Termination of Employment: A Lawful and Ethical Approach

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WORKPLACE LAW

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One of the most difficult aspects of workplace management is the termination of employment. This is an inevitable part of any employer's business. It can be a stressful and difficult experience for all participants.

It can also cause significant legal risks to the employer.

As a default position, employees are entitled to maintain the status quo of their employment. As such, employees have a number of statutory and common law protections against the unlawful alteration or termination of their employment.

When it comes to making a decision about terminating that employment and interfering with the entitlement to employment, the legal risks that may arise for employers include claims made for:

- breach of contract;
- unfair dismissal;
- general protections; and
- discrimination.

As a consolidated principle, however, it is lawful to terminate the employment of an employee if:

- the employer has a 'valid reason' for termination[1];
- the reasons for the termination are not discriminatory or otherwise unlawful;
- the termination is done in accordance with the contract of employment; and
- the employee is given appropriate procedural fairness.

When employers make the decision to terminate, it is not always possible to know what an employee might allege about the employment relationship post-termination, or what application they might choose to bring.

This is why at Olexo Workplace Law we adopt a consolidated and holistic approach to these legal risks when advising employers on the termination of an employee; one that covers the bases of as many claims as possible.

The first consideration for employers should be whether or not the employee is covered by unfair dismissal[2]. For the purpose of this publication, it is presumed that the employees concerned are covered by unfair dismissal legislation. However, if an employee is not covered by unfair dismissal then the process is slightly different.

The second consideration for employers should be to identify whether termination of employment is being considered because of:

- reasons relating to the capacity or conduct of an individual employee; or
- because the employer no longer wishes the employee's job to be performed by anyone (redundancy).

The approach to these areas is entirely different, and each is addressed separately in Parts A and B below.

1 If the employee is covered by unfair dismissal - see footnote 2;

2 To qualify for unfair dismissal protection, an employee must either earn below the high income threshold (currently $153,600) or be covered by a modern award or enterprise agreement; and have been regularly and systematically engaged by the business for at least six months (for standard employers), or twelve months (for small business employers).

Part A - Terminations of Employment Relating to Employee Capacity or Conduct

Step 1 - Identify and consider the reasons for the potential termination

'Valid reasons' relating to capacity or conduct that justifies the termination of employment fit into three categories:

1. termination for misconduct (including serious misconduct);
2. termination for poor performance; or
3. termination for issues relating to the employee's capacity (other than poor performance).

Once the employer has identified the concerns regarding the employment, it is important for the employer to make a preliminary consideration of whether:

1. the employer has enough information and/or evidence to establish that the concerns and/or suspicions are genuine and well founded; and
2. if established to be true, whether those concerns would justify the termination of employment, with regard to all of the circumstances.

Depending on which category the employee fits into above, there are a number of separate considerations.

