

Termination of Employment:

*A handbook
for your business*



Australian Business
Lawyers & Advisors

2ND EDITION

UPDATED FEBRUARY 2011

RRP \$45.00

A new legal framework

The Fair Work Act took effect on 1 July 2009. As with the previous legislation, the Fair Work Act provides a framework for dealing with claims of unfair dismissal and provides a means by which unfairly dismissed employees may be compensated or reinstated to their former employment. The Fair Work Act expands the unfair dismissal protections to the majority of employing businesses. Even small businesses are affected by these laws and the Fair Work Act includes a special dismissal code for small business. The relevance of the Fair Work Act is not just confined to unfair dismissal claims. The National Employment Standards as contained in the Fair Work Act provide for minimum periods of notice and minimum severance pay conditions where employment is terminated due to redundancy. The Fair Work Act also provides additional protections from termination for prohibited reasons.

Our objective

Employers need to ensure compliance with existing laws and need to be suitably informed in order to assess the potential effects of laws upon their businesses. Termination of employment is a subject that can be confusing and daunting for employers. Dismissal can expose employers to challenges to the fairness of the dismissal and several other legal actions. It is not possible for a single handbook to deal with everything that is relevant to the subject of termination of employment and this handbook does not purport to be comprehensive. However, the handbook is designed to be an information resource in which key issues are explained and illustrated by example. In keeping with this objective, the handbook contains an overview of unfair dismissal and unlawful termination processes under the Fair Work Act and includes practical checklists for redundancy, counselling and discipline, warnings and pre-dismissal checks.

Making business life simpler

Our mission is to make business simpler by using everyday scenarios to explain the workplace law issues which frequently confront business. Our team has a wealth of experience in all areas of workplace law. We use the intellectual property from our strategic practice to provide tangible and practical solutions. By promoting how workplace law is understood, we promote compliance.

Experts make things simple

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1. Reasons for termination of employment

“A contract of employment like any contract can come to an end in a number of ways. Termination can be “by” the employer where an employee “is dismissed” either with notice in accordance with the provisions of the contract or without notice in the event of serious and wilful misconduct. Both the employer and the employee may mutually agree that the contract of employment should come to an end. In other cases the employee may bring about the termination by resigning.”

Allison v Bega Valley Council (1995) 63 IR 68 at 72.

There are various ways in which employment can come to an end. If the employer is responsible for bringing the employment to an end, it can be said that the employment has terminated at the initiative of the employer. If the employee is responsible for bringing the employment to an end, it can be said that the employment has terminated at the initiative of the employee. If the employee is employed for a fixed term, the employment ends at the time agreed by the employer and the employee.

This chapter describes some frequently encountered reasons for termination and some important considerations such as particular responsibilities of the party who initiates the termination.

RESIGNATION

An employee can resign from the employment by giving the employer notice. The period of notice may be stated in a contract; an award; or an enterprise agreement.

Illustrative examples – resignation

Joe’s written contract of employment requires one month’s notice of termination. Joe wishes to resign. To comply with the terms of his employment, Joe must give his employer one month’s notice.

Marie is employed under an enterprise agreement. The agreement requires two weeks notice from an employee with between one year and not more than three years continuous service. Marie has been employed for just over two years. She wishes to resign. Marie will need to give her employer two weeks notice.

If the employee does not resign voluntarily, but is forced to do so because of the employer’s conduct, the termination can be considered to be at the employer’s initiative. This situation is often described as ‘constructive dismissal’.

An employee who is constructively dismissed could gain access to the unfair dismissal jurisdiction - subject to satisfying any other relevant conditions for gaining access to that jurisdiction. Unfair dismissal is covered in chapter 5 of this handbook.

Illustrative example – constructive dismissal

Michael is the quality control manager of a small department store. He has been employed for six years. An audit in Michael's store reveals that an item of stock is missing. There is no record to show the location of the item. Without any further investigation the employer concludes that Michael stole the item. Michael's supervisor tells Michael that, unless he resigns, the police will be called to investigate. The supervisor then gives Michael a letter of resignation previously prepared by the supervisor. Even though he does not really wish to resign, Michael signs the resignation because he feels pressured and thinks that he will be dismissed if he does not sign. In this example, the resignation letter does not represent Michael's free consent. The conduct of Michael's employer is the principal contributing factor leading to the termination of the employment and so the dismissal is at the initiative of Michael's employer.

SUMMARY DISMISSAL (INSTANT DISMISSAL)

If the conduct of the employee is sufficiently serious, an employer can dismiss the employee without giving notice. This right is reserved for very serious circumstances. The employee's conduct demonstrates wilful or deliberate behaviour inconsistent with the continuation of the contract of employment. Examples are: physical violence; fraud; theft; refusal to carry out a lawful and reasonable instruction.

Illustrative example – summary dismissal

Peter has been employed for eight years and occupies a supervisory position. His contract requires four weeks notice of termination. As part of his job, he is responsible for a petty cash float of \$1,000. There is a detailed procedure for the proper use of petty cash. Peter is well aware of that procedure. Despite this, Peter uses the petty cash for his own personal purchases and attempts to conceal his actions from the employer by misleading behaviour and explanations. However, the employer finds out about Peter's conduct and his attempts to conceal the facts. The employer is satisfied that Peter has misappropriated its funds and Peter's employment is terminated without notice. In this example, Peter has conducted himself in a manner contrary to his duty of honesty towards his employer. This dishonest behaviour is inconsistent with the continuation of the employment.



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