



Termination of employment

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Termination of employment is when an employee's contract of employment with an employer ends. This sometimes happens because of redundancy, resignation or dismissal.

The relevant Commonwealth workplace laws set out specific rules and protections relating to the termination of an employment relationship. These rules establish whether the termination of the employment was unlawful or unfair, the entitlements an employee may be owed at the end of their employment, and the requirements for dismissing an employee due to redundancy.

The Fair Work Ombudsman works alongside Fair Work Australia in regulating the relevant Commonwealth workplace laws relating to termination of employment. The Fair Work Ombudsman is specifically responsible for educating employers and employees about their rights and obligations, as well as ensuring compliance with the new laws, and can prosecute employers that contravene the new laws. Fair Work Australia is specifically responsible for dealing with unfair dismissal and unlawful termination applications.

What is an unfair dismissal?

An employee has been unfairly dismissed if Fair Work Australia is satisfied that all of the following occurred:

- the person has been dismissed
- the dismissal was harsh, unjust or unreasonable
- if the employer is a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code
- the dismissal was not a case of genuine redundancy.

What is harsh, unjust or unreasonable?

In considering whether a dismissal was harsh, unjust or unreasonable, Fair Work Australia must take into account all of the following factors:

- whether there was a valid reason for the dismissal related to the employee's capacity or conduct
- whether the employee was notified of that reason and given an opportunity to respond
- any unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to dismissal
- if the dismissal related to unsatisfactory performance by the employee, whether they had been warned about that unsatisfactory performance before the dismissal
- the degree to which the size of the employer's enterprise and the degree to which the absence of dedicated human resource management specialists or expertise would be likely to impact on the procedures followed in effecting the dismissal
- any other matters that FWA considers relevant.

Who can make an unfair dismissal application?

To be eligible to make an unfair dismissal application an employee must be both:

- covered by the national workplace relations system
- eligible to apply.

Only employees covered by the national workplace relations system are covered by the unfair dismissal laws. Other employees may have access to remedies under relevant State legislation.

An employee is eligible to make an application to Fair Work Australia for unfair dismissal if they have completed the minimum employment period of:

- one year – where the employer is a small business employer (which is an employer that employs less than 15 **full-time equivalent** employees).

Note: the requirement of 15 full-time equivalent employees will only apply until 1 January 2011. Hours of all employees (full-time, part time and casual) are counted in calculating whether there are less than 15 full-time equivalent employees.

After 1 January 2011, small business employers will be defined as who employ less than 15 employees. All employees, except for casuals unless they are employed on a regular and systematic basis, will be counted.

- six months – where the employer is not a small business employer.

In addition, at least one of the following must apply:

- an award covers the person
- an enterprise agreement (or other industrial agreement) applies to the person
- the person's annual rate of earnings is less than the high income threshold (from 1 July 2009 this is \$108,300 for full-time employees or a pro-rata amount for part-time employees). This threshold will be indexed each financial year starting on 1 July.

If you believe you have been unfairly dismissed, you can apply to Fair Work Australia for a remedy. **You must apply within 14 days after a dismissal takes effect.** The Fair Work Ombudsman does not investigate unfair dismissal complaints. However, applications to Fair Work Australia about unfair dismissal can be lodged at any Fair Work Ombudsman office.

Who is not eligible to make an unfair dismissal application?

The following persons are not eligible to make an unfair dismissal application:

- independent contractors
- employees who resign and were not forced to do so by the conduct of their employer
- those employed under a contract for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, task or season
- an employee to whom a training arrangement applied and whose employment was for a specified period of time or limited to the duration of the training agreement, and the employment terminated at the end of the training arrangement

- employees who have been demoted but the demotion did not involve a significant reduction in their remuneration or duties and who remain employed by the employer who demoted them.

In addition, a person may not be entitled to an unfair dismissal remedy if the person was:

- dismissed in the case of a genuine redundancy (see *Redundancy and unfair dismissal* below)
- dismissed by a small business employer who has complied with the Small Business Fair Dismissal Code in relation to the dismissal.

What is the Small Business Fair Dismissal Code?

The Small Business Fair Dismissal Code (the Code) is a legislative instrument declared by the Minister for Employment and Workplace Relations.

The Code provides the following:

Summary Dismissals

It is fair for a small business employer to dismiss an employee without notice or warning when the employer has reasonable grounds to believe that the employee was guilty of serious misconduct. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair, it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police.

Other Dismissals

In other dismissals, a small business employer must give the employee a valid reason based on their capacity or conduct to do the job if they are at risk of being dismissed. The employee must be warned verbally or (preferably) in writing, that they risk being dismissed if there is no improvement. Further, the employer must provide the employee with an opportunity to respond to the warning and give them a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural matters

Employees can have another person present to assist them in discussions in circumstances where dismissal is possible. However, the other person cannot be a lawyer acting in a professional capacity.

If the employee makes an unfair dismissal claim to Fair Work Australia, the small business employer will be required to provide evidence of compliance with the Code. This evidence may include that a warning has been given (except in cases of summary dismissal), a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

More information on the Small Business Fair Dismissal Code, as well as the Checklist can be found at <http://www.fairwork.gov.au/Info/small-business-fair-dismissal-code>

What is an unlawful termination?

The relevant Commonwealth workplace laws prohibit an employee from being terminated on certain grounds, including those that are discriminatory. Generally, an employee has protection from unlawful termination under the General Protections provisions of the *Fair Work Act 2009*. However, if a person does not have a protection under these provisions, they are still protected from unlawful termination, as described below. For more information on General Protections, including what protections apply and who they may apply to, please see the *Fair Work Ombudsman Fact Sheet - General Protections*.