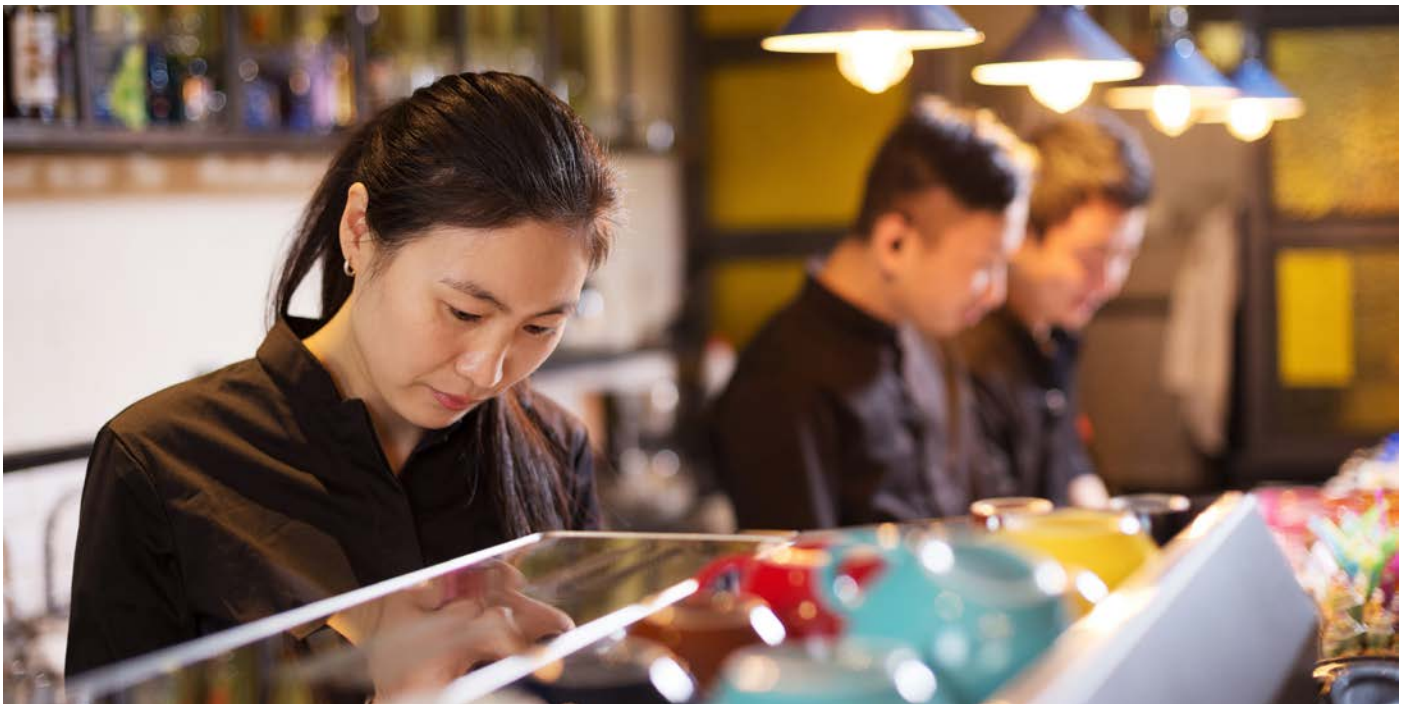
Misconduct

When considering if there was a valid reason for dismissal relating to an employee's conduct, the Fair Work Commission will determine on the balance of probabilities whether the conduct that the employee allegedly engaged in actually occurred.

Conduct that commonly has been held to be a valid reason for dismissal includes:

- where an employee lies to their employer, and this lie causes the employer to lose faith and confidence in their employee;
- inappropriate behaviour such as inappropriate touching of colleagues, bullying, harassment, etc;
- a significant breach of an employment contract, or workplace code or policy; or
- conduct that puts another person's safety at risk.

It should be noted that 'misconduct' is generally a voluntary or intentional action which is extrinsic to the performance of the employee's role. If the employer's concerns with the employee relate to the employee doing their job poorly, or in an unsatisfactory manner (even if they suspect some form of intention or deliberateness), this is not classified as 'misconduct', and the rules relating to performance (set out below) will apply.



Serious Misconduct

'Serious Misconduct' is a form of misconduct that is so serious that it justifies termination of employment without notice (known as 'summary dismissal').

From a common law contractual perspective, serious misconduct is conduct which is fundamentally inconsistent with the continuation of the contract of employment. At common law, an employer has the right to summarily dismiss an employee guilty of such conduct without any notice or payment in lieu of notice.

