitlements.
- I have either:
 - settled the matter with the employee and filed the required forms with the court OR
 - sent my response to the court and served a copy on the employee with the required amount of notice



Hearing

- I have prepared my case and evidence
- I have evidence to show how the employee's entitlements were calculated

Find out more

The Fair Work Ombudsman has a comprehensive Small Claims Guide with more details about the small claims process and templates you can use to set out your claim. You can find this, as well as some helpful videos at www.fairwork.gov.au/smallclaims.

For information on court locations and procedures, you should contact the Federal Circuit Court at www.federalcircuitcourt.gov.au or the magistrates court in your state or territory.