Unlawful termination is when an employee is dismissed by their employer for reasons including:

- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some exceptions apply, such as where it's based on the inherent requirements of the job)
- temporary absence from work because of illness or injury
- trade union membership or non-membership
- participation in trade union activities outside working hours or, with the employer's consent, during working hours
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint or participating in proceedings against an employer.

The Fair Work Ombudsman can investigate unlawful termination complaints.

However, if you wish to seek redress for what you believe to be an unlawful termination, you should apply to Fair Work Australia. **Unlawful termination applications must be made to Fair Work Australia within 60 days of the termination.**

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 day of termination, or payment in lieu of that notice.

The amount of notice is based on the length of service of the employee.

For more information on notice of termination, including the minimum notice period which is required to be given to an employee, and the exceptions to this entitlement, please see the *Fair Work Ombudsman Fact Sheet – Notice of termination and redundancy pay and the National Employment Standards*.

What entitlements are owing on 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 payments that are being made in lieu of notice of termination by the employer – this is generally between 1-5 weeks pay, depending on the age of the employee and how long they have been employed on a continuous basis by the employer
- any accrued annual leave and long service leave entitlements
- any severance pay entitlements if the employee has been made redundant and the employee has an entitlement to redundancy under relevant Commonwealth workplace laws or an industrial instrument.

If an employee believes that they have not received payment for all of their entitlements at the time their employment ends, the Fair Work Ombudsman can investigate and take action to make sure that all legal entitlements under relevant Commonwealth workplace laws are paid. An employer may be liable to a penalty of up to \$33,000 per contravention if they have not complied with their obligations under relevant Commonwealth workplace laws.

Redundancy

What is redundancy?

Redundancy occurs when an employer decides they no longer want a job an employee has been doing to be done by anyone, and terminates their employment (except in cases of ordinary and customary turnover of labour). The job itself, not the employee, becomes redundant.

Redundancy may happen when an employee is terminated because:

- the job someone has been doing is replaced due to the employer introducing new technology (i.e. it can be done by a machine)
- staff reduction for a particular task occurs due to a downturn in business
- a merger or takeover happens and the position is no longer required
- the business restructures or reorganises and the position is no longer required (this may include where tasks performed by a particular employee are distributed between several other employees)
- of the insolvency or bankruptcy of the employer.

What redundancy pay might be payable?

As of 1 January 2010, an employee covered by the national workplace relations system, who has at least one year of continuous service and who works for an employer that employs 15 or more employees may be entitled to redundancy or severance payments (to a maximum of 16 weeks pay) under the National Employment Standards (NES).

When is redundancy pay not payable?

An employer who is a small business employer is not required to provide redundancy pay on the termination of an employee's employment. A small business employer for the purpose of determining redundancy pay is an employer who, at a particular time, employees fewer than 15 employees. When calculating the number of employees employed at a particular time, the following factors are to be taken into account:

- all employees employed by the employer at that time are to be counted
- a casual employee is not be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis
- associated entities are taken to be one entity
- the employee being terminated and any other employees being terminated at that time are counted.

In addition, redundancy pay will not be payable to any of the following:

- an employee whose period of continuous service with the employer is less than 12 months
- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct
- a casual employee
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
- an apprentice
- an employee to whom a industry-specific redundancy scheme in a modern award applies
- an employee to whom a redundancy scheme in an enterprise agreement applies if:
 - the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation
 - the employee is covered by the industry-specific redundancy scheme in the modern award.

An award that is in operation may include a term specifying other situations in which redundancy pay does not apply to the termination of an employee's employment.

For more information on redundancy pay, please see the *Fair Work Ombudsman Fact Sheet – Notice of termination and redundancy pay and the National Employment Standards*.

What happens if my employer goes bankrupt?

An employee may be entitled to redundancy pay by an employer if their employment is terminated because of the insolvency or bankruptcy of the employer.

In some circumstances, the business may not have sufficient funds to pay employees termination entitlements, including redundancy pay.

The General Employee Entitlements and Redundancy Scheme (GEERS), is a Government scheme established to help employees who lose their job because of the liquidation or bankruptcy of their employer, and are seeking outstanding employment entitlements.

Eligible employees can apply for GEERS help if the employer is in liquidation or bankruptcy and can't pay their employees their entitlements.

GEERS may provide assistance for:

- up to 3 months unpaid wages for the period prior to the appointment of the insolvency practitioner
- unpaid annual leave
- unpaid long service leave
- up to a maximum of 5 weeks unpaid payment in lieu of notice
- up to a maximum of 16 weeks unpaid redundancy entitlement.

For more information on GEERS, contact the GEERS Hotline on **1300 135 040**, or email GEERS@deewr.gov.au

Redundancy and unfair dismissal

Where a case is a genuine redundancy, it will not be considered an unfair dismissal.

The *Fair Work Act 2009* provides that a person's dismissal is a 'genuine redundancy' if all of the following conditions were met:

- the employer no longer required the person's job to be done by anyone because of changes in the operational requirements of the employer's enterprise
- the employer complied with any obligation in an applicable workplace instrument (e.g. award or agreement) to consult about the redundancy
- there was no reasonable opportunity for the person to be redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

Fair Work Australia website: www.fwa.gov.au

FWA Help Line: **1300 799 675**

Monday to Friday, between 9.00am–5.00pm

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94