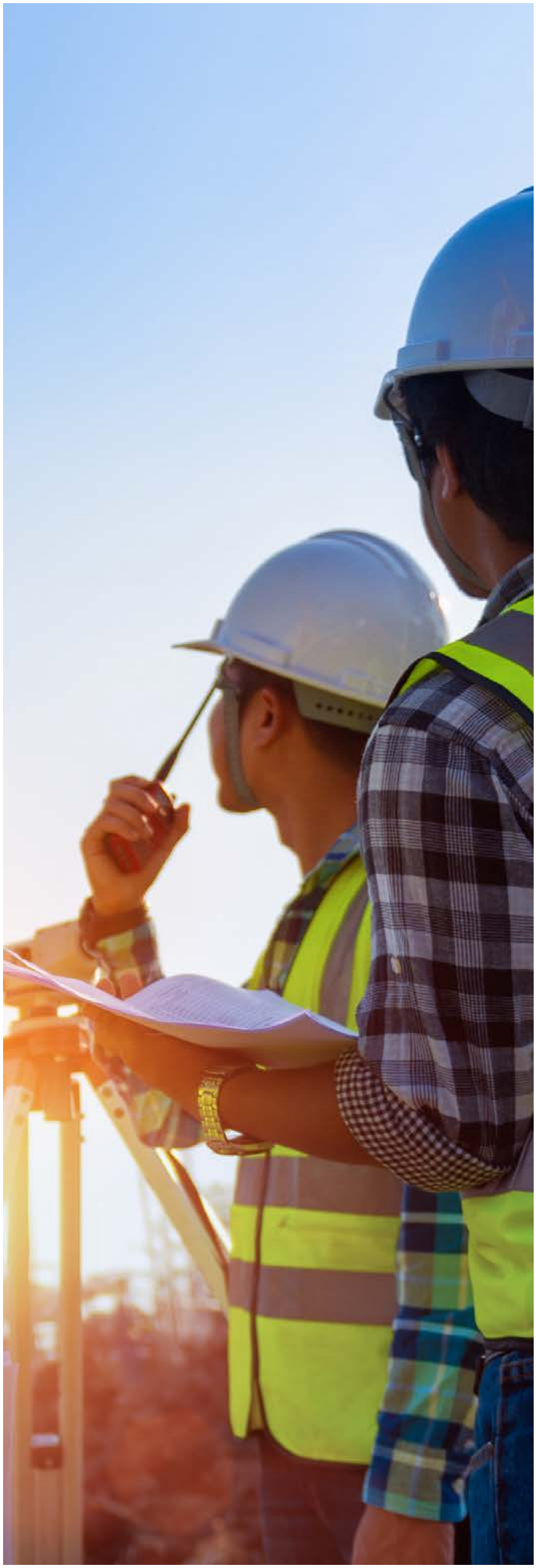
For the purposes of section 117 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**), the *Fair Work Regulations 2009* (Cth) also define 'serious misconduct' as including conduct that is deliberate and wilful and that is inconsistent with the employment contract continuing.

A wide range of conduct can constitute serious misconduct including:

- conduct that causes serious and imminent risk to the reputation, viability or profitability of the employer's business;
- conduct that causes serious and imminent risk to someone's health or safety;
- criminal conduct in the workplace such as assault, theft or fraud;
- the employee being intoxicated at work; or
- the employee refusing to carry out a lawful and reasonable direction.

The distinction between 'misconduct' (justifying dismissal on notice) and 'serious misconduct' (justifying summary dismissal) is not always clear.

The Fair Work Commission may find a summary dismissal 'unfair' because it was a disproportionate response to the conduct. This is despite the fact that the Commission may hold that the employer had a 'valid reason' for the dismissal, had notice been provided. Employers should beware that an incorrect characterisation of the misconduct may lead to a decision that the dismissal was 'harsh'.



Performance

In relation to unfair dismissal legislation, the Fair Work Act provides that employees should be warned if their performance is below the required standard and given an opportunity to improve prior to being dismissed. Warnings should be in writing, clearly indicate what improvements are required, and set out that dismissal may occur if those requirements are not met. This message needs to be explicit, to have any legal value. A suggestion or implication of a possible dismissal is not enough to constitute a 'warning'.

Whilst it is not necessary for a formal performance improvement plan to be implemented, it is important that the employee be given a reasonable time frame to improve for a warning to have the required effect legally. The specific time required may vary from case to case depending on the nature of the job, but much less than one month between warning and dismissal is probably too brief in most cases.

Therefore, if an employee is underperforming, it is important for the employer to be proactive about providing warnings, to prevent the process from dragging on.

If a performance plan is entered into, and the employee does not engage at all with the process, an employer can in many cases take steps to terminate the employment more quickly.

If the employee does not improve, the procedural requirements set out below still need to be followed.

