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# Termination of employment

A guide for Aboriginal and Torres Strait  
Islander corporations covered by the  
federal industrial relations system

Larger employers

This guide will help you to understand the issues you will need to deal with if you are thinking of dismissing an employee. It will also help you to understand the employee's entitlements.

This guide is only for corporations covered by the federal industrial relations system – by the Fair Work Act.

The law in this area is quite complex, and it is different depending on whether your corporation is, or is not, a Small Business Employer for the purposes of the Fair Work Act.

Because termination of employment is a difficult area you may wish to consider applying for legal advice.

This guide is only for corporations that are larger employers – **not** Small Business Employers. The concept of 'Small Business Employer' is explained below. There is a separate Termination of Employment Guide for Small Business Employers.

## Introduction

If you are going to dismiss one of your employees you need to do it:

- fairly
- without breaching the legislation that applies to you
- without breaching the contract of employment with the employee.

There are some reasons for terminating an employee's employment that are against the law. In certain circumstances, an employee can challenge your decision in a court or tribunal.

### *Key things to bear in mind*

As a matter of law, there are two general points you need to think about when you are deciding to terminate an employee's employment. The first is the relevant legislation. The second is the employee's contract of employment.

### *The legislation*

The relevant legislation will generally be the federal Fair Work Act and the federal anti-discrimination legislation. State anti-discrimination legislation may also be relevant.

As far as the legislation goes, the main things you need to be concerned about are:

- unfair dismissal
- unlawful termination
- the general protections.

### *The contract of employment*

Generally speaking, you need to make sure that you have a right to dismiss the employee, for the reason you are planning, under the contract of employment with the employee.

If you don't have that right, you run the risk of the employee taking you to court for breach of contract, which could be a very costly exercise for the corporation.

## Is your corporation a Small Business Employer?

It is important that you know what your rights are, and those of your employees if they are to be dismissed. One of the first things you need to know is whether your corporation is a Small Business Employer under the Fair Work Act.

An employer is a Small Business Employer, for the purposes of the Fair Work Act, if it employs less than **15** employees. When determining whether an employer is a Small Business Employer for the purposes of ending employment, the employee being dismissed, and any other employees who are being dismissed, are included in this count.

Casual employees are not included in the count *unless* they are regular casual employees. A **regular** casual employee is a casual who works on a regular and systematic basis. For instance, an employee is likely to be a regular casual if they have a clear pattern or roster of hours. If you are not sure whether a casual employee should be included, it is a good idea to seek advice.

If your corporation owns or controls another entity, or is owned or controlled by another entity, you might need to think about whether your corporation has any **associated entities**. This is because employees of associated entities are counted for the purposes of deciding whether a corporation is a Small Business Employer. Again, if you are not sure whether your corporation has associated entities, it is a good idea to seek advice.

## **If your corporation is a NOT a Small Business Employer**

If your corporation is NOT a Small Business Employer, the standard rules apply to it under the Fair Work Act. These rules are set out below.

### ***Unfair dismissal***

#### ***Which employees are covered?***

The main rule here is that an employee who works for an employer that is not a Small Business Employer will be covered by the federal unfair dismissal laws if the employee has worked for their employer continuously for six months or more. Putting this another way, if an employee has not worked for the employer for six months continuously, that employee will **not** have access to the unfair dismissal provisions of the Fair Work Act.

The Fair Work Act also provides that an employee will only have access to unfair dismissal remedies if one (or more) of the following conditions applies to the employee:

- they are covered by a modern award
- they are covered by an enterprise agreement, or
- their annual rate of earnings is less than the high income threshold, which is currently \$175,000 (as at 1 July 2024). This amount increases each year on 1 July. Superannuation contributions, reimbursement and payments that

cannot be determined in advance, such as commissions, overtime and bonuses, are not included in the annual rate of earnings.

Clearly, this will cover almost all employees of an Aboriginal and Torres Strait Islander corporation.

It is also important to know that unfair dismissal does not apply in cases of genuine redundancy. But a redundancy will not be genuine if it would have been reasonable for the employer to have redeployed the employee.

