

GENERAL TERMINATION ADVICE



Last month we touched on recruitment. Some key takeaways were:

- ▶ Recruitment of skilled and effective staff is something that many businesses struggle with. Recruitment isn't easy. And the worst part.... Even skilled professionals make recruitment mistakes. Why? People are people. In a job interview people tell you what you want to hear.
- ▶ Setting up a good, sturdy recruitment process can alleviate some errors in the recruitment process

THIS MONTH

This month we are dealing with the other side - termination. I once heard that employing staff is just like flying an aeroplane - the most dangerous time is on take off and landing. The part in the middle is generally free of problems. This is the same for staff - getting a good recruitment process, finding the right person, in the right role at the right time and setting clear expectations from the start can alleviate most issues.

However, if you do need to terminate a staff member, this guide can provide some key information. Just so you don't sue us if you end up in a conciliation hearing or in front of the commission... here is our disclaimer for this information: While all care has been taken in the preparation of this material, no responsibility is accepted by HR Dynamics for any errors, omissions or inaccuracies. The material provided in this resource has been prepared to provide general information only. It is not intended to be relied upon or be a substitute for legal advice. No responsibility can be accepted by the author(s) for any known or unknown consequences that may result from reliance on any information provided in this publication.



Introduction

Organisations are obliged to meet certain requirements in respect to termination of an employment contract. These requirements are prescribed by relevant legislation and community expectations, and relate to notification, notice periods, process and reasoning. When Fair Work Australia considers whether a dismissal is harsh, unjust or unreasonable, they take into account a range of factors including:

- if there's a valid reason for the dismissal relating to the employee's conduct or capacity
- if the employee is notified of the reason and given an opportunity to respond
- if the dismissal relates to unsatisfactory performance, then whether the employee is warned about it before the dismissal.

Organisations should ensure that all employees are made aware of and fully understand their expectations in regard to work performance and standards of behaviour.

Where employees fail to meet these expectations or standards, they should be provided with every opportunity to improve.

In any dismissal cases, organisations should ensure that all entitlements are met and employees are treated

fairly, equitably and with dignity during the investigative process and possible termination.

The responsibility for dismissal action should remain with Senior Management. Consultation with a professional Human Resources Consultant is advised prior to any dismissal action being taken.

Definitions

Dismissal means a cessation of the employee's contract of employment at the employer's initiative. It is for genuine reasons, usually relating to unacceptable performance or behaviour, and is always subject to due process being followed.

Summary Dismissal means a dismissal that, due to the nature of the issue, is immediate and not associated with a notice period.

Notice period means the amount of time required to be given in advance of a dismissal taking effect. In cases of dismissal, it is usual practice to make payment in lieu of the notice period being worked.

Fraud is criminal deception, dishonest act or misrepresentation by the employee to gain unjust advantage.

Responsibilities

It is the responsibility of the employer to ensure that:

- all dismissal cases follow procedural fairness and the employee is given every opportunity to present their explanation (natural justice principles);
- the employee is treated fairly during any investigation and subsequent dismissal;
- all cases of dismissal follow full and detailed investigation, and that decisions made are based on all relevant facts;
- all required documentation is completed to ensure the employee receives all correct entitlements;



Consideration of a Dismissal

If an employer feels that dismissal of an employee may be necessary as a result of performance or behavioural issues, they should review the situation to ensure that all facts have been considered and the employee has been provided with procedural fairness.

In general terms Managers should ensure that they:

1. establish performance criteria - ie: set clear expectations from the beginning;
2. inform the employee of any poor performance - a staff member cannot improve if they don't know what they are doing is incorrect;
3. invite the employee to respond;
4. ensure that in any warning meetings the employee has been offered the opportunity to have a support person present (this can be anyone that the employee chooses). The support person is merely there for support and does not take part in the meeting in any way;
5. agree on a plan to remedy the poor performance, provide the employee with an opportunity to improve (specify the timeframe) - generally a performance plan is a good document to put in place;
6. identify the consequences of continued poor performance - ie: you must tell the employee that failure to improve may lead to further disciplinary action, up to and including termination of employment;
7. document warning meetings appropriately;
8. if the poor performance continues and you have taken all steps, issued warnings, offered training and

support, that you terminate with appropriate notice (or pay in lieu), plus accrued entitlements.

An employer can either: let the employee work through their notice period, or pay it out to them (also known as pay in lieu of notice). If the employer pays out the notice, the amount paid to the employee must equal the full amount the employee would have been paid if they worked until the end of the notice period. This includes: incentive-based payments and bonuses, loadings, monetary allowances, overtime, penalty rates any other separately identifiable amounts.

Fair Work Notice Periods:

Period of continuous service	Minimum notice period
▶ Less than 1 year	1 week
▶ 1-3 years	2 weeks
▶ 3-5 years	3 weeks
▶ over 5 years	4 weeks

An employee has to get an extra week of notice if they're over 45 years old and have worked for the employer for at least 2 years.

