

Warnings

Myths and Facts

Myth: A warning must be in writing.

Fact: This is not necessarily true, unless you are covered by a binding agreement which specifies that warnings must always be in writing. In the absence of that, the fact is that warnings may be given verbally or in writing.

Myth: Employees must be given three warnings before they can be dismissed.

Fact: This is incorrect. There is no minimum requirement that an employer must provide three warnings before a dismissal can occur.

What is the purpose of a warning?

The purpose of a warning is to advise an employee that their work performance or conduct is unsatisfactory, and to put the employee on notice that the performance or conduct in issue needs to be improved. Warnings (or the lack of them) can be relevant in unfair dismissal claims, where the Fair Work Commission (FWC) must decide whether a termination of employment was harsh, unjust or unreasonable.

Warnings may also be relevant in assessing whether an employer is complying with its contractual obligations.

Finally, if warnings are issued unfairly and it can be shown that they are being used to target people with a particular characteristic (e.g. people with a disability, people of a certain age etc) it may be argued that the employer is in breach of federal or state anti-discrimination laws.

If you were employed by an employer with less than 15 employees you should also see the **Small Business Fair Dismissal Code**. A dismissal by an employer with less than 15 employees that is factually consistent with the Small Business Fair Dismissal Code will be considered fair by FWC.

Do I have to sign a warning?

No, you do not have to sign a warning. In cases where you are under pressure to sign a warning and you disagree with it, you can write on the document:

“I disagree with the contents of this document”

sign it and then write a letter in response to the warning, objecting to the warning and explaining your concerns.

Whether you decide to do this or not may depend upon whether you are eligible to make an unfair dismissal claim. Even though you may choose not to sign a warning that has been issued to you, it still has effect as a warning.

Note: This Fact Sheet should be read in conjunction with JobWatch's Fact Sheets on 'Unfair Dismissal', 'Constructive Dismissal', 'General Protections Dispute – Termination claim' and 'Notice of Termination'.

You only have **21 days** from the date of your dismissal to file an Unfair Dismissal or General Protections Dispute - Termination claim at the Fair Work Commission.

Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

What to do if you get a warning

If you disagree with either a written or verbal warning you may choose to respond to it in writing and keep a copy of your response. If the warning is disputed it is important that you are able to show written evidence of having responded to it with your version of events. It is much harder to prove that you responded if you only did so verbally. Three things you should consider doing:

1. Diarise any conversations or meetings in which performance was an issue.
2. Find out if you are covered by an Enterprise Agreement or a policy which outlines the procedure that should be followed by your employer when performance or misconduct issues arise. Check that your employer is complying with any such procedure.
3. For further assistance, contact JobWatch, your union, or a lawyer.

Note!

It is always best to request a copy of the document and take it away with you so that you can respond to it (preferably in writing).

Example of a response to a warning

Dear [Employer Name],

I wish to respond to the warning letter which you gave to me on [Date]. Your letter states that I was forty minutes late to work on Tuesday and Thursday last week.

I disagree that I was late on both days. As I tried to explain to you over the phone on [Date], I arrived at work on Tuesday ten minutes early as usual and opened up the shop. The register roll will confirm that I made a sale at 9:05 in the morning.

I agree that I was late on Thursday. I was twenty minutes late, not forty. I did telephone the head office on Thursday morning at 8am and left a message on the answering machine stating that I would be 20 minutes late. The reason why I was late is because I had to make alternative childcare arrangements.

This is the first time that I have been late in 2 years and I believe that this should be taken into account.

Yours sincerely
[Your Name]

Relevance of warnings in unfair dismissal cases

If you are eligible, you may file an unfair dismissal claim with FWC if you believe that your dismissal was harsh, unjust or unreasonable.

In assessing your claim, FWC will consider:

- whether there was a valid reason for the dismissal related to your capacity or conduct including any effect on the safety and welfare of other employees;
- whether you were notified of that reason;
- whether you were given an opportunity to respond to any reason related to your capacity or conduct;
- any unreasonable refusal by your employer to allow you to have a support person present to assist at any discussions relating to dismissal;
- if the dismissal related to unsatisfactory performance, whether you were given any warnings about that unsatisfactory performance before the dismissal;

Note!

If you were employed by a small business employer, your dismissal will not be unfair if it was consistent with the Small Business Fair Dismissal Code. See JobWatch's 'Unfair Dismissal' Fact Sheet.

Relevance of warnings in unfair dismissal cases (cont.)

- the degree to which the size of your employer would be likely to impact on the procedures followed in effecting the dismissal;
- the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- any other relevant matters.

Therefore, if you are eligible to file an unfair dismissal claim, you may use the issue of warnings to argue that:

- your employer did not have a valid reason for dismissing you (this is also applicable if you are arguing constructive dismissal); and/or
- your employer did not follow a *fair process* in implementing the termination of your employment.

Should I attend a performance meeting with my employer?

If your employer requests that you attend a meeting to discuss your work performance or conduct it is important that you attend the meeting.

There is no statutory right to have a witness or a support person present in the meeting with you although employers normally allow someone to attend with you. It is important to request in writing that you wish to have a witness or support person present. If your employer unreasonably refuses this request, it may affect the overall fairness of the dismissal process and FWC will take this into account when considering whether your dismissal was harsh, unjust or unreasonable.

Don't sign anything you disagree with or which you are unsure about at the meeting. Ask to take any documents away with you and give yourself an opportunity to read it (them) away from the workplace. You should also consider asking for time to obtain legal advice about any documents your employer wants you to sign.

Take notes at the meeting and ask any questions you may have. Ask for a break if you need one.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

Fair process: e.g. because the employer was not clear about what was required or did not provide you with an opportunity to respond to any criticisms or did not provide you with an adequate timeframe within which to improve etc.

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Victoria Law Foundation, the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and Victoria Legal Aid.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.