Capacity

Not having the capacity to perform the role can be considered a 'valid' reason for dismissal of an employee. This can include either physical or medical incapacity, or merely not holding required licences or security clearances that are an inherent requirement necessary for the position.

The termination of an injured or sick employee is a high risk and complex area of law. There are numerous risks, which need to be considered concurrently and factored into any action by the employer.

However, in circumstances where an employee has a prolonged absence from work due to their inability to perform their role, it is lawful to terminate their employment, so long as:

1. In relation to any illness or injury (whether related to work or not), the employee has been absent for more than three months other than on a period of paid personal leave (See *Fair Work Act 2009* (Cth) section 352); and
2. in relation to an injury or illness connected with work, they have been absent from work for a period exceeding six months in total since the injury (see section 248 of the *Workplace Injury Management and Workplace Compensation Act 1998* (NSW)); and
3. objective medical evidence can demonstrate that:
    a. the employee is unable to perform the inherent requirements of the role;
    b. no reasonable adjustments are available which would allow the employee to perform the inherent requirements of the role;
    c. there are no suitable alternative duties that the employee could do; and
    d. the continuation of the absence from the employment would cause 'unjustifiable hardship' to the employer.
4. It is also crucial that the procedural fairness requirements (as set out below) have been followed.

Paragraph 3 above is of critical importance. There are only two clear ways to obtain this evidence.

They are:

1. A report from the employee's treating medical professional, which addresses specific questions in line with those issues set out above; or
2. a report from an independent medical examiner.

The termination of any employee for reasons relating to medical capacity is high risk, and we recommend employers obtain specific legal advice in these circumstances.

Step 2 - Consider whether the reason is unlawful for some other reason

For all employees, it is also unlawful for employers to dismiss employees on grounds that are discriminatory, or otherwise 'prohibited' grounds. Some of the attributes that are protected under Australian law include:

- the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- the employee's involvement, or non-involvement, in an industrial association, or industrial action; and
- because of the fact that the employee has a workplace right, has exercised a workplace right, or proposes to exercise a workplace right. It should be noted that 'workplace right' includes the making of a complaint or enquiry in relation to work.

Under the 'General Protections' provisions of the Fair Work Act, in order for a dismissal decision to be unlawful in this way, the discriminatory or prohibited reason needs only to be part of the reason. It will also be necessary for the employer to disprove that the prohibited reason formed part of the reasons for termination.

For this reason, it is critical for employers to examine the whole of the circumstances prior to commencing any termination process, in order to assess whether this type of allegation is available.

Step 3– Consider notice requirement – statute and contract

Employers should consider how much notice is required. Only in 'serious misconduct' cases is instant dismissal legally justified. The minimum notice period will either be dictated by section 117 of the Fair Work Act, and will in part depend on the employee's age and length of service, or will be defined by the contract of employment – whichever is the longer.

Employers should also consider whether actual notice should be worked out by the employee, or whether it should be paid to them as a financial payment in lieu of notice. In many instances, for the protection of the employer's various interests, it may be commercially preferable to remove the employee straight away, and make payment in lieu of notice.

Step 4 - Meet with the employee to discuss the reason for the possible dismissal

For an employee with access to an unfair dismissal remedy, it is essential that the employer meets with the employee, and then notifies them in writing of the concerns that they have relating to the employee's capacity or conduct. This letter should be detailed and very specific, outlining the reasons why the employee's job is at risk. This may either be the performance or capacity concerns or may be some specific allegation relating to misconduct.

Step 5 - Provide the employee with a genuine opportunity to respond

After the employee is notified, they should be given an opportunity to respond to these concerns (or any allegations, if related to misconduct). The employee must essentially be given an opportunity by the employer to change the employer's mind about whether that employee should, or should not, be dismissed.

It is vital the employee has a genuine opportunity to respond prior to making the decision to dismiss. It is not enough to merely appear to give this opportunity. Timing is important. We generally recommend a period of at least 24 to 48 hours. Where the allegations are complex or voluminous, sometimes a longer period is necessary. If the employee is given an unreasonably short period of time to respond, it may be possible for them to assert that they were deprived a genuine opportunity.