Unfair Dismissal

When is dismissal unfair?

When FWA considers whether a dismissal is harsh, unjust or unreasonable, they take into account a range of factors including:

- if there's a valid reason for the dismissal relating to the employee's conduct or capacity
- if the employee is notified of the reason and given an opportunity to respond
- any unreasonable refusal by the employer to allow the employee to have a support person present at any discussions relating to dismissal

- if the dismissal relates to unsatisfactory performance, whether the employee is warned about this unsatisfactory performance before the dismissal
- the impact of the size of the employer's enterprise on the dismissal process, including the absence of dedicated human resource management specialists or expertise
- any other factors FWA considers relevant.



Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code applies to small business employers. A small business is defined as any business with fewer than 15 employees. This is calculated on a simple headcount of all employees who are employed on a regular and systematic basis.

There is a simple Fair Dismissal Code checklist for small business employers to follow to ensure that they do not unfairly dismiss an employee.

Under the Fair Dismissal Code, employees of small businesses cannot make a claim for unfair dismissal in the first 12 months after being hired. Employees of larger businesses are able to make a claim for unfair dismissal at 6 months.

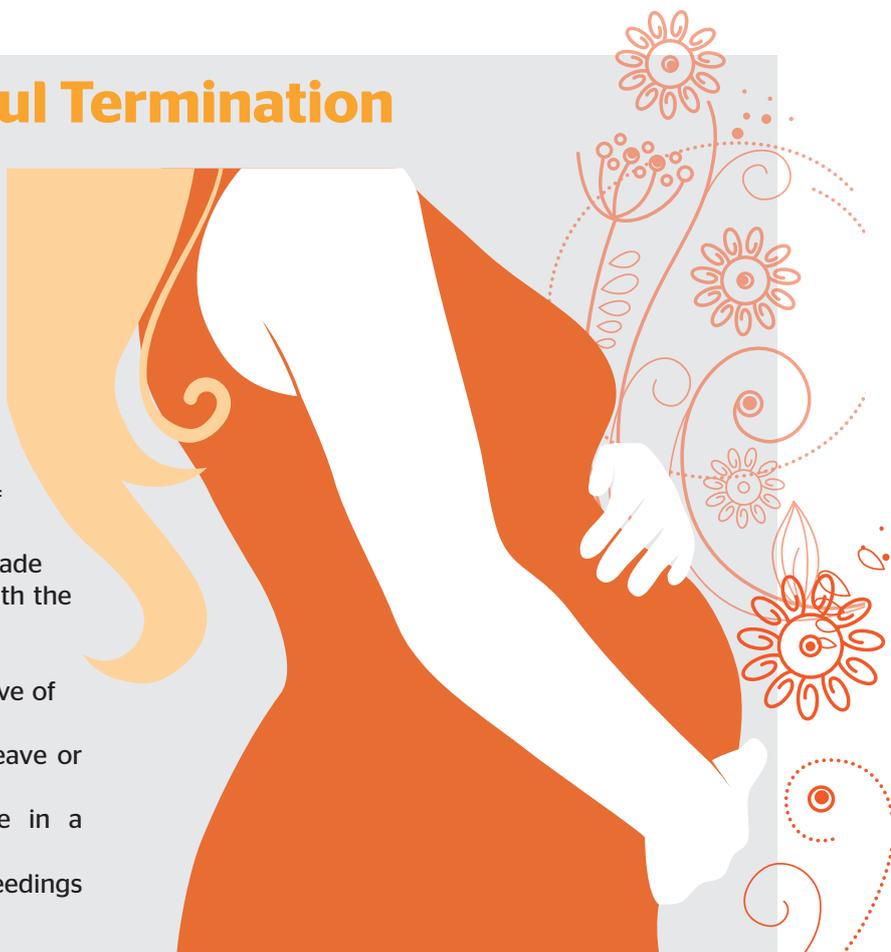
The Small Business Fair Dismissal Code and Checklist is available from the Fair Work Ombudsman's website.



Unlawful Termination

It's illegal for an employer to dismiss an employee for a number of reasons. These reasons include:

- a person's 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
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.



Conduct which may warrant a dismissal

Misbehaviour

A repeated act of practical joking or skylarking where an employee has received previous warnings is sufficient reason for dismissal, depending on the severity of misdemeanour. The criteria are whether or not such behaviour could endanger fellow employees, damage organisation property or adversely affect the production of products and services.

Disobedience

An employee has an obligation to follow all fair, lawful and reasonable instructions. If the employee does not do so he or she may be dismissed. An isolated act of disobedience may not be sufficient to justify summary termination, but a calculated and persistent course of disobedience is never trivial. Where an employee is instructed to do something which varies significantly from the character and capacity in which the employee was hired or where a reasonable apprehension of danger to the employee or others exists, the employee cannot be bound to obey such orders. In such cases it is essential that the facts are beyond doubt.

