**Termination of Employment**

**How to Guide**

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# Termination of employment is when an employee’s employment with an employer ends. Employment can end for many different reasons. An employee may resign or can be dismissed (fired). However it ends, it’s important to follow the rules about dismissal, notice and final pay. There are also different rights and obligations when a job is made redundant or when a business is bankrupt.

# Commonwealth workplace laws have rules about terminating employment. These rules establish whether the termination of the employment was unlawful or unfair, what entitlements an employee is owed at the end of their employment, and what must be done when an employee is dismissed because of redundancy.

# What is a dismissal?

# A person has been dismissed from their employment when:

# their employment has been terminated at the initiative of the employer, or

# they have resigned from their employment but the resignation was forced by something the employer did (this can also be known as constructive dismissal e.g. when an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.)

# Difference between “Unfair Dismissal” and “Unlawful Termination”

* *Unfair Dismissal* - where the employee believes the termination of their employment was harsh, unjust or unreasonable (whether the employee was given a “fair go”).

* *Unlawful Termination* - where the employee believes the reason for their termination is an unlawful reason, as specified in the *Fair Work Act 2009* (the Act) e.g. discrimination.

# Employees excluded from claiming Unfair Dismissal

Certain categories of employees are excluded from the unfair dismissal laws under the Act. These categories include:

* an employee employed for a specified task, a specified period of time or a seasonal worker and who is terminated at the end of that time, task or season;
* an employee subject to a training agreement whose employment is limited to the duration of that agreement;
* an employee dismissed in the case of a genuine redundancy;
* from 1 January 2011, an employee of an employer with fewer than 15 employees (headcount), including casuals engaged on a regular and systematic basis, who has complied with the Small Business Fair Dismissal Code;
* employees earning above the high income threshold which is indexed each July;
* an employee who has not met the minimum employment period (see below); and
* casual employees employed on an irregular basis (note: casual employees employed on a regular and systematic basis who have a reasonable expectation of ongoing employment can make an unfair dismissal claim).

# Minimum employment period

An employee must serve a minimum employment period before being able to make an unfair dismissal claim. The Act prescribes a “minimum employment period” for small business employers (that is employers who employ less than 15 full time equivalent (FTE\*) employees) of 12months, and for all other employers, 6 months.

An employee’s period of employment is based on the employee’s **continuous service** with the employer. Service as a casual employee can count towards the period of employment as long as it was on a regular and systematic basis and the employee had a reasonable expectation of continuing work on a regular and systematic basis. Any unauthorised absences and most periods of unpaid leave do not count as service; however these do not break an employee’s continuity of service.

# Small Business Fair Dismissal Code (the Code)

The Code describes the steps for a small business employer to follow when dismissing an employee. The Code is not a compulsory requirement. However, if a person’s dismissal is consistent with the Code then the dismissal will be considered fair (only relevant where the employer is a small business employer). For all other employers, not defined as a small business, it is expected that the Code will form the absolute minimum standard required when dismissing an employee.

The Code deals with three types of dismissal

1. **Redundancy:** Employees who have been dismissed because of a downturn in business or on the basis that their position is no longer required to be performed by anyone cannot bring a claim for unfair dismissal. The redundancy must be genuine. If the employer dismisses an employee on the basis of redundancy and recruits a new employee to the same position, it would not be deemed a genuine redundancy and the employee would be eligible to lodge a claim of unfair dismissal. It is not a case of genuine redundancy if the person dismissed could have been redeployed in another position within the business or “associated entity” and it would have been reasonable in all the circumstances to redeploy them.
2. **Summary dismissal:** An employer can dismiss an employee without notice or warning for behaviour that amounts to serious misconduct under the Act. Serious misconduct includes:
   1. wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
   2. conduct that causes serious and imminent risk to:
      1. the health or safety of a person; or
      2. the reputation, viability or profitability of the employer’s business.
   3. The employee, in the course of the employee’s employment, engaging in:
      1. theft; or
      2. fraud; or
      3. assault;
   4. the employee being intoxicated at work;
   5. the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee’s contract of employment.

Prior to dismissing the employee, the employer must have sufficient evidence to support the allegations. In the case of theft, fraud or assault, a report to the police department will validate the dismissal as fair.