Even if there is ultimately a valid reason to terminate the employment, and even in cases of serious misconduct, a failure to provide this opportunity to an employee may render a dismissal 'unreasonable'.

Step 6 – Consider 'harshness'

In an unfair dismissal context, the Fair Work Commission may consider a dismissal to be 'harsh', even where there is a valid reason for dismissal and procedural fairness has been followed. Employers should be aware that the following factors may support a finding that the dismissal was 'harsh':

- there will be a significant personal or economic impact on the employee, such as the employee's age or other circumstances making them unlikely or unable to find alternative employment;
- the employee had a long length of service, especially where that service was unblemished or of a high quality; and/or
- an employee is dismissed for conduct when other employees engaged in comparable conduct and faced lighter penalties.

Once these factors are considered, it may be necessary to assess whether the consequences of dismissal are actually disproportionate to the gravity of the misconduct or performance concern, and to consider whether another option (such as final warning) may be more appropriate. In our experience, it is only in extreme cases where this consideration becomes relevant and seeking external advice may be desirable before making the decision alone, particularly where an employee has a very long period of service.

Step 7 - Communicate the dismissal to the employee

Once each of these steps has been followed, the employer should arrange to have a meeting with the employee. At this meeting, the employer should:

- ask the employee if they have any further responses or questions;
- if any additional or further responses are given, take time away from the meeting to consider further responses;
- if applicable, tell the employee that the responses have been considered and the employer has decided to terminate; and
- provide notice of termination in writing following the meeting.

It is a critical part of the procedural fairness owed to employees that no final decision is made until the responses are fully considered.

A note about Meetings

In relation to the meetings set out in step 4 and step 7, it remains our recommendation that employers hold these meetings in person (COVID-19 allowing). Despite many suggestions in the new 'information' age that it is no longer necessary to meet with employees face to face, such a meeting is always preferable if there is a possibility of termination of employment. During COVID-19, it has become commonplace for meetings about employment (including termination meetings) to occur via videoconference and at times by telephone.

However, the Fair Work Commission has made it clear that there are significant legal risks of communicating a dismissal by written or electronic means, unless the employee has been given ample opportunities to meet face to face and refuses to meet. Terminations via text message, are particularly frowned upon by the Commission as being 'callous'.

It is also recommended that employers provide the employee with an opportunity to have a support person present. Contrary to common belief, the Fair Work Act does not create a positive obligation to provide this. The employer only must not 'unreasonably deny' the employee a support person. In our experience, however, the best practice is to actively provide an employee an opportunity to have a support person present during a termination or disciplinary meeting.

While an employer does not have to unreasonably delay the meeting for the employee to find a support person, if a reasonable request is made, the request should not be refused. The employer is entitled to impose conditions on who the support person is (for example not a lawyer) and also require a confidentiality agreement to be signed by the support person. The support person is not an advocate for the employee and in most cases should not actively take part in the meeting. If they do repeatedly interrupt or intervene, it is appropriate to ask the support person to leave.

Part B - Terminations of Employment Relating to the Role (Redundancy)

What is Redundancy and when can it be used?

A redundancy is a permanent termination of employment, in circumstances where an employer no longer wishes the role to be performed by anyone.

A redundancy is defined in section 119 of the Fair Work Act as occurring when employment is terminated:

a. *at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
b. *because of the insolvency or bankruptcy of the employer.*

A number of circumstances can give rise to redundancies under the Fair Work Act, including:

- bankruptcy or insolvency affecting the employer;
- business downscaling due to a downturn, falling profitability, exchange rates, market conditions or other economic circumstances;
- business relocation;
- business restructures; and
- technological change (such as increased automation).

Importantly, redundancies cannot directly arise from poor job performance. It is tempting for employers to use redundancy as a smokescreen to avoid the difficulties of managing the performance of (or even terminating) underperforming employees. However, unless it can be demonstrated that a real change in the operational requirements of the business was the reason for the dismissal, employers may be exposed to claims for unfair dismissal and possibly general protections claims.

Cost of Redundancy

Notice (actual or payment in lieu)

The amount of notice to be given is set out in the National Employment Standards and is replicated in the table below.

However, if the individual contract of employment or applicable modern award contains a longer notice period, that notice period will apply as it is more favourable to the employee.

Period of continuous service	Notice
Not more than 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

If an employee being made redundant is over 45 years of age and has completed more than 2 years of continuous service, they must be given an additional one week's notice on top of the above outlined notice.

For employees covered by a modern award, the decision to work out their notice period may also apply.

If the employee leaves during the notice period, they are still entitled to severance pay (but not to any payment in lieu of notice) in accordance with certain provisions of the modern award.

Employees are entitled to paid leave of up to one day per week to seek alternative employment during the notice period in accordance with the modern award.

Severance payment

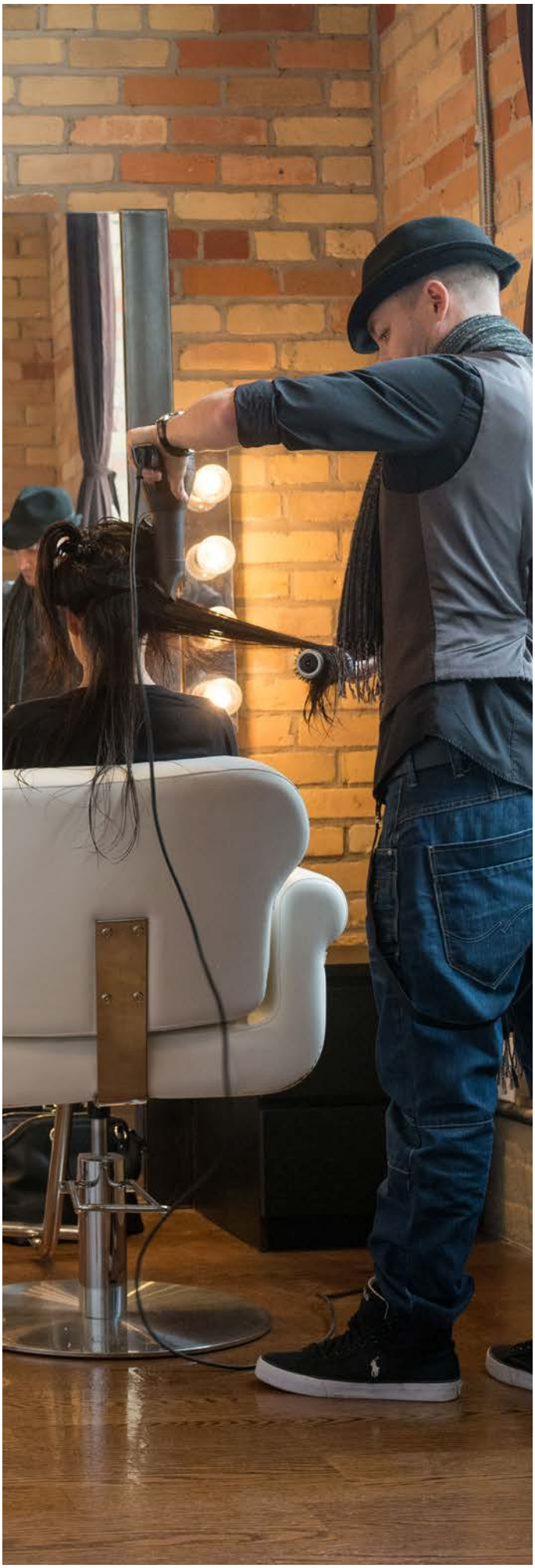
Employees who are not otherwise covered by a contractual term or enterprise agreement term relating to redundancy, are entitled to redundancy pay in accordance with the National Employment Standards as follows.

Employee's period of continuous service	Severance Pay
Less than 1 year	0 weeks
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

Variations to redundancy pay

In some limited circumstances, an employer may make an application to the Fair Work Commission to reduce the amount of redundancy pay if the employer proactively obtains other acceptable employment for the employee, or if the employer cannot pay the amount.

Therefore, in the case of a transfer of business, it may be beneficial for an employer to assist the employees in gaining employment with the new business. This may involve working with the new business and securing employment for particular employees.



