Australian Government
Office of the Registrar of Indigenous Corporations

AGS

Termination of employment

A guide for ORIC corporations covered by the federal industrial relations system

Small business employers

This guide will help you to understand the issues you will need to deal with if you are thinking of dismissing an employee. It will also help you to understand the employee's entitlements.

The law in this area is quite complex, and it is different depending on whether your corporation is, or is not, a Small Business Employer for the purposes of the Fair Work Act.

Because termination of employment is a difficult area, you may wish to consider obtaining legal advice.

This guide is for Small Business Employers only. The concept of 'Small Business Employer' is explained below.

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Introduction

If you are going to dismiss one of your employees, you need to do it:

- fairly
- without breaching the legislation that applies
- without breaching your contract of employment with the employee.

The legislation

The relevant legislation will generally be the federal Fair Work Act and the federal anti-discrimination legislation. But State anti-discrimination legislation may also be relevant.

In relation to the legislation the main things you need to be concerned about when dismissing an employee are:

- unfair dismissal
- unlawful termination.

The contract of employment

Generally speaking, you will need to make sure that you have a right to dismiss the employee under the contract of employment with the employee.

If you don't have that right, you run the risk of the employee taking you to court for breach of contract, which could be a very costly exercise for the corporation.

Is your corporation a Small Business Employer?

It is important that you know your employees' rights if you are intending to dismiss them. First you need to know whether your corporation is a Small Business Employer under the Fair Work Act.

An employer is a Small Business Employer, for the purposes of the Fair Work Act, if it employs less than **15 full-time equivalent** employees.

Some examples to help explain this:

- if you only employ 10 people you are a Small Business Employer
- if you employ 20 people and five of those people work full-time hours and the other 15 work half-time hours, this works out to 12.5 full-time equivalent employees and you are a Small Business Employer

- if you employ 20 people and 12 of those people work full-time and the other eight work half-time hours, this works out to 16 full-time equivalent employees and you are not a Small Business Employer.

These rules will change from 1 January 2011. After that date, the question will simply be, 'Do you employ less than 15 people?' The issue of full-time equivalence will no longer be relevant. From 1 January 2011, if you employ less than 15 people, you will be a Small Business Employer.

Why does it matter? What happens if the corporation is a Small Business Employer?

If your corporation is a Small Business Employer, special rules apply to it under the Fair Work Act, especially in the area of unfair dismissal.

Unfair dismissal

Coverage of employees

The main coverage issue here is that an employee who works for a Small Business Employer will only be covered by the federal unfair dismissal laws if the employee has worked for their employer continuously for 12 months or more. Putting this another way, if an employee of a Small Business Employer has not worked for the employer for 12 months continuously, that employee will **not** have access to the unfair dismissal provisions of the Fair Work Act.

It is also important to know that unfair dismissal does not apply in cases of genuine redundancy.

The Small Business Fair Dismissal Code

The next important thing about being a Small Business Employer is that, in relation to employees who have been employed for 12 months or more – the ones who are covered by the unfair dismissal provisions – there are special arrangements about unfair dismissal.

The key point is a dismissal is not unfair if it is done consistently with Small Business Fair Dismissal Code. In essence, the Small Business Fair Dismissal Code sets up a clear way to make sure that the dismissal is not an unfair dismissal.

The Small Business Fair Dismissal Code is set out at Attachment 1 to this guide.

The code is a very short document. A checklist to take you through it is at Attachment 2. The checklist has been prepared by the Fair Work Ombudsman. It is not compulsory to work through the checklist when you are dismissing an employee but it is a very good idea to do so.

You should check for any updates to these documents at: http://www.fairwork.gov.au/Termination-of-employment/Pages/Small-Business-Fair-Dismissal-code.aspx?role=employees

Next steps

If you are a Small Business Employer and you are going to dismiss an employee who has worked for you for 12 months or more, you must carry out the dismissal consistently with the Small Business Fair Dismissal Code.

The essence of the Small Business Fair Dismissal Code is as follows:

- there must be a valid reason for a dismissal based on the employee's conduct or capacity
- you may dismiss an employee without warning but only if they are guilty of serious misconduct
- serious misconduct includes theft, fraud, violence and serious breaches of OHS requirements – but it could be other things
- for any other dismissals, you must not dismiss an employee unless they have been warned about their conduct or work performance, and have been given a reasonable chance to fix it
- you may need to give the employee training so they can fix the problem, or you may need to make sure they know what you expect of them in their job
- the employee can have a support person with them at any discussions leading up to their dismissal
- you need to keep evidence that you have complied with the code in dismissing the employee.

Consequences

If you do not comply with the Small Business Fair Dismissal Code, the employee can bring an unfair dismissal action to Fair Work Australia. If their dismissal is found to be unfair, the employee may be reinstated, or may be given up to six months' pay as compensation for their dismissal.