### *How do I avoid an unfair dismissal claim?*

It is not possible to spell out precisely how to carry out a dismissal of an employee in such a way that is not an unfair dismissal but there are some key principles:

- there must be a valid reason for the dismissal based on the employee's conduct or capacity
- you must have notified the employee of the reason for dismissal
- the employee should have been given an opportunity to respond to any reason for dismissal which is related to their capacity or conduct before the employer makes a final decision about ending the employment
- you may dismiss an employee without notice but only if they are guilty of serious misconduct
- serious misconduct includes theft, fraud, violence and serious breaches of OHS requirements – but it could be other things
- for dismissals relating to unsatisfactory work performance, you should not dismiss an employee unless they have been warned about their work performance and have been given a reasonable chance to fix it
- you may need to give the employee training so they can fix the problem, or you may need to make sure they know what you expect of them in their job
- the employee can have a support person with them at any discussions leading up to their dismissal and an employer cannot unreasonably refuse an employee's request to have a support person present at these discussions
- you need to keep evidence of what you have done in dismissing the employee.

If their dismissal is found to be unfair by the Fair Work Commission, the employee may be reinstated, or they may be given up to either six months' pay as compensation for their dismissal. If the employee earns more than the high income threshold (\$175,000 as at 1 July 2024), the most they can receive as compensation is half the high income threshold (\$87,500 as at 1 July 2024).

### ***Redundancy payments under the Fair Work Act***

Under the National Employment Standards (**NES**) in the Fair Work Act, an employer who is NOT a Small Business Employer is required to pay a redundancy payment where the:

- employee is made redundant, or
- employment is terminated because the employer is insolvent or bankrupt.

The amount of redundancy pay is set out in a table in section 119 of the Fair Work Act. The table is set out below. The last line of the table is not a misprint.

| <b>Period of continuous service</b> | <b>Redundancy pay</b> |
|-------------------------------------|-----------------------|
| 1 year but less than 2 years        | 4 weeks               |
| 2 years but less than 3 years       | 6 weeks               |
| 3 years but less than 4 years       | 7 weeks               |
| 4 years but less than 5 years       | 8 weeks               |
| 5 years but less than 6 years       | 10 weeks              |
| 6 years but less than 7 years       | 11 weeks              |
| 7 years but less than 8 years       | 13 weeks              |
| 8 years but less than 9 years       | 14 weeks              |
| 9 years but less than 10 years      | 16 weeks              |
| At least 10 years                   | 12 weeks              |

### ***The employee may have other entitlements to a redundancy payment***

The employee may also have an entitlement to a redundancy payment:

- if a modern award applies to the employee, or
- under their contract of employment.

Redundancy entitlements under employment contracts are discussed later in this guide.

## What other rights do employees have in relation to dismissal?

### *No unlawful termination*

The unlawful termination provisions of the Fair Work Act apply to all employers in Australia. As such, these provisions apply to large Aboriginal and Torres Strait Islander corporations and to small ones.

### *What is an unlawful termination?*

If an employer dismisses an employee for one or more of the following reasons, they may have breached the Fair Work Act and could be subject to a serious penalty. Specifically, these reasons are:

- the employee's race, colour, sex, sexual orientation, breast feeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin
- the employee's temporary absence from work because of illness or injury
- the employee's trade union membership or participation in trade union activities outside working hours (or, with the employer's consent, during working hours)
- the employee's non-membership of a trade union
- the employee seeking office as, or acting as, a representative of employees
- the employee having filed a complaint, or participating in proceedings against an employer
- the employee's absence from work because of maternity leave or parental leave
- the employee's temporary absence from work to engage in voluntary emergency activity.

There are some exceptions. For example, it would not be unlawful to dismiss an employee with a disability if the employee is unable to carry out the inherent requirements of their job.

If you are dismissing an employee, you will need to check very carefully that you are not breaching the unlawful termination provisions.

If an employee brings an action claiming unlawful termination, it will be up to the employer to prove that the dismissal was not for one of the reasons set out above.

The Fair Work Commission provides further information about unlawful termination. You can find this at <https://www.fwc.gov.au/job-loss-or-dismissal/unlawful-termination>.

### ***General protections***

It is also unlawful for some employers (including corporations that are covered by the federal industrial relations system) to terminate employment for one of the reasons prohibited in Part 3-1 of the Fair Work Act (**the general protections**).

There is a lot of overlap between the general protections, and unlawful termination (which is described above). However, there are some relevant differences. For instance, under the general protections, it is unlawful for an employer to terminate employment because an employee exercises a workplace right. For example, it would be unlawful to terminate employment because an employee exercises their right under an enterprise agreement to claim a particular allowance.

### ***Notice periods for termination***

Under the Fair Work Act, if an employer is going to dismiss an employee, the employer must give that employee notice in writing. This must tell the employee that their employment is being terminated and the day it will finish. The notice cannot be retrospective.

Generally speaking, the employee must be given at least the period of notice set out in the table in section 117 of the Fair Work Act, or they must be paid in lieu of that notice period. That table is as follows.

| <b>Period of continuous service</b>     | <b>Period of notice</b> |
|---|-------------------------|
| Up to 1 year                            | 1 week                  |
| More than 1 year but less than 3 years  | 2 weeks                 |
| More than 3 years but less than 5 years | 3 weeks                 |
| More than 5 years                       | 4 weeks                 |

Further, if the employee is over 45 years old and has completed two years or more of service with the employer at the end of the day on which the notice is given, they are entitled to one extra week of notice.

The notice and redundancy arrangements do not apply where an employee's employment is terminated because of serious misconduct.

The notice and redundancy arrangements do not apply to casual employees, or to employees employed to perform a specified task (sometimes referred to as 'fixed term' employees).

### *How do you calculate an employee's pay in lieu of notice?*

The amount paid to the employee must equal or exceed the total amount the employee would have got if they had kept working until the end of the minimum period of notice.

You need to calculate this based on the employee's full rate of pay including all the following:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts.

### *Right to be paid out for untaken annual leave and long service leave*

Under the Fair Work Act, when an employee's employment ends – for any reason – the employee is entitled to be paid for any unused annual leave credits they had at the time their employment ended.

The employee may also be entitled to be paid for long service leave credits, even if they have not worked for long enough to be entitled to take long service leave. This will depend on the terms of their long service leave entitlements.

If you want help in calculating final payments call the Fair Work Ombudsman Infoline on 13 13 94.

### *Contractual rights*

Employees and employers are entitled to have their contracts honoured. If an employer breaches their contract of employment with an employee, the employee may take the employer to court for breach of contract.

Employers must make sure that the reason for dismissing an employee is allowed under the contract of employment and that it is carried out in a way that follows the contract. This includes paying the employee any entitlements they have under the contract.

For example, while an employee might have no entitlement to redundancy pay under the Fair Work Act (for example, because they have less than one year of service), they might still have an entitlement to redundancy pay because their



employment contract says so. In this case, the employer will have a legal obligation under the contract to pay the employee redundancy pay.

Similarly, if the contract sets out all of the grounds on which the employer may terminate the employee's employment, generally speaking (though there are some exceptions relating to implied terms), the employer can only terminate the employment on one of those grounds – and not for some completely different reason not provided for in the contract.

## **Some key steps for termination of employment – four different grounds**

Each of the grounds below may be a valid reason for terminating employment (if they are permitted by the relevant employment contract). However, to minimise the risk of a successful unfair dismissal or breach of contract claim, it is important to take the steps outlined below.

While these are some of the most common grounds, there might also be other valid reasons for terminating employment, depending on the circumstances and the terms of the employment contract.

### **1. Probation**

A probation period may be implemented to allow an employer the opportunity to check that the employee is suitable for the role.

Generally, if an employee is not suitable for the role, an employer may terminate their employment during the probation period. However, this will depend on the terms of the employment contract. An employer must also still be conscious of the unfair dismissal provisions explained above. This means, if an employee has been employed for more than 6 months, the employer must have a valid reason for their dismissal that relates to their capacity or conduct, irrespective of whether they are still within their probation period. If that reason relates to poor performance or misconduct, they should also have regard to the steps that are described under the relevant headings below.

It is also important to make sure that the reasons for finding that the employee did not satisfy probation do not include any reasons that would make the termination of employment unlawful (such as the employee's race, sex, etc).

If an employer is going to terminate an employee's employment for failing to satisfy probation, this must be done before the end of the employee's period of probation.

The employer is obliged to give the employee the notice of termination required under the NES, or payment in lieu of notice (unless their employment has been terminated for serious misconduct). In cases where an employment contract imposes a notice period that is greater than the NES, an employer may choose to include a term in the contract that allows the employer or employee to end the employment by providing a shorter notice period during the probation period (provided this period is not less than the period required under the NES).

### **2. Poor performance**

The employer is required to tell the employee the standard of work performance they need to meet, and at present, the employee is not meeting that standard.

Having warned the employee that they are not meeting the required standard, the employer must give the employee a chance – over a specified period of time – to show they can improve.

- This period might be, for example, four weeks or eight weeks or 12 weeks, depending on the complexity of the job. The employer needs to warn the employee that they may lose their job if their performance does not improve sufficiently over the assessment period.