1. **Other**: In all other cases, such as unsatisfactory performance, the employer is required to provide the employee with a reason as to why he or she is at risk of being dismissed, and a notice period for the dismissal. The reason for termination must be on the basis of the employee’s inability to fulfil the requirements of the position. The employee must be warned verbally or in writing that their lack of performance or unsatisfactory behaviour is putting them at risk of being dismissed should he or she not improve. The employer must also provide the employee with the opportunity to respond to the warning and give them a reasonable chance to rectify the problem. The employer may also be required to provide further training to the employee to ensure he or she has the necessary skills to meet the requirements of the role.

# Unlawful Termination

Employees who are excluded from making a claim of unfair dismissal are not excluded from claiming unlawful termination.

It is unlawful for an employer to terminate the employment of **any** employee (including short- term casuals) for reasons that include anyone or more of the following:

* Temporary absence from work due to illness or injury;
* discrimination on the grounds of race, colour, sex, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
* trade union membership or non-membership
* participation in union activities outside of working hours or, with the employer’s consent, during working hours;
* seeking office as, or acting or having acted as, a representative of employees;
* the filing of a complaint, or involvement in proceedings, against an employer regarding an alleged breach of the law;
* absence from work during maternity leave or other parental leave; or
* temporary absence from work due to undertaking voluntary emergency management activity, where the absence is reasonable.

Please note that it is also unlawful, under the freedom of association provisions in the Act, to dismiss any employee primarily because they are entitled to the benefit of an industrial instrument (e.g. award or agreement).

# Notice of Termination Requirements

Should an employee be given notice of termination?

Generally, an employer must not terminate an employee’s employment unless they have given the employee written notice of the last day of employment. An employer can either let the employee work through their notice period, or pay it out to them (also known as pay in lieu of notice).

The amount of notice depends on the age of the employee and how long the employer has employed them on a continuous basis.

The Act provides for standard notice provisions to be given by *employers* when terminating the employment of an employee.

From 1 January 2010 notice of termination provisions will be contained in the National Employment Standards (NES). The NES require that an employer must provide the employee with written notice of termination. The notice may be provided to the employee by delivering it personally, leaving it at the employees last known address or sending it by prepaid post to the employees last known address.

An employee is entitled to the following notice period

# Length of continuous service Notice period

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| Not more than 1 year | 1 week |
| More than 1 year but not more than 3 years | 2 weeks |
| More than 3 years but not more than 5 years | 3 weeks |
| More than 5 years | 4 weeks |

Note: if the employee is over the age of 45 and has completed at least 2 years continuous service you must increase the notice period by one week.

Notice of termination requirements do not apply to the following employees,

* an employee employed for a specified period of time, for a specified task or for the duration of a specified season;
* an employee who is terminated for serious misconduct;
* a casual employee; or
* an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time.

# Notice of Termination by an Employee

In the absence of a notice period set by the Act, the notice of termination by an employee will usually be specified by the relevant industrial instrument (e.g. Award).

# Making Unfair Dismissal / Unlawful Termination claims Unfair dismissal claims

Employees must lodge an application for Unfair Dismissal to the Fair Work Commission (FWC). An unfair dismissal claim must be made within 21 days after the dismissal took effect (extensions may be granted in certain circumstances). A lodgement fee is required with each application, which is indexed annually.

Prior to considering the merits of an application, the FWC must decide the following matters in relation to an application for unfair dismissal

1. whether the application was made within the required period (within 21 days of the dismissal taking effect)
2. whether the person was protected from unfair dismissal
3. whether the dismissal was consistent with the small business fair dismissal code
4. whether the dismissal was a case of genuine redundancy

The Fair Work Commission may choose to hold a conference or hold a hearing in relation to the claim.

FWC must only hold a hearing if it believes it is the most effective and efficient way to resolve the matter.

In determining a claim of unfair dismissal FWC must consider factors including:

1. whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
2. whether the person was notified of that reason; and
3. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
4. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal;
5. if the dismissal related to unsatisfactory performance by the person – whether the personhadbeenwarnedabouttheunsatisfactoryperformancebeforethedismissal;
6. and the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
7. any other matters that the FWC considers relevant.

If satisfied that the employee was unfairly dismissed, the FWC may order reinstatement to the employee’s former position. If that is impracticable, re-employment in a position that the employer has available and that the FWC considers suitable may be an option. If reinstatement or re-employment would be impracticable, the FWC may order compensation.