Other important issues about access to unfair dismissal

The Fair Work Act provides that an employee will only have access to unfair dismissal remedies if one (or more) of the following conditions applies to the employee:

- they are covered by a modern award

- they are covered by an enterprise agreement (or another agreement made under the old Workplace Relations Act), or
- their annual rate of earnings is less than the high income threshold, which is currently $113,800. (This amount will increase from 1 July 2011 and every 1 July after that.)

No right to a redundancy payment under the Fair Work Act

A Small Business Employer is not required to pay a redundancy payment, under the Fair Work Act, where the employee is made redundant, or where the employment is terminated because the employer is insolvent or bankrupt.

The employee may have other entitlements to redundancy payment

Although an employee of a Small Business Employer has no right to a redundancy payment under the Fair Work Act, this is not the end of the matter. The employee may be entitled to a redundancy payment

- under an old State award (via transitional provisions in the modern award that covers them, which operate until 31 December 2014); or
- under their contract of employment.

You will need to work out what State award the employee would have been working under (if they had been employed before 1 January 2010) in order to be able to find out what redundancy arrangements apply to the employee.

We discuss redundancy entitlements under contract later in this guide.

What other rights do employees have in relation to dismissal?

No unlawful termination

As noted above, the unfair dismissal provisions of the Fair Work Act apply in a limited way to Small Business Employers.

Yet the situation is different in relation to the unlawful termination provisions in the Fair Work Act.

The unlawful termination provisions apply to **all** employers who are covered by the Act, from the largest to the smallest. There are no special arrangements for Small Business Employers in relation to unlawful termination under the Fair Work Act.

What is an unlawful termination?

If an employer dismisses an employee for one or more of the following reasons, they may have breached the Fair Work Act and could be subject to a serious penalty for that breach.

Specifically, these reasons are:

- the employee'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
- the employee's temporary absence from work because of illness or injury
- the employee's trade union membership or participation in trade union activities outside working hours, (or, with the employer's consent, during working hours)
- the employee's non-membership of a trade union
- the employee seeking office as, or acting as, a representative of employees
- the employee having filed a complaint, or participating in proceedings against an employer
- the employee's absence from work because of maternity leave or parental leave
- the employee's temporary absence from work to engage in voluntary emergency activity.

There are exceptions to some of these reasons. For example, it would not be unlawful to dismiss an employee with a disability if they are unable to carry out the inherent requirements of their job.

If the reason for dismissing the employee falls into any of the categories set out above, you will need to check very carefully whether you will breach the unlawful termination provisions if you dismiss the employee.

If an employee brings an action claiming unlawful termination, it will be up to the employer to prove that the dismissal was not for one of the reasons set out above.

Notice periods for termination

Under the Fair Work Act, if an employer is going to dismiss an employee, the employer must give the employee a notice in writing that tells the employee that their employment is being terminated and sets out the day on which the employee's employment will finish.

Generally speaking, the employee must be given at least the period of notice set out in the table in section 117 of the Fair Work Act, or they must be paid in lieu of that notice period. That table is as follows.

Period of continuous service	Period of notice
Up to 1 year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks

Further, if the employee is over 45 years old and has completed two years or more of service with the employer at the end of the day on which the notice is given, they are entitled to one extra week of notice.

The notice and redundancy arrangements do not apply where an employee's employment is terminated because of serious misconduct.

The notice and redundancy arrangements do not apply to casual employees, or to employees employed to perform a specified task.

How do you calculate the pay in lieu of notice?

The amount paid to the employee must equal or exceed the total amount the employee would have received if the employment had kept going until the end of the minimum period of notice.

You need to calculate this based on the employee's full rate of pay including all the following:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts.

Right to be paid out for untaken annual leave and long service leave

Under the Fair Work Act, when an employee's employment ends – for any reason – the employee is entitled to be paid for any annual leave credits they had at the time their employment ended.

The employee may also be entitled to be paid out for long service leave credits, even if they have not worked for long enough to be entitled to take long service leave. This will depend on the terms of their long service leave entitlements.

Call the Fair Work Infoline on 13 13 94 if you want help in calculating final pay.

Contractual rights

Employees and employers are entitled to have their contracts honoured. If an employer breaches their contract of employment with an employee, the employee may take the employer to court for breach of contract.

So employers need to make sure that what they are doing in dismissing their employee is allowed for in the contract of employment, and that the dismissal is carried out in the way the contract says it must be carried out. This includes paying the employee any entitlements they may have under the contract.

So, for example, while the employee may have no entitlement to redundancy pay under the Fair Work Act, they may still have an entitlement to redundancy pay because their employment contract says so. The employer will have a legal obligation under the contract to pay the employee their redundancy pay.

Similarly, if the contract spells out all of the grounds on which the employer may terminate the employee's employment, the employment can only be terminated on one of those grounds – and not for some completely different reason not provided for in the contract.