The employer should keep a written note about issuing the warning.

The employer should allow the employee to have another person present at any meeting between them about the employee's performance, if requested by the employee.

If the employee needs more training in order to do their job properly, the employer may have to give the employee that training.

The employer should closely monitor the employee's performance during the assessment period. The employer should give the employee regular feedback about their performance during this time.

If the employee has not improved enough at the end of the assessment period, the employer can terminate the employee's employment for poor performance. However, the employer must first notify the employee that they have not improved to the standard expected and their employment will likely end. The employer should then provide them with an opportunity to respond before making a final decision.

If, after considering the employee's response, the employer decides to proceed with the dismissal, it must give the employee notice in writing of the termination, setting out the day on which the termination is to occur. This notice cannot be retrospective.

The employer will have to give the employee the period of notice of termination required under the NES, or payment in lieu of notice.

*The Fair Work Ombudsman has published an excellent best practice guide on managing underperformance. You can find this at [fairwork.gov.au/tools-and-resources/best-practice-guides/managing-underperformance](https://fairwork.gov.au/tools-and-resources/best-practice-guides/managing-underperformance)*

### **3. Misconduct**

If the organisation has a code of conduct which the employee has broken, and the matter is sufficiently serious, the employer should appoint someone to investigate the misconduct.

The employer should allow the employee to have a support person present at any meetings with the employee about their alleged misconduct.

If the employee's misconduct is 'serious misconduct' (for example, fraud, theft or a serious breach of occupational health and safety laws) and the employer is satisfied that the employee is guilty, the employer may be able to terminate the employee's employment immediately – without any warning and without any notice of termination. Even in this situation, however, the employer must tell the employee the case against them and needs to give the employee the chance to put their side of the story to the employer before making a final decision about dismissal.

The employer should keep written records of the misconduct action.

If the employee's misconduct is not such as would warrant immediate dismissal (and the employee has been told of the case against them and has been given a chance to tell the employer their side of the story), yet the finding is that the employee did commit the misconduct, the employer can terminate the person's employment.

However, it is important to remember that an employer does not have to dismiss an employee simply because they engaged in misconduct. In some cases, if an employee engages in misconduct the employer may decide that other types of disciplinary action such a warning or training may be more appropriate than dismissal. When determining whether misconduct should result in dismissal, employers should consider the employee's circumstances, the extent of the misconduct, and what action has been taken against employees who have engaged in similar misconduct in the past.

The employer must give the employee a notice in writing of the termination, setting out the day on which the termination is to occur. This notice cannot be retrospective.

The employer will have to give the employee the period of notice of termination required under the NES, or pay in lieu of notice.

*The Fair Work Ombudsman has also published an excellent best practice guide on managing performance and warnings. You can find this at [fairwork.gov.au/employment-conditions/performance-in-the-workplace](https://www.fairwork.gov.au/employment-conditions/performance-in-the-workplace)*

## **4. Redundancy**

Under the Fair Work Act, a termination of employment will only be a genuine redundancy if the employer no longer needs the employee's job to be done by anyone. (If the employer plans to recruit someone else to do the same job after the employee's employment has been terminated, this is not a genuine redundancy, and the termination may be subject to the unfair dismissal laws under the Fair Work Act)

The employer should try to redeploy the employee whose role has become redundant before making a decision to terminate the person's employment. This means trying to find the employee another job in the corporation at, or below, the employee's level, that is suitable for the employee to do. The dismissal will not be excluded from the unfair dismissal jurisdiction if it would have been reasonable for the employer to have redeployed the employee within the employer's enterprise or within an associated entity.

If a modern award or enterprise agreement applies to the employee it may provide for time off for the employee to attend work interviews.

If the employee is to be terminated on the grounds of redundancy, the employer needs to work out what severance benefit the employee is entitled to. This will depend on the employee's length of service, and the calculation will be set by the NES, the relevant modern award or enterprise agreement, or by the contract of employment. The NES provide the minimum entitlement. This can be topped up by the modern award, enterprise agreement or by the contract of employment.

The employer must give the employee notice in writing of the termination, setting out the day on which the termination is to occur. This notice cannot be retrospective.

The employer must give the employee the notice of termination required under the NES, or payment in lieu of notice.

If you have any other questions about ending employment, the Fair Work Ombudsman has published a range of guidance materials. You find these at [fairwork.gov.au/ending-employment](https://fairwork.gov.au/ending-employment).