Terminating Employment

Introduction

redundancy or dismissal - it is extremely important that the separation is handled carefully and professionally. If the employee is being dismissed it is important to follow a fair dismissal procedure. This helps minimise any risks of legal action, protect your can also help to keep good workplace morale in difficult times.

Regardless of the reason your employee is leaving - resignation,

reputation as an employer and the reputation of the business, and



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employee needs to be dismissed. If the code is followed then the dismissal will be taken to be fair. The Code provides a checklist to help you assess and record your reasons for dismissing an

Small Business Fair Dismissal Code

employee and to help you to be sure that you have followed the Code. What to pay employees at the end of ongoing employment You may need to pay any or all of the following

The Small Business Fair Dismissal Code applies to small business employers with less than 15

employees. The Code is not compulsory but it is highly recommended that you follow the Code if an

• Annual Leave Loading • Long Service Leave • Payment in lieu of a Notice Period • Payment for work performed until time of termination

RESOURCES AND REFERENCES 4 The Small Business Fair Dismissal Code- PDF

Fair Work Ombudsman fact sheet **Termination of employment** - PDF Workplace Info - A guide to complying with the Fair Dismissal Code - Website

Accrued Annual Leave

• <u>Superannuation</u>

- **Unfair Dismissal** A dismissal is seen as unfair when there is no valid reason for dismissal, the process used by the

employer to terminate the employee was harsh, unjust or unreasonable, or the employee was not

Requirements and procedures for lodging and defending unfair dismissal actions can be found on the Fair Work Commission web site or WA Industrial Relations Commission website. There is

given a 'fair go'. A dismissal is also unfair if the dismissal was not in accordance with the **Small** Business Fair Dismissal Code and the dismissal was not a case of Genuine Redundancy. The federal industrial laws and Western Australian state industrial laws have procedures which allow employees to bring an action for unfair dismissal if they believe they were unfairly dismissed.

also a WA specific fact sheet in the resource section below for more information about Western

As of 1 July 2009, employees can make a claim for unfair dismissal regardless of the number of

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Not all employees are able to make an unfair dismissal claim. See the section Who is not eligible to make an unfair dismissal application? In the Fair Work Ombudsman fact sheet 'Termination of employment '.

Australia's unfair dismissal laws.

employees engaged in the business.

12 months.

• Was there a valid reason for the dismissal?

• Was the person told the reason for the dismissal?

• Was the person given any warnings about their performance?

• Was the person given a chance to respond to the allegation(s)?

months.

exceptional circumstances.

NOTE Minimum employment periods apply before employees are entitled to make a claim for unfair dismissal. • For businesses with less than 15 employees, the minimum employment period is

• For businesses with 15 employees or more, the minimum employment period is 6

Unfair dismissal claims must be lodged with the Fair Work Commission within 21 days of the date of

the termination. This time limit can be extended by the Fair Work Commission if there are

The Fair Work Commission will look at the following when considering claims:

• Did the employer follow the **Small Business Fair Dismissal Code** (if the employer is a small business)? • Whether the size of the employer's business or the lack of a dedicated HR person might have impacted the dismissal procedures followed. **NOTE**

• Was the employee allowed to have a support person present at any discussions about dismissal?

• maternity leave or other parental leave; • temporary absence from work for a voluntary emergency management activity, if reasonable; or • trade union membership or activities or non-membership of a trade union or acting as an employee representative.

It is important that you keep a record of all warnings, complaints and processes that have led up to

• 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;

• temporary absence from work because of illness or injury (up to three months if not on paid sick

Termination of employment for one or more of the following reasons is unlawful:

discriminatory reason alleged by the employee was not a reason for the dismissal. This means that the employer will have to prove that there were other reasons for the termination which did not

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leave);

an employee's dismissal so you can provide evidence of the 'other reasons' for termination and defend yourself against any claims. See the template below for an example of how to record warnings.

include the unlawful reason.

TOP Genuine redundancy

Redundancies usually occur in farming where a farmer is retiring, cutting staff to save costs or

A job becomes redundant when an employer decides that the job the employee has been doing is

no longer needed to be done by anyone or that fewer employees are needed to do that type of job

You cannot make someone redundant because they are not good at their job. The selection of employees for redundancy should be fair and employees should be consulted and given an opportunity to have their say. Failure to consult can result in a claim for unfair dismissal and is also a breach of the award.