Dishonesty

An employee can be summarily dismissed for taking an employer's property without authority or for stealing money. It is recommended that the Manager contacts Police, who may take action independent of the employer.

Intoxication

Employers must be very careful in deciding whether or not to dismiss an employee on this ground. Unless it was a gross case where the employee is obviously incapable of performing his or her duties, it is better to send the employee home and investigate.

Negligence

Where an employee's carelessness results in damage to

the employer's property, product and/or injury to other employees, the employer has the right to exercise summary dismissal. Except in gross cases, the test is not so much the extent of the damage or injury, but the nature of the act. Ignoring work rules or safety instructions, particularly where there is a past history of negligence, would justify dismissal. A trivial isolated act of forgetfulness would not.

Fighting, Insubordination, Abuse

All of these reasons may or may not be grounds for summary dismissal and the employer should proceed cautiously until all facts are known. These issues almost invariably involve a large emotional content and unless it can be shown that the act was malicious or calculated, it is better to give a warning and record it than to summarily dismiss. Each case is a question of fact.

Absenteeism and Tardiness

Unless it can be proved that an employee was untruthful in explaining absence or lateness, it is better to issue a warning and place it on the employee's file. Where it can be established that absence or lateness is habitual, an act of summary dismissal can be carried out.

Offences outside the Workplace

In some situations, offences committed outside the workplace may warrant dismissal. A general rule is that the employee's behaviour must be incompatible with a faithful discharge of his or her duty to an employer. Examples would be where an employee is convicted for an offence and the penalty frustrates his or her ability to fulfil the contract of employment, or where the employer has a reasonable apprehension that the employee might commit a criminal act in the employment situation.

DISMISSAL CHECKLIST

Question 1

Is the person you intend dismissing actually an employee? The termination of an independent contractor is different.

Question 2

Does the person conducting the investigation and potential dismissal have the delegated authority to do so?

Question 3

Is there a "valid reason" for dismissing?

- a) If the dismissal is due to "serious and willful misconduct" would an independent person agree that the matter/behaviour in question really is serious and/or willful?

- b) Is the dismissal directly or indirectly as a result of the employee's age, gender, race, religious beliefs or other like reasons? If so, STOP.
- c) Is the dismissal due to absence from work as a result of injury or illness? If so, you should contact your employer association or legal representative for advice as an employee in this circumstance may be protected by several pieces of overriding legislation, including federal unlawful dismissal provisions, commonwealth, state or territory workers compensation laws, state or territory anti-discrimination laws, or federal disability discrimination laws.

Question 4

Could an independent, impartial person be satisfied that you have applied reasonable procedural fairness?

a) In the case of instant or summary dismissal:

- Are you able to prove that the person was aware of and understood the consequence so the behaviour or actions for which they are being dismissed?
- Has the employee been given reasonable time to present a defence to the allegation or show just cause as to why they should not be terminated?
- Has the allegation been put to the person in a confidential manner with the option to have an independent witness present?
- Has there been a thorough and documented investigation into the incident, including written statements from witnesses, if appropriate?

b) In the case of dismissal other than instant or

summary, the same test as outlined above applies in addition to:

- Has the employee received at least two written warnings?
- Does at least the second letter clearly advise the potential outcome of failure to comply with the required instruction; do they know they may be dismissed if they don't improve?
- Have the warnings being issued in a timely way and are still current?
- Does the last warning say that the next step may include termination of employment?
- Was the employee given the option to have an independent witness present at each and all interviews relating to their behaviour/performance?
- Is there thorough and accurate documentation relating to all interviews?
- Does the employee have a Position Description that clearly reflects the organisation's expectations?

Good staff are the foundation of businesses. They should be your most valuable asset. They will be the ones who ensure that you have the systems, products, customer service and functionality to be successful.

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Rebecca Bottomer

A Director of the company Rebecca has 13 years experience in human resource management complemented by a degree in Management & Human Resources from James Cook University. Prior to HR Dynamics Rebecca worked in HR leadership roles for large international organisations in both the hospitality and engineering sectors. Rebecca has worked in remote areas and enjoys the challenges of complex organisations. Rebecca has worked with a number of local Government organisations in Far North Queensland and Cape York Peninsula and is experienced in restructuring and ensuring long-term organisational sustainability.



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Phoebe Kitto

A Director of the company Phoebe has 15 years experience in human resource management. Phoebe is currently the President of the Port Douglas Chamber of Commerce. She has a strong human resources background in a range of industries. Prior to Human Resource Dynamics Phoebe was the Human Resources Manager at Sheraton Mirage Port Douglas for seven years and a lead human resource auditor in Australia for Starwood Hotels and Resorts. A particular area of interest for Phoebe is in helping those businesses where the management team are tired and stressed and need some one on one assistance to increase motivation and direction to get the business back on track to achieve higher levels of success. Phoebe was awarded the Cairns Chamber of Commerce Port Douglas Business Person of the Year Award in 2012.



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