

Performance Management and Termination

A guide for employers

Termination during the qualifying period

The basics

- Employees have a 'qualifying period' that lasts for the first six months of their employment.
- If they are dismissed in this period, they cannot make an unfair dismissal claim.
- Employees who are dismissed during their qualifying period are entitled to one week's notice under the National Employment Standards (NES) but may be entitled to more depending on their specific employment agreement.

Step by step guide

1. Read the employee's contract to determine the date on which they started their employment.
2. Determine whether the employee has been employed for less than 6 months.
3. If the employee has been employed for less than 6 months, write a letter to the employee telling them the following things:
 - a. Their employment has been terminated during the qualifying period.
 - b. They are entitled to one week's notice or in accordance with their employment agreement.
 - c. Whether they will be required to work during their notice period or whether they will be paid instead.
 - d. What their last day of work will be.
4. Give the letter to the employee or deliver it by express post to their address.
5. Pay the employee any accrued entitlements.

Termination with notice

The basics

- Employees are entitled to a period of notice when they are terminated with cause but not for serious misconduct.
- An employee can work during the notice period. Alternatively, the employee can be paid the wages that they would have earned in the notice period and be asked to leave immediately.

Step by step guide

1. Read the employee's contract to see whether there is a clause specifying how much notice an employer must give. If there is, skip to step 4. If there is not, go to step 2.
2. Read the employee's contract to determine the date on which they started their employment.
3. Determine how much notice the employee is entitled to under the NES:
 - a. If the employee has been employed for 1 year or less, they are entitled to 1 weeks' notice;
 - b. If the employee has been employed for more than 1 year but less than 3 years, they are entitled to 2 weeks' notice;

- c. If the employee has been employed for more than 3 years but less than five years, they are entitled to 3 weeks' notice;
 - d. If the employee has been employed for more than 5 years; they are entitled to 4 weeks' notice; and
 - e. If the employee is over 45 years old and has worked for the employer for at least 2 years, they are entitled to an additional 1 weeks' notice in addition to the above.
4. If the employee has been employed for more than 6 months, write a letter to the employee telling them the following things:
 - a. Their employment has been terminated;
 - b. They are entitled to notice in accordance with the NES or their employment agreement;
 - c. Whether they will be required to work during their notice period or whether they will be paid in lieu; and
 - d. What their last day of work will be.
5. Give the letter to the employee or deliver it by express post to their address.
6. Pay the employee any accrued entitlements.

Termination due to poor performance

The basics

- Employees can be terminated for consistently failing to complete their work to the required standard.
- Before underperforming employees are terminated, they must be given an opportunity to improve their performance.

Step by step guide

1. Has the employee consistently produced poor quality work or consistently missed deadlines?
If yes, go to step 2.
2. Give the employee a written notice:
 - a. Stating that their performance has been poor;
 - b. Identifying a number of representative incidents of poor performance;
 - c. Directing the employee to attend a formal counselling meeting at a specified location at a specified time;
 - d. Identifying who else will be at the meeting;
 - e. Identifying what will be discussed at the meeting; and
 - f. Informing the employee that they can bring a support person.
3. At the meeting, you and the employee should together agree on a performance improvement plan that requires the employee to meet certain goals or benchmarks within a certain period of time, and to provide regular reports to you on their progress towards these goals. Ensure that you are providing adequate support to enable the employee to meet the agreed goals.
4. If the performance improvement plan is complied with, discontinue the performance management process.
5. If the performance improvement plan is not met, the employee should be issued with:
 - a. A final formal warning which explains that, if their performance does not improve, their employment contract may be terminated; and
 - b. A written notice requiring them to attend a final formal counselling discussion for a further performance improvement plan.
6. Repeat step 3.
7. If the second performance plan is not met, you can terminate the employee with notice as outlined above.

Termination due to serious misconduct

The basics

- If employees engage in serious misconduct, they may be dismissed without notice.
- Serious misconduct could include:
 - Illegal or unlawful behaviour;
 - Behaviour that creates a serious risk to the health and safety of the employee, colleagues and clients;
 - Harassment, bullying or intimidation of colleagues and clients; or
 - Failure to follow a lawful and reasonable direction given by the employer (if an objectively serious direction involving issues such as the above).
- No employee should be terminated for serious misconduct unless a workplace investigation has been carried out.

Step by step guide

1. Identify the alleged instances of serious misconduct.
2. Contact an external workplace investigator or instruct a senior employee without an interest in the matter to carry out an investigation into the alleged instances of serious misconduct.
3. Give the employee a written notice:
 - a. Stating that they are alleged to have engaged in serious misconduct;
 - b. Briefly outlining the allegations that have been made against him or her, including all relevant details and evidence;
 - c. Stating that you have appointed an independent investigator to determine whether these allegations are true;
 - d. Identifying the investigator and the company that they work for;
 - e. Stating that the employee is directed to attend an interview with the investigator at a specified location at a specified time;
 - f. Stating that the employee will be given an opportunity to respond at that meeting;
 - g. Stating that the employee can bring a support person to the meeting if they wish to do so;
 - h. Stating that the employee may be dismissed or subject to disciplinary action as a result of any findings made by the investigator; and
 - i. Stating that the employee has been stood down on full pay until such time as the investigation has been finalised.
4. If the employee wishes to respond in writing, you may wish to consider allowing this in lieu of a meeting with the investigator, unless the written response then results in questions from the investigator which require further clarification.
5. Once the investigation has been carried out, read the investigator's report and recommendations.
6. If the investigator has found out that the employee has engaged in serious misconduct, you should issue the employee a show cause notice outlining the findings of the investigation and inviting the employee to explain why the allegations should not result in their termination.
7. If after considering the show cause notice, you consider that termination is warranted, you may terminate the employee without notice. You should provide the employee with a letter of termination informing them of this result.
8. Pay the employee with the accrued entitlements.

Termination for redundancy

The basics

- A redundancy takes place where an employee's role is no longer required. For example, a redundancy might take place where:
 - The employer decides that it no longer wants the jobs or tasks that the employee has been doing to be done by anyone; or
 - The employer decides to eliminate the employee's role or position as part of a restructure, and to redistribute the jobs or tasks associated with that role or position to other employees in different roles or positions.
- Employees must be consulted prior to a redundancy round and provided the opportunity to give feedback on the proposed restructure.
- Employees who are made redundant are entitled to severance pay in accordance with the NES or their redundancy policy (if better than the NES standards) as well as notice.

Step by step guide

1. Announce that a restructure is being considered, and outline what those changes would look like.
2. Seek feedback from affected employees.
3. Once you have made a decision to eliminate a role, discuss the changes with the employee whose role is being affected.
4. Read the employee's contract to determine the date on which they started their employment.
5. If there are no conflicting entitlements in the employee's contract or your redundancy policies, determine how much redundancy pay the employee is entitled to under the NES:
 - a. If the employee has been employed for at least 1 year but less than 2 years, he or she is entitled to 4 weeks' redundancy pay;
 - b. If the employee has been employed for at least 2 years but less than 3 years, they are entitled to 6 weeks' redundancy pay;
 - c. If the employee has been employed for at least 3 years but less than 4 years, they are entitled to 7 weeks' redundancy pay;
 - d. If the employee has been employed for at least 4 years but less than 5 years, they are entitled to 8 weeks' redundancy pay;
 - e. If the employee has been employed for at least 5 years but less than 6 years, they are entitled to 10 weeks' redundancy pay;
 - f. If the employee has been employed for at least 6 years but less than 7 years, they are entitled to 11 weeks' redundancy pay;
 - g. If the employee has been employed for at least 7 years but less than 8 years, they are entitled to 13 weeks' redundancy pay;
 - h. If the employee has been employed for at least 8 years but less than 9 years, they are entitled to 14 weeks' redundancy pay;
 - i. If the employee has been employed for at least 9 years but less than 10 years, they are entitled to 16 weeks' redundancy pay; and
 - j. If the employee has been employed for more than 10 years, they are entitled to 12 weeks' redundancy pay.
6. Determine how much notice the employee is entitled to in accordance with the above guidance.
7. Write a letter to the employee telling them the following things:
 - a. Their employment has been terminated on the grounds of a genuine redundancy;
 - b. They are entitled to redundancy pay in accordance with the above;

- c. They are also entitled to notice in accordance with the above, and whether he or she will be required to work during their notice period or whether he or she will be paid in lieu; and
 - d. What their last day of work will be.
8. Pay the employee their accrued entitlements.