The federal industrial laws require you to consider whether the employee can be redeployed elsewhere in your business or an associated entity, rather than being made redundant. If you do

termination

Not more than 1 year

At least 1 year but less than 2 years

At least 2 years but less than 3 years

At least 3 years but less than 4 years

At least 4 years but less than 5 years

At least 5 years but less than 6 years

At least 8 years but less than 9 years

At least 9 years but less than 10 years

At least 10 years

At least 6 years but less than 7 years 11 weeks

ask for proof of attendance at a job interview if employees take more than one day off during the notice period. Also, if employees are transferred to lower paid duties because of redundancy, they are still entitled to receive the same period of notice before transferring to the lower duties. Employers can choose to pay the employee the difference between the higher and lower duties for the notice period.

structural or similar reasons must notify the Department of Human Services, using the appropriate

If any of the employees are members of a union, the employer must also notify the union and enter

into discussions about ways to reduce the impact of termination on the employees and the number

The Pastoral Award 2020 (clause 26), Horticultural Award 2020 (clause 28) and the

Cotton Ginning Award 2020 (clause 29) also all require the employer to consult with

employees and any unions whenever they decide to introduce major changes to the

All employers who dismiss 15 or more employees at one time for economic, technological,

form, as soon as possible after making the decision and before dismissing any employees.

of employees whose employment is being terminated.

IT'S THE LAW

workplace.

fact sheet for more information

RESOURCES AND REFERENCES

notice.

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Notice Periods

Employer notice

employers.

REMEMBER

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notice is given

Not more than 1 year

minimum notice period.

The Pastoral Award 2020, the Horticulture Award 2020 and the Cotton Ginning Award 2020 provide

Employees covered by these awards who have been given notice of termination due to redundancy

are entitled to one day's paid leave per week of the notice period to look for work. Employers can

redundancy entitlements in addition to the National Employment Standards.

needs to be calculated so that the notice period can be worked out. If you need help calculating the notice period for an employee, you can use the notice and redundancy calculator found on the Fair Work Ombudsman web site.

Once you have given notice of termination to an employee who is covered by an

Employee's period of continuous service with the employer at the end of the day

award, they must be allowed up to one day's time off without loss of pay to look for

other employment. The time off can be taken when it is convenient for the employee,

Continuous service is the time an employee has spent working for an employer without a break, and

More than 5 years If the employee is over 45 years old and has completed at least two years of continuous service with

notice.

NOTE

leave.

Employee notice

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Fair Work Ombudsman notice and redundancy calculator **<u>Letter of Termination with guidelines</u>** – Word Doc Advice of Employee Warning template - Word Doc

Managing underperformance

RESOURCES AND REFERENCES

You must inform the employee that they are at risk of being dismissed and let them know why they are at risk. You must also give them an opportunity to respond to any allegations and improve on their workplace performance. You should keep a record of all assistance offered to the employee and a copy of all written warnings dated and signed by both parties where possible. Below is a sample dismissal process you can follow when managing an underperforming employee. You should also offer an employee the chance to have a support person attend any counselling session with them. This is especially important if the employee has any language or learning

• You must give the employee a fair opportunity to respond to any allegations of poor performance • You must allow the employee to have a support person present at any discipline interview.

difficulties, or for particularly young or old employees.

Sample dismissal process • You must clearly warn the employee (preferably in writing) that they are not doing the job properly and state that dismissal might occur if performance does not improve. Use the warning letter template

• You must provide the employee with a reasonable amount of time to improve his or her

You must give an employee a reason why they are at risk of being dismissed and an

performance or conduct. • You should offer to provide the employee with any training or opportunity to develop his or her skills and provide feedback about their performance or conduct. You should keep any records of warning(s) made to the employee and of any discussions on how his

or her conduct or performance could be improved. Use the <u>record of employee warning template</u>

RESOURCES AND REFERENCES

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Discipline interview letter -Word Doc

Also relevant

or misconduct.

opportunity to improve.