Exclusion from obligations to pay redundancy

A terminated employee is not entitled to redundancy pay if, immediately before the time of termination or at the time when the employee was given notice of termination (whichever came first):

1. the employee's continuation of service with the employer is less than 12 months; or
2. they are a casual employee; or
3. the employer is a small business employer (an employer that employs fewer than 15 employees).

Small business employer

When counting the number of employees, an employer must include:

- all employees employed at that time;
- casual employees who, at that time, are employed on a regular and systematic basis; and
- the employees who are being dismissed or terminated.

Risks of Redundancy

In order to be a genuine redundancy and to avoid the risk of an unfair dismissal or general protections application, the employer must have complied with any obligation arising under an award or enterprise agreement to consult about the redundancy – this consultation will be with employees but will sometimes be required to be with unions as well, depending on the agreement. Additionally, the employer must show that it was not reasonable in all the circumstances for the person to be redeployed within the employer's enterprise or the enterprise of an associated entity. If such redeployment would have been reasonable, then the redundancy would not have been a genuine redundancy.

Provided these three conditions can be met, the dismissal will constitute a genuine redundancy and the employer will be protected from any claim of unfair dismissal by the affected employee or employees.

The Process for Redundancy

It should be noted that the following process only applies to those employees covered by a modern award or enterprise agreement which provides for an obligation regarding consultation. In other cases, a simpler process may be adopted. The procedure is:

1. Notify the relevant employee/s that a consultation process will commence regarding changes in the workplace and advise the employee/s when the meeting will take place.
2. Before the consultation meeting, decide whether the employee/s are to work out the notice period or if they will be given a payment in lieu of notice. It is also important to consider other roles that an employee could be redeployed based on their skills.
3. Meet with the employee/s (and their support person) individually. The following should be explained to each employee:
   a. the needs of the organisation have changed;
   b. there are no roles that the employee can be redeployed to;
   c. that there is a real possibility the position will be made redundant; and
   d. what notice will be given and what payments will be made to the employee.

   Offer each employee a chance to discuss the redundancy, including any proposals they have to limit the impacts of redundancy.
4. Provide each employee with a letter that summarises everything that was discussed in the consultation meeting and advises of a date and time for a final consultation meeting in two to three days' time.
5. If more than 15 employees are to be made redundant, the employer must give written notice to Centrelink.
6. In the final consultation meeting, summarise the previous meeting and explain why the position is to be made redundant. Provide employees with an opportunity to raise new matters and take breaks to consider any new proposals. If it is decided that the position is to be made redundant, explain again the reason for this and that there are no redeployment options.
7. Ensure all final payments for the employee's notice, redundancy pay, annual leave and any other entitlement are made by the termination date and the final pay slip is issued to the employee. Ensure all property belonging to the organisation is returned by the employee, and confidential information is not retained by the employee.
8. Provide each employee with a letter confirming the redundancy, noting the reasons for the redundancy and all payments that will be made to the employee.

Conclusion

Termination of employment can be a difficult and emotionally distressing experience for employees. It is also not easy for the employer or manager involved in communicating the decision.

A dismissal does not have to be affected in an adversarial or combative manner. Often, having a respectful conversation, which allows the employee to preserve their dignity, can be the best protection against the issue escalating unnecessarily. Even if the employee becomes abusive or emotional, the employer/manager is well advised to remain as calm as possible. Further, in our experience from a practical context, providing a courteous and open forum to communicate the employer's decision, greatly decreases the potential for employees to be aggrieved enough by the outcome to consider challenging the dismissal legally.

Olexo Workplace Law have many years of experience in dealing with terminations, both in providing advice to employers about risk, drafting documentation, or attendance at meetings with employees. This guide is intended as an aide to the decision-making process, but we recommend specialist advice be sought in any situation which creates legal risk.

Some of the content of this guide has been extracted from *An Employers Guide to Australian Employment Law*, published by PCC Employment Lawyers (now Olexo Workplace Law) in December 2018.

The full text, *An Employers Guide to Australian Employment Law,* is available for purchase by email to info@olexo.com.au or by calling (02) 8436 2500.

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