**UNFAIR DISMISSAL AND UNLAWFUL TERMINATION**

The Workplace Relations Act 1996 (the Act) prohibits unfair dismissals and unlawful terminations.

**Unfair dismissal** occurs when an employer may have had a valid reason for dismissing a worker but went about it the wrong way.

**Unlawful termination** occurs when an employer dismisses a worker for a prohibited reason under the Act; for example, where a worker is sacked because of his or her ethnic background or gender.

Who is covered by the unfair dismissal and unlawful termination provisions of the Act?

The following employees are covered by the unfair dismissal provisions of the Act:

- those employed in the Commonwealth public sector
- employees in Victoria, the Australian Capital Territory or the Northern Territory
- employees covered by a federal award, certified agreement or Australian Workplace Agreement and employed by a trading, financial or overseas corporation as defined under the Australian Constitution in Western Australia, Tasmania, South Australia, Queensland or New South Wales
- certain employees involved in interstate or overseas commerce such as waterside workers or flight crew officers.

*Employees not covered by the above will most likely have access to State legislation.*

All employees nationally are covered by the unlawful termination provisions of the Act, except those in the categories outlined below.

Who is not covered by the unfair dismissal and unlawful termination provisions of the Act?

All employees are excluded from the unfair dismissal provisions for the first three months of their employment (this period can be varied by written agreement).

In addition, the following categories of employees are not covered by the unfair dismissal or unlawful termination provisions of the Act:

- Employees engaged on contract for a specified period or task, unless a substantial purpose of this form of contract is to avoid an employer’s obligations under the legislation
- Employees on probation where the probationary period is determined in advance and is either no more than three months duration or, if longer than three months, is reasonable given the nature of the employment
- Casuals, unless engaged by a particular employer for at least 12 months
- Trainees under the National Training Wage Award or approved traineeship agreements and apprentices where the employment is limited to the duration of the traineeships or apprenticeship
- Employees not covered by a federal award or agreement and earning more than $90,400 (total remuneration package). This amount is indexed and varied on 1 July each year.
Having a valid reason for the termination

Capacity and Conduct
The lack of ability to do the job, or failure to observe proper conduct, can be valid reasons for dismissal if procedural fairness is observed. An employee must have the necessary skills, knowledge and qualifications to do the job and be prepared to behave in an appropriate manner—to follow instructions, not intentionally harm the employer’s business and use skill and care while working.

Operational Requirements
Dismissal of an employee because of the operational requirements of the business usually occurs because there is no longer any work for the employee. This situation, known as redundancy, usually arises because of circumstances such as the introduction of technological change, economic downturns, company mergers, takeovers or restructuring.
When making employees redundant, an employer should ensure that he or she follows the redundancy procedures in the award or agreement that applies to their business.

Procedural fairness
Procedural fairness is an important issue, and the Commission will have regard to whether or not an employee has been afforded a "fair go" when it is considering an unfair dismissal claim. Procedural fairness relates to the process leading up to the dismissal of an employee.

Notification
In handling unfair dismissal cases, the Commission will not only consider whether the employer had a valid reason for dismissing the employee but also whether the employee was informed of it.

• Therefore it is good business practice to give the employee the reason(s) in writing for termination and keep a copy for your records.

Opportunity to respond
Giving the employee the opportunity to respond to the reasons given for dismissal provides fairness to employees who face losing their jobs. It is particularly important if the reason is the employee’s conduct or work performance. It is also good business practice to keep a written record of the fact that the employee was given a chance to respond, and record the nature of any response.

Warnings
There is no set number of warnings that must be given to an employee about unsatisfactory performance or conduct. An unfair dismissal claim based on procedural fairness might not happen if the employer gives the employee at least one warning of dismissal. This warning should:

• Clearly identify the problem and indicate what changes are expected
• State that dismissal might occur if the problem continues
• Set time in the near future to review the employee’s performance or conduct
• Specify a time for improvement and also make clear that dismissal could still occur in the review period if the employee’s performance is unacceptable.

A copy of a written warning is the best way to demonstrate that this procedure has been followed. Ideally this should be signed by the employee to acknowledge receipt.
An employer might offer an employee the opportunity to have a representative, such as a union or workplace representative, in attendance at any counselling session.

- This might be especially important if the employee has any language or literacy difficulties.

