

A PLAIN ENGLISH GUIDE TO



>>TERMINATION OF EMPLOYMENT: DISMISSAL & REDUNDANCY

Termination of employment is a serious step to take because of the cost of business disruption and the potential cost of an unjust dismissal claim or other litigation. Managing employment termination involves understanding and managing the risks.

>>What are the legal risks from termination of employment?

Unjust Dismissal Claim

This is the most common form of litigation arising from termination of employment.

Since the WorkChoices legislation commenced on 27 March 2006, employees of companies can only make a claim arising from an alleged unjust dismissal if the company or relevant group of companies have more than 100 employees.

Employees of sole traders or partnerships or state government bodies can make claims alleging unjust dismissal whether or not their employer has more than 100 employees.

Employees can only make these claims if they are covered by an award, or earn a total package of less than \$101,300 (June 2008: indexed in July annually).

Employees can also make claims alleging 'unlawful dismissal' if the dismissal was partly because of a discriminatory reason (sex, race, age, religion etc) or because of union activity.

The AIRC can order re-instatement or award compensation, up to 6 months pay (or up to total pay received, if the employee has been employed for less than 6 months). Usually, each party has to pay its own costs, win or lose. An unjust

dismissal application should be filed within 21 days of the termination of employment but this period can be extended.

Discrimination Claims

If there are circumstances which suggest that the termination may have been prompted by an illegitimate discriminatory reason (such as sex, pregnancy, race, age and so on), a terminated employee may make an application to the State or Federal discrimination authorities, or may raise that issue in unjust dismissal or unfair contract claims.

>>Are any employees excluded from making an unjust dismissal claim?

Probationary Employees

An employee on probation for up to 3 months cannot make an unjust dismissal claim. The probation period must have been agreed before the employee started work. It is highly desirable that the probationary period is in writing.

And if the employer is a company, a 6 months qualification period applies, during which an employee cannot allege unjust dismissal (but can claim 'unlawful dismissal').

However, if the termination, within the probationary period is because of an illegitimate discriminatory reason, then the employee will be able to make a discrimination claim on that basis.

Casual employees

'True' casuals, that is, casuals whose employment is irregular, informal and uncertain, and who have no reasonable expectation of ongoing work, and who have been employed for less than 12 months under the federal system, (6 months under the NSW system) cannot make an unjust dismissal claim.

Other casuals, genuine or so-called, can make an unjust dismissal claim.

Employees on fixed term contracts or engaged to undertake a particular task

If an employee has a contract which is for a fixed term of less than 6 months with no scope to be terminated during that term, the employee is excluded from making an unjust dismissal claim. The same applies if the employee is engaged to do a specified task.

>>How can I manage these risks?

Industrial tribunals expect employers to terminate employment fairly: that is, to have a good reason for the termination, and give the employee procedural fairness in the termination process.

In the case of termination for **poor performance**, this involves:

- telling the employee the level of performance expected and the (reasonable) time in which improvement must occur and that failure to improve may result in termination of employment;
- giving the employee a reasonable opportunity to respond to criticism and considering the response in good faith.

If a termination is for **misconduct** there should be:

- clear policies as to the conduct required which have been properly communicated (unless what is unacceptable is so obvious it goes without saying);
- a proper investigation with opportunity for the employee to respond to allegations.

It is important to consider how other employees have been dealt with for similar conduct. If you have condoned similar behaviour from others, or similar conduct by this employee in the past, it will be harder to justify termination even if the conduct is in breach of policy or performance requirements. In that case, some lesser penalty such as a final warning or a demotion or a pay cut may be a better option.

>>Good Termination Practice

- Keep records of warnings and counselling.
- Have a second person attend significant interviews.
- Don't terminate in anger.
- Don't respond in kind to any "game playing" by an employee: maintain a professional attitude.
- Give warnings as necessary depending on the nature of the problem: it is not necessary to give three warnings in all cases.

For employees who have been with the employer for a long time, or who are in a senior position, you have to consider carefully what may be 'reasonable notice' overall. You need to take account of the employee's age and length of service, level of seniority and responsibility and chances of obtaining comparable replacement work.

>>Payments on Termination

It is important to get the payment right. Annual leave and long service leave are statutory entitlements. Delay or underpayment always looks bad.

Getting notice payments right, particularly payments on redundancy, involves considering a variety of sources of obligation to pay redundancy or notice, and making a judgment about what is required in your situation. A right to severance pay may arise from an award, NSW legislation, precedents in the workplace, the employment contract, policies about redundancy or the general obligation to give fair notice.

For award employees, awards or NSW legislation prescribe scales of payments. For non-award employees, these may be a benchmark, but there are cases where there is no entitlement to a redundancy payment.

>>When can an employee be terminated without payment of notice?

Termination without notice, or summary dismissal, is only allowed when the employee is guilty of serious misconduct. 'Serious misconduct' may include theft, dishonesty, serious breaches of confidentiality obligations or other acts directly against the interest of the employer, violence in the workplace, serious sexual harassment or bullying.

If you are considering terminating an employee without notice, you need to ensure that you have conducted a proper investigation, resulting in a sufficiently strong case against the employee, who is dealt with fairly. If a summary dismissal results in an unjust dismissal or unfair contract claim, you will bear the onus of justifying the termination without notice.

>>How can Coleman & Greig help you?

Solicitors at Coleman & Greig have many years experience in representing employers and employees at conciliation conferences and hearings in the Industrial Relations Commissions and the discrimination authorities.

The solicitors at Coleman & Greig can also help you to manage your risks by:

- Responding quickly to advise in person, by phone or by email, when employment issues arise;
- Highlighting for you risk areas, and suggesting ways of dealing with risks in particular circumstances;
- Advising generally on management of poor performance, misconduct or redundancy programs.



>>Interpreter Services

Coleman & Greig can provide interpreter services in a range of foreign languages including:

- Arabic
- Assyrian
- Croation
- Samoan

>>Other Services

Coleman & Greig provides a wide range of services including:

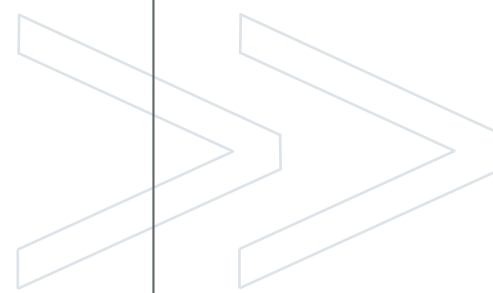
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For further information: