

Overview

The ending of a person's employment can be due to several factors and can be conducted in a number of ways however, there are strict guidelines on the correct process for dismissing an employee depending on the type of termination taking place.

Reasons for Dismissal or Termination

There are many reasons why termination of employment may be necessary. However, in each case you must have a valid reason for the termination, which must be justifiable given the facts.

Broadly, reasons for terminating someone's employment are one of the following:

- Serious or Gross Misconduct – when an employee partakes in behaviour that is out of line with company policy, goes against the terms of an employment agreement, or is unlawful.
- Poor performance due to factors such as lack of skill, care, diligence or quality
- Capacity – reflects employee's ability to fulfil the inherent requirements of their role
- Redundancy – when an employer either decides they no longer need an employee's job to be done by anyone, or the employer becomes insolvent or bankrupt
- Accumulation of 3 official warnings

Employees should be provided with written notification that their employment has been terminated.

Official Warnings can be given for:

General Misconduct:

- Poor Presentation (uniform, hair, piercings, smoking on site etc)
- Tardiness (Starting late/ Finishing early)
- Not attending work shift with adequate notice or no notice
- Not following company policies and processes (including WHS and QMS)

After each official warning guidance or training should be given to allow the employee to correct their actions

Accumulating a total of 3 official warnings results in Dismissal or Termination

Definitions**General Misconduct**

General Misconduct is behaviour that is inconsistent with employee obligations or duties; a breach of company policy or procedure; or generally unacceptable or improper behaviour. Examples include unauthorised absences, lateness and bad language.

The *Fair Work Regulations 2009* define serious misconduct as wilful and deliberate behaviour that is inconsistent with the continuation of the employment contract or causes serious and imminent risk to the reputation, viability or profitability of the business, or health and safety of a person. It includes theft, fraud, assault, intoxication at work or failure to follow a lawful and reasonable instruction that is in keeping with the employee's contract of employment.

If an act of misconduct is deemed serious enough – even for a first offence – if substantiated, the employee may be dismissed without notice or pay in lieu of notice. This is called summary dismissal. When this happens, the employee has to leave the workplace immediately following the disciplinary process and outcome being issued. Prior to an immediate dismissal, a fair process still needs to be followed. You should be consistent in how you respond to an act of serious misconduct.

Serious or Gross Misconduct

The *Fair Work Act 2009* refers to (and defines in the accompanying regulations) serious misconduct, so that is the term used most frequently rather than gross misconduct. The term gross misconduct was used historically.

Serious misconduct is behaviour in the workplace that is contrary to the continuation of ongoing employment, or that is a threat to a person or the business, often an illegal or dangerous activity. If an act of misconduct is deemed serious enough – even for a first offence – if substantiated, the employee may be dismissed without notice or pay in lieu of notice.

Serious Misconduct – Fair Work Regulations

The Fair Work Regulations define serious misconduct as wilful and deliberate behaviour that is inconsistent with the continuation of the employment contract or causes serious and imminent risk to the reputation, viability or profitability of the business, or health and safety of a person. It includes theft, fraud, assault, intoxication at work or failure to follow a lawful and reasonable instruction that is in keeping with the employee's contract of employment.

It is important that employers know the difference between general misconduct and serious misconduct, as serious misconduct can result in summary dismissal, i.e. dismissal without notice. However, even an employee dismissed without notice can submit an unfair dismissal claim and may even succeed if there is no procedural fairness. To best position your business for success in the event of a claim, it is recommended that you follow a fair process and document evidence.

Poor Performance

One of the ways SKG Services stays competitive in our industries is by making sure all our employees are performing at their best. Managing performance well creates a more productive and harmonious workplace because employees can see the value of their work. So we always take a consistent approach to performance management. The employee handbook sets out the standards expected at work and the steps we have to take if an employee starts to fall short. Conducting regular performance appraisals also help us measure their skills, abilities and output against these expectations. If there is a gap between our employee's performance and what we expect, we need to address it early, make a note on their record and talk to them as soon as possible. Set out clearly how we expect them to improve, with measurable targets if possible. They need to feel supported in improving, for example with further training, but grasp the potential consequences if they do not lift their game. Sometimes an employee is just physically unable to do the work they were employed to do. This is not underperformance but medical capability. You need to establish the medical facts by getting an independent medical report done and then seek advice about what to do next.

Redundancy (Made Redundant)

Redundancy occurs when we no longer requires anyone to do the employee's job or because the client is insolvent or bankrupt. There are many reasons why a redundancy may occur. Some examples include introducing an automated process to do the job or the business relocating or closing down. The result is that the employee, who no longer has any work to do, may have their employment terminated. A redundancy is not considered genuine if it occurs because of an employee's performance or conduct, as the role is being made redundant, not the employee. It is important that employers follow a fair procedure for redundancy, including consultation with the relevant employee as to why the role is being made redundant and exploring options to keep the employee in the business. Failing to comply with these requirements makes it difficult to defend an unfair dismissal claim.

A redundancy is only exempt from unfair dismissal when the redundancy is genuine.

A Redundancy is Genuine When:

- The employer no longer requires an employee's job to be performed by anyone because of changes in the operational needs of the employer's business
- The redundancy is made in compliance with the terms and conditions of a Modern Award or enterprise agreement that applied to the employment to consult about the redundancy.

