



This document has been prepared solely for the use of not-for-profit corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). Its application in any particular case will depend upon the facts of that case. In every case, due care will need to be taken by a corporation registered under the CATSI Act in assessing the suitability of its application. The Australian Government Solicitor and ORIC cannot take any responsibility for this assessment.

This document may only be reproduced or distributed for use in the drafting of a contract for a not-for-profit corporation registered under the CATSI Act. All other rights are reserved.

# Termination of employment

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

Small business 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.

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 obtaining legal advice.

This guide is for Small Business Employers only. The concept of 'Small Business Employer' is explained below.

## Introduction

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

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

### *The legislation*

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

In relation to the legislation the main things you need to be concerned about when dismissing an employee are:

- unfair dismissal
- unlawful termination
- general protections.

### *The contract of employment*

Generally speaking, you will need to make sure that you have a right to dismiss the employee 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 your employees' rights if you are intending to dismiss them. First you need to know 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.

## **Why does it matter? What happens if the corporation is a Small Business Employer?**

If your corporation is a Small Business Employer, special rules apply to it under the Fair Work Act, especially in the area of unfair dismissal.

### ***Unfair dismissal***

#### ***Coverage of employees***

The main coverage issue here is that an employee who works for a Small Business Employer will only be covered by the federal unfair dismissal laws if the employee has worked for their employer continuously for 12 months or more. Putting this another way, if an employee of a Small Business Employer has not worked for the employer for 12 months continuously, that employee will **not** have access to the unfair dismissal provisions of the Fair Work Act.

It is also important to know that unfair dismissal does not apply in cases of genuine redundancy.

#### ***The Small Business Fair Dismissal Code***

The next important thing about being a Small Business Employer is that, in relation to employees who have been employed for 12 months or more – the ones who are covered by the unfair dismissal provisions – there are special arrangements about unfair dismissal.

The key point is a dismissal is not unfair if it is done consistently with Small Business Fair Dismissal Code. In essence, the Small Business Fair Dismissal Code sets up a clear way to make sure that the dismissal is not an unfair dismissal.

The Small Business Fair Dismissal Code is a very short document. It includes a checklist which has been prepared by the Fair Work Ombudsman. It is not compulsory to work through the checklist when you are dismissing an employee but it is a very good idea to do so.

You can download the Small Business Fair Dismissal Code and Checklist at: <https://www.fairwork.gov.au/ending-employment/unfair-dismissal>

### *Next steps*

If you are a Small Business Employer and you are going to dismiss an employee who has worked for you for 12 months or more, you must carry out the dismissal consistently with the Small Business Fair Dismissal Code.

The essence of the Small Business Fair Dismissal Code is as follows:

- there must be a valid reason for a dismissal based on the employee's conduct or capacity
- you may dismiss an employee without warning but only if they are guilty of serious misconduct
- serious misconduct includes theft, fraud, violence, sexual harassment and serious breaches of OHS requirements – but it could be other things
- for any other dismissals, you must not dismiss an employee unless they have been warned about their conduct or work performance, and have been given a reasonable chance to respond and 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, however the person cannot be a lawyer acting in a professional capacity
- you need to keep evidence that you have complied with the code in dismissing the employee.

### *Consequences*

If you do not comply with the Small Business Fair Dismissal Code, the employee can bring an unfair dismissal action to the Fair Work Commission. If their dismissal is found to be unfair, the employee may be reinstated, or may be given up to 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).

### *Other important issues about access to unfair dismissal*

The Fair Work Act 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.

### ***No right to a redundancy payment under the Fair Work Act***

A Small Business Employer is generally not required to pay a redundancy payment, under the Fair Work Act.

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

Although an employee of a Small Business Employer will generally not be entitled to a redundancy payment under the Fair Work Act, this is not the end of the matter. The employee may be entitled to a redundancy payment:

- if the Small Business Employer is bankrupt or in liquidation and the employer became a Small Business Employer because a number of employees were dismissed, therefore reducing its headcount;
- under the provisions of a modern award or enterprise agreement; or
- under their contract of employment.

Employers undergoing bankruptcy or insolvency should obtain further advice in relation the potential obligation to make redundancy payments.

We discuss redundancy entitlements under employment contracts later in this guide.

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

### ***No unlawful termination***

As noted above, the unfair dismissal provisions of the Fair Work Act apply in a limited way to Small Business Employers.

Yet the situation is different in relation to the unlawful termination provisions in the Fair Work Act.

The unlawful termination provisions apply to **all** employers who are covered by the Act. There are no special arrangements for Small Business Employers in relation to unlawful termination under the Fair Work Act.

### *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 for that breach.

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

If the reason for dismissing the employee falls into any of the categories set out above, you will need to check very carefully whether you will breach the unlawful termination provisions if you dismiss the employee.

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 Small Business Employers 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 the employee notice in writing that tells the employee that their employment is being terminated and sets out the day on which the employee's employment will finish.

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 the pay in lieu of notice?*

The amount paid to the employee must equal or exceed the total amount the employee would have received 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 need to make sure that the reason for dismissing an employee is allowed under the contract of employment, and that the dismissal is carried out in the way that follows the contract. This includes paying the employee any entitlements they may have under the contract.

For example, while an employee may have no entitlement to redundancy pay under the Fair Work Act, they may 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 employment can only be terminated on one of those grounds – and not for some completely different reason not provided for in the contract.

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