Termination while on leave

The basics

- You cannot terminate an employee because they exercised a workplace right to take leave.
- You cannot dismiss an employee because they are absent from work due to an illness or injury within a 3-month period. If the employee is absent for longer than 3 months due to illness, you may be able to terminate them with notice on the grounds that they are no longer able to fulfil the inherent requirements of the role.
- You cannot dismiss an employee who is on workers' compensation leave in NSW because they are unfit for work as a result of their injury within a 6-month period. If the employee is absent for longer than 6 months, you may be able to terminate them with notice on the grounds that they are no longer able to fulfil the inherent requirements of the role, if you have done everything possible to assist the employee get back to work in this time. In SA, you may terminate the employment of an injured employee by providing 28 days written notice to the Return to Work Specialist responsible for the employee's claim.
- Employees who are on parental leave are entitled to return to the position that they had prior to taking leave. However, it is possible for employers to terminate employees on parental leave, as long as it is for one of the reasons detailed above, and **not** because the employee has taken leave.

Paying accrued entitlements

The basics

- If you wish to dismiss an employee, you must pay that employee their accrued entitlements.
- Accrued entitlements include:
 - Untaken annual leave;
 - In NSW, untaken long service leave, if the employee has been employed for at least 5 years and has not resigned for reasons other than serious illness, incapacity or other pressing necessity or been terminated for serious misconduct, or if they have been employed for more than 10 years;
 - In SA, if the employee has been employed for at least 7 years and has resigned and given the correct notice or is terminated for any reason other than serious and wilful misconduct; and
 - Unpaid wages.

Step by step guide

1. Before dismissing an employee for any reason, determine whether the employee has any accrued entitlements.
2. Pay the employee the accrued entitlements on termination.

Unfair dismissal applicants

The basics

- An employee who earns less than the high-income threshold (\$167,500 as of 1 July 2023) and who has been employed for at least six months can make an unfair dismissal claim. Employees who are covered under a modern award and earn above the high-income threshold and are not covered by a guarantee of annual earnings can also be eligible to make an unfair dismissal claim. In order to determine whether employees are under the high-income threshold, you need to add their wages and salary sacrifice contributions to the value of non-monetary benefits (i.e. vehicle usage, telephone usage etc.). You do not consider overtime or performance-based bonuses.
- Casual employees who are regularly rostered can also make an unfair dismissal claim.
- A dismissal may be unfair if:
 - There is not a valid reason for the termination;
 - The termination is disproportionate to the conduct of the employee, or is otherwise harsh, unjust or unreasonable;
 - You did not give the employee any warnings; or
 - You did not give the employee an opportunity to respond to any such warnings prior to termination.

Minimising the risk of a successful unfair dismissal applicant

- If termination was based on poor performance, you must have a strong paper trail highlighting the rigour of the performance management processes that came before termination. This paper trail should indicate that the employee was given opportunities to respond to your concerns and to improve.
- If termination was based on serious misconduct, you must have a strong paper trail highlighting the rigour of the workplace investigation. This paper trail should indicate that the employee was given opportunities to respond to the allegations.
- Employers should not terminate employees after the qualifying period for reasons such as “not fitting in with culture” or other subjective reasons.
- When terminating an employee and an unfair dismissal claim is a risk, consider paying the employee an additional ex gratia amount in return for their signing a Deed of Release which would prohibit them from making any claims against the company.

General protections applications

The basics

- General protections claim arises where an employer takes 'adverse action' against an employee for a prohibited reason. Examples of adverse action include, but are not limited to unreasonable performance management, reduction in pay or duties, and dismissal.
- Prohibited reasons include an employee's participation in lawful union activities, discriminatory reasons, or an employee's exercise of their workplace rights, such as the right to take leave or to make a complaint or inquiry about their employment.
- If the employee makes a claim, and proves that the employer took the adverse action, the employer will be required to prove that it did not take the adverse action for a prohibited reason.

Minimising the risk of a successful general protections applicant

- You must have a strong paper trail highlighting the rigour of the workplace investigation or performance management processes that came before termination.
- You should avoid dismissing employees while they are on leave, after they have requested to take leave, or after they have made a complaint about their employment.
- When terminating an employee and a general protections claim is a risk, consider paying the employee an additional ex gratia amount in return for their signing a Deed of Release which would prohibit them from making any claims against the company.

Key things to remember

The basics

- You must always pay employees their accrued entitlements.
- You must always pay employees their notice entitlements unless the employee is being terminated for serious misconduct.
- You must make sure that you tick off every step of the processes outlined above if you wish to terminate for poor performance, serious misconduct, or redundancy.
- You must collect and store a paper trail which provides evidence of how you conducted the termination process.

What next?

If you would like to speak to someone about terminating an employee, call us on (02) 9199 8597 or email us at wehelp@jfmlaw.com.au.

Further information can also be found on our website at www.jfmlaw.com.au.