Compensation for unfair dismissal has been set at a maximum of 26 weeks wages for award covered employees or half the amount of the high income threshold immediately before the dismissal (whichever is the lesser).

The Fair Work Commission can reduce the amount of compensation if it is satisfied that the person’s misconduct contributed to the employer’s decision to dismiss the person. Any compensation ordered by the Fair Work Commission will not include compensation for shock, distress or humiliation caused by the manner of the person’s dismissal.

# Unlawful dismissal claims

In most cases employees not covered by the national workplace system will be covered by unlawful termination laws. Employees who believe their employment has been unlawfully terminated may make an application to the FWC within 21 days after the employment was terminated (FWC may allow for a further period in certain circumstances).

**What is unlawful termination?**

Section 772 of the Act says that an employer must not terminate an employee’s employment for one or more of the following unlawful reasons:

1. temporary absence from work because of illness or injury (within the meaning of the Fair Work Regulations 2009)
2. trade union membership or participation in trade union activities outside working hours (or during working hours with the employer’s consent)
3. non-membership of a trade union
4. seeking office as, or acting or having acted in the capacity of, an employee representative
5. the filing of a complaint, or the participation in proceedings, against the employer involving alleged violation of laws or regulations or recourse to competent administrative authorities
6. race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin
7. absence from work during maternity leave or other parental leave
8. temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

**General Protections Claim**

**What is a general protections claim?**

This may be the most appropriate application for an employee if they believe they were dismissed from their employment because of their:

* race
* colour
* sex
* sexual orientation
* age
* disability
* marital status,
* family or carers responsibilities
* pregnancy
* religion
* political opinion
* national extraction, or
* social origin
* OR because of temporarily absence from work because they were sick or injured
* OR because they joined or did not join a trade union or participated in industrial activities
* OR because they exercised or proposed to exercise a workplace right (e.g. by making a complaint or inquiry in relation to their employment, such as querying a pay rate)

**To be eligible to lodge this type of application:**

1. The employment must have been terminated at the initiative of the employer, or the employee was forced to resign because of something the employer did
2. The employee must believe that they were dismissed because of one of the reasons outlined above.
3. The application is not about the fairness or otherwise of the dismissal, it is about a dismissal that has occurred in breach of a protection set out in the Fair Work Act 2009.
4. Generally the Fair Work Commission only has a narrow role in relation to these types of disputes, and that is to facilitate a conciliation conference.
5. If the employee wishes to have the matter determined to finality, they may need to commence an action in the Federal Court. The employee cannot commence an action in the Federal Court until after they have been through the Fair Work Commission General Protections processes.

# Representation

A person may be represented by a legally qualified member, officer or employee of an organisation, employer association or peak council representing the person.

A person may be represented in a matter before the FWC by a lawyer or paid agent, but only with the permission of the FWC.

The FWC may grant permission for a person to be represented by a lawyer or agent only if:

* It would allow the matter to be dealt with more efficiently
* the person to be represented is unable to represent himself, herself or itself effectively
* it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

However, the FWC’s permission is not required if the lawyer in question is representing the person in their capacity as an employee of an employer or company defending a claim.

# Notification of Terminations to Centrelink

Ifanemployerdecidestoterminatetheemploymentof15ormoreemployeesforreasonsof any economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed terminations to Centrelink.

The notice must be in a specific form as prescribed by the Fair Work Regulations and set out:

1. the reasons for the terminations; and
2. the number and categories of employees likely to be affected; and
3. the time when, or the period over which, the employer intends to carry out the terminations.

# What entitlements should be paid termination?

When an employment relationship ends, employees should receive the following entitlements in their final pay:

* any outstanding wages or other remuneration still owing
* any pay in lieu of notice of termination
* any accrued annual leave and long service leave entitlements
* the balance of any time off instead of overtime that the employee has accrued but not yet taken
* any redundancy pay or entitlements if the employee has been made redundant and is eligible.
* If an employee has taken leave in advance and their employment ends before they’ve accrued it all back, the employer can deduct the amount still owing from the employee’s final pay.

If an employee believes that they have not been paid for all of their entitlements when their employment ends, the Fair Work Ombudsman can investigate and take action to make sure that all entitlements are paid.

An employer can be liable to pay a penalty if they have not complied with their obligations under relevant Commonwealth workplace laws.

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