A redundancy is not genuine in circumstances where the employer:

- hires someone else to do the same job as the employee who was dismissed
- has not properly communicated with the employee and given fair notice under the Modern Award or agreement
- has not made a reasonable effort to replace the staff member to another position in the company or explored other alternatives to redundancy

If an employer is unsure whether the redundancy is genuine or not, they should seek expert advice from a qualified practitioner or work relations specialist. To ensure a business not only satisfies its obligations, but avoids unnecessary disputes by troublesome employees, it is recommended that a formal consultation process is undertaken, which should be documented accordingly. An employer should not tell an employee that they have made a definitive decision until consultation has been completed.

Redundancy Payment

When an employee's role becomes redundant, they may be entitled to a payment in lieu of their service being no longer necessary. The National Employment Standards (NES) usually set out a minimum redundancy or severance payment for permanent employees based on their length of service, though some awards or registered agreements may have Industry Specific Redundancy Schemes that set out different entitlements.

Although not all employees are entitled to redundancy pay, if they are it usually depends on how long the employee has been employed with the business, even though it may have changed hands during their employment. Generally, for an employee to be eligible for redundancy payment, they have to have been working with the business for at least one year and the business needs to have fifteen or more employees at the time including the employees whose roles are being made redundant. However, it is important that you check for any exceptions in the applicable Award or registered agreement as sometimes the employee will get redundancy pay irrespective of their length of service and regardless of the size of the business.

Redundancy is paid at the employee's base rate of pay for the ordinary hours they would otherwise have worked over that period. This does not include any incentive-based payments or bonuses, loadings, allowances, overtime or penalty rates.

Period of continuous service.	Weeks of pay.
At least one year but under two years	4
At least two years but under three years	6
At least three years but under four years	7
At least four years but under five years	8
At least five years but under six years	10
At least six years but under seven years	11
At least seven years but under eight years	13
At least eight years but under nine years	14
At least nine years but under 10 years	16
At least 10 years	12

You should also know that if an employee started work prior to the introduction of the NES on 1 January 2010, then their period of service for purposes of redundancy payment calculation will begin from January 2010, even though they may have been employed in the business before that date.

Redundancy – Notice on Termination

For a redundancy to be genuine there are some specific requirements which you need to stick to, specifically a consultation process. This is to try and encourage a positive relationship with the employee despite their imminent departure, but may also be necessary to comply with the *Fair Work Act 2009*, as awards and registered agreements require consultation with the employee before ending their employment. You must notify the employees of the proposed change to their employment, invite them to a meeting to further discuss the matter and take any suggestions the employee might offer to keep their job into consideration before making a final decision. As part of the consultation process you must offer the employee any vacant job within the business or an associated entity that the employee can reasonably do. If ending employment because of redundancy, you need to give the employee written notice of the day of termination. An employer is required to give the employee a certain amount of notice, depending on how long the employee has been employed in the business. The employee can either work during the notice period or alternatively the employer must make payment of the notice in lieu, which is to be included in their final pay as well as any redundancy pay owing. Notice is paid at the employee's full pay rate as if they had worked the minimum notice period, so the notice can include incentive-based payments and bonuses, loadings, allowances and overtime or penalty rates. The minimum notice period in the NES is based on how many years your permanent employee has worked in the business continuously (continuous service).

Period of employment.	Minimum notice period.
Less than one year	One week
One – three years	Two weeks
Three – five years	Three weeks
Over five years	Four weeks

You should take note at this point that if particular agreement or contract with an employee stipulates a longer notice period, then that is the notice period which needs to be applied. On top of this, it is important to know that if an employee becoming redundant is over 45 years old and has worked within your business for at least two years, they are generally entitled to an extra week's notice, depending on the applicable award or registered agreement.

Who Does Not Receive Redundancy Pay?

Not all employees who are made redundant are entitled to redundancy pay. In some instances, redundancy payment is not necessary due to the nature of the employee's employment arrangement or type. Instances of employment ending where redundancy payment is not required are outlined below:

- Termination of employees whose period of continuous service with the employer is less than 12 months
- employees terminated because of serious misconduct
- employees employed for a specific period of time or for the duration of a project or season
- termination of trainees engaged only for the length of the training agreement
- termination of casual employees
- termination of apprentices
- employees of a small business (depending on the circumstances)

Abandonment of Employment

It is considered abandonment of employment when the employee does not:

- come to work for an unreasonable length of time
- have a reasonable excuse
- speak to their employer about being away.

Any of these behaviours for 3 consecutive work shifts is considered abandonment of employment

Unfair Dismissal or Termination

When considering whether a dismissal is unfair, the Fair Work Commission will assess whether it is “harsh, unjust or unreasonable”. What is harsh, unjust or unreasonable will depend on the circumstances of each case. In most cases, it is accepted that an employer must follow a procedurally fair process prior to terminating the employee. This process will include reasons for the proposed dismissal as well as an opportunity for the employee to respond. This is because both the reason for the dismissal and the process adopted in coming to the decision to dismiss will be considered in determining whether a dismissal was a fair one.

An employee has been dismissed if the employee’s employment is terminated by the employer, or if the employee resigns because they were forced to do so because of the conduct of the employer (known as constructive dismissal).

A person has been unfairly dismissed when the Fair Work Commission is satisfied that:

- the dismissal was harsh, unjust or unreasonable
- the dismissal was not a case of genuine redundancy
- where the employer is a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have:

- completed the minimum employment period
- are covered by a Modern Award