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A Redundancy may also be regarded as an unfair dismissal if the employer could have redeployed the employee elsewhere in the business or an associated entity. Unlawful dismissal occurs when an employer dismisses an employee for an unlawful reason or fails to provide the legally required **Minimum Notice** of termination.

If an employee makes a claim for unlawful dismissal, the employer has to prove that the

RESOURCES AND REFERENCES

introducing new machinery or technology.

Advice of employee warning - Word Doc

because of the operational requirements of the employer's business.

Employee's period of continuous service with the employer on

Redundancy must be *genuine* or it will be considered to be an <u>Unfair Dismissal</u>

WA specific Fact Sheet – Word Doc

Fair Work Ombudsman fact sheet **Ending Employment** - PDF

Fair Work Commission – resources for unfair dismissal - Website

not do this the affected employees can make a claim for unfair dismissal. The National Employment standards provide for Redundancy pay based on years of continuous service with an employer. Redundancy pay is calculated on the employee's base rate of pay for ordinary hours of work. See the table below to determine the redundancy pay period based on an employee's period of continuous service.

Redundancy pay

period

1 week

4 weeks

6 weeks

7 weeks

8 weeks

10 weeks

14 weeks

16 weeks

12 weeks

At least 7 years but less than 8 years 13 weeks

If an employer does not comply with these terms, the person dismissed may be able to make an unfair dismissal claim. The employer may also be liable for a breach of the award. If you are making employees redundant they are entitled to the same notice of termination as they would receive for any other termination of employment. Employees covered by the Pastoral Award

2020, the Horticulture Award 2020 and the Cotton Ginning Award 2020 who elect to leave during the

See *Notice Periods* below and the Fair Work Ombudsman Notice of termination and redundancy

Redundancy Information for Employers – Department of Human Services Website

You can choose to pay out the notice period when you are terminating an employee.

This can be a good idea if your relationship with the employee has broken down. You

must pay the amount the employee would have earned, had they worked the

Notice of termination applies to all employers and is provided for in the **National Employment**

Standards, regardless of whether they are national system employers or non-national system

You must give your employee written notice of their termination and this can be delivered in person

or mailed to their home address. See the termination letter samples and template in the resource

section below. Notice periods are calculated according to the length of the employee's continuous

service. These periods are a minimum only and longer notice periods can be given.

but only after consultation with the employer.

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Notice

period

1 week

4 weeks

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Notice to the Department of Human Services of proposed dismissal- Word Doc

Fair Work Ombudsman Notice of termination and redundancy fact sheet- PDF

notice period do not lose their redundancy pay entitlement but are not entitled to pay in lieu of

More than 1 year but not more than 3 years 2 weeks More than 3 years but not more than 5 years 3 weeks

the employer at the end of the day the notice is given, the employee is entitled to an extra week's

have to provide any notice of termination. However, you still have to pay the

Under the NES, employees are only required to give notice if it is a term of an award or enterprise

agreement. The Pastoral Award 2020, the Horticulture Award 2020 and the Cotton Ginning Award

2020 all provide that employees must give the same amount of notice as employers when resigning

except for the additional week of notice based on the age of the employee and length of service. If

wages from their termination payment, if the employee is over 18 years of age. See the Notice of

Under the **Small Business Fair Dismissal Code**, it is fair for an employer to dismiss an employee

conduct is sufficiently serious to justify immediate dismissal. This is called summary or instant

without notice or warning when the employer believes on reasonable grounds that the employee's

Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and

safety procedures. For a dismissal to be deemed fair it is enough that an allegation of theft, fraud or

violence be reported to the police. Obviously, you need to have reasonable grounds for making any

Termination and Redundancy Pay fact sheet and the relevant award for more information.

an employee doesn't give you the correct amount of notice you are allowed to deduct up to a weeks

Fair Work Ombudsman fact sheet – Notice of termination and redundancy pay - PDF

When an employee is terminated on the grounds of **serious misconduct**, you do not

employee all outstanding entitlements such as payment for time worked or annual

If an employee is not involved in serious misconduct, then there are a number of steps that must be followed before they are dismissed.

such claims or reports.

dismissal.

Advice and record of employee warning template - Word Doc Summary or immediate dismissal letter - Word Doc

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Employers