**What are employees entitled to when their employment is terminated?**

**Notice requirements - payments**

The Act requires employers to give a minimum period of notice of termination to employees, or pay in lieu.

- The period of notice is increased by one week if the employee is aged more than 45 years and has more than two years of continuous service with the employer.

<table>
<thead>
<tr>
<th>Period of continuous service</th>
<th>Period of Notice</th>
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<tbody>
<tr>
<td>Not more than 1 year</td>
<td>at least 1 week</td>
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<tr>
<td>More than 1 year but not more than 3 years</td>
<td>at least 2 weeks</td>
</tr>
<tr>
<td>More than 3 years but not more than 5 years</td>
<td>at least 3 weeks</td>
</tr>
<tr>
<td>More than 5 years</td>
<td>at least 4 weeks</td>
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</tbody>
</table>

If an employer provides pay in lieu of notice the amount must be at least equal to the amount that would have been paid to the employee if employment had continued during the notice period.

These notice requirements do not apply to the categories of employees excluded from the unfair dismissal and unlawful termination provisions (listed earlier on page 1). In addition, they do not apply to:

- Casual employees (whether short or long term)
- Daily hire employees
- Weekly hire employees performing work in, or in connection with the meat industry, whose term is determined solely by seasonal factors.

**Notice requirements for Victorian employees**

Victorian employees are required to give their employers notice based on the period of notice required by the relevant employment agreement or other contract of employment. If this is not applicable, a period of notice equal to the employees usual pay period; i.e. if paid weekly, one week's notice, if paid fortnightly, two week's notice.

**Calculating continuous service**

The following actions and events must be disregarded when calculating an employee’s period of continuous service:

- A termination, suspension, stand down or other interruption imposed by the employer to avoid the obligation under the legislation to give notice
- Any authorised absence on leave
- Temporary absence due to injury or ill health, where the employee meets any award or agreement requirements to notify the employer and provides a reason for the absence, or provides a medical certificate within 24 hours, or longer period, that is reasonable in the circumstances.
- Absence due to protected industrial action while negotiating a formal federal agreement—unless the Commission has determined that the absence did constitute a break in continuity of service
- Any other absence, unless the employer has given the employee written notice within 14 days that the employer will take an absence to break the employee's continuity of service with the employer.
**Severance pay**

In addition to notice or pay in lieu of notice, many awards and agreements contain provisions requiring employers to pay severance pay for termination of employment in redundancy situations. It compensates employees for the loss of their jobs. The following table shows current community standard severance-pay provisions.

<table>
<thead>
<tr>
<th>Period of continuous service</th>
<th>Severance Pay*</th>
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<tbody>
<tr>
<td>1 year or less</td>
<td>Nil</td>
</tr>
<tr>
<td>1 year and up to the completion of 2 years</td>
<td>4 weeks pay</td>
</tr>
<tr>
<td>2 years and up to the completion of 3 years</td>
<td>6 weeks pay</td>
</tr>
<tr>
<td>3 years and up to the completion of 4 years</td>
<td>7 weeks pay</td>
</tr>
<tr>
<td>4 years and over</td>
<td>8 weeks pay</td>
</tr>
</tbody>
</table>

*ordinary time rate of pay

You should check the provisions in the award or agreement that applies to your business.

**Serious misconduct**

Notice or pay in lieu of notice is not required in cases of serious employee misconduct. This is generally understood to mean **conduct of such a nature that it would be unreasonable to expect the employer to continue with the employment** during the notice period that would otherwise be required.

Dismissal without notice is a very serious step for an employer to take. Under common law, dismissal without notice is only justified if misconduct is so serious that it shows that employees do not intend to fulfil their part of the employment contract. This type of dismissal is commonly known as ‘summary dismissal’.

Under the Act, serious misconduct includes, but is not limited to:

- Wilful or deliberate behaviour inconsistent with continuation of the contract of employment
- Conduct that creates an imminent and serious risk to the health or safety of any person, or the reputation, viability or profitability of the employer’s business
- Theft, fraud, assault, intoxication, or refusal to carry out a lawful and reasonable instruction consistent with the employee’s contract of employment (unless the employee can show that in the circumstances the conduct did not make employment in the notice period unreasonable).

**Publications**

You can purchase a copy of *Hiring and Firing: Are You Complying* for $26 from the Office of Workplace Services of the Department of Employment and Workplace Relations.