

Australia

Introduction

At common law an employer can only unilaterally terminate the employment relationship by giving the employee a period of notice of termination. The only exception to this is where the employee is guilty of gross or serious misconduct (which includes fraud or gross negligence). It is usual to specify the required period of notice in an employment agreement. The length of notice usually varies depending on the status of the employee.

Under the federal Workplace Relations Act 1996 (Cth) there is a minimum scale of notice of termination of between one and five weeks, which applies to all employees of corporations.

In circumstances where no period of notice has been agreed upon, the common law will imply an obligation that the employer provide a “reasonable” period of notice. What constitutes reasonable notice is not readily ascertainable and requires an examination of the circumstances surrounding each particular termination. Although the courts have not adopted any particular formula to determine the reasonableness of a notice period, they commonly have regard to various factors, including the following:

- The employee’s position within the organisation;
- The length of service of the employee;
- The qualifications required for the position held by the employee and the qualifications actually held by the employee;
- The employee’s salary;
- The normal retiring age for an employee holding the position in question; and
- The length of time that is likely to elapse before the employee obtains equivalent or other suitable employment and their likely remuneration.

An employer may, with the employee’s agreement, make a payment to the employee equivalent to the remuneration due during the notice period and terminate the relationship immediately. Such a payment is referred to as a “payment in lieu of notice.”

With regard to employees covered by Industrial Awards and Agreements, the applicable Award or Collective Agreement will set out a specific notice period. However, this is a minimum only and the period may be increased by agreement between the parties.

Terminations

Restrictions On Employers

In respect of both Award and non-Award employees, the Workplace Relations Act 1996 (Cth) prescribes minimum notice requirements for employees of corporations as follows:

Period of Service	Period of notice or payment in lieu thereof
Less than one (1) year	At least one (1) week
More than one (1) year but less than three (3) years	At least two (2) weeks
More than three (3) years but less than five (5) years	At least three (3) weeks
More than five (5) years	At least four (4) weeks

The minimum periods of notice set out above are increased by one week in cases where the employee has been in continuous employment for over two years and is over 45 years of age.

Provided that the period of notice specified in an employment agreement exceeds the above minimum, as well as the notice period set out in any applicable Award, then the contractual notice period is enforceable.

Redundancy

Employees covered by Industrial Awards are entitled to additional severance payments where their employment is terminated because their position within the employer's organisation disappears through no fault of their own, which is referred to as a "redundancy." Under Australian law an employee's position is considered to be redundant if:

- An employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by anyone;

- The decision is not due to the ordinary turnover of labour;
- The decision leads to the termination of the employee's employment; and
- The termination of the employee is not on account of any personal act or default on the part of the employee.

Where a termination occurs in these circumstances, most Industrial Awards provide for additional termination payments, known as "severance" or "redundancy" payments, which are calculated according to the employee's length of service. Some Awards also provide for lengthier periods of notice in the event of redundancy. Usually, Awards also contain consultation requirements with the relevant unions, and may provide that no redundancy payment is required if the employer finds its employees adequate alternative employment.

Non-Award employees are not entitled to redundancy payments unless these entitlements are set out in their employment agreements. However, in many industries, it is common for employers to make redundancy payments to non-Award employees.

In all cases, it should be noted that redundancy payments are separate and additional to the employer's obligation to provide "notice" of termination or a payment in lieu thereof.

Proposed changes to federal laws (if passed by the federal parliament) will extend a statutory entitlement to severance pay to all employees of corporations, regardless of whether they are Award or Non-Award employees.

Procedural Fairness And Unfair Dismissals

At common law, and absent any contractual obligations to the contrary, an employer can terminate the services of an employee without giving reasons provided that the appropriate period of notice is given in accordance with the applicable contract, statutory and Award minimums. However, this position has been altered by federal industrial relations legislation, which establishes certain minimum procedural standards that an employer must follow prior to terminating the services of an employee. These standards or requirements are not available to all employees and the remedy of unfair dismissal is restricted to Award employees or employees earning less than AUD106,400 (as at January 2009). The federal legislation also generally excludes an employee from bringing such an unfair dismissal claim where their

employment is terminated during the initial probationary period of the employee's employment, or where the termination is a result of the redundancy of the employee's position.

The primary legislative requirement is that an employer may not terminate the services of an employee in circumstances where the termination is harsh, unjust or unreasonable. In determining this question, the relevant industrial authority will consider (among other matters):

- Whether or not a reason was provided by the employer for the termination, and whether or not the employee was provided with an opportunity to respond to this reason;
- Whether or not there was a valid reason for the termination connected with the employee's capacity or conduct, or based on the operational requirements of the employer; and
- Whether or not warnings of unsatisfactory performance were provided to the employee prior to the termination.

Generally speaking, these aspects of the federal legislation require employers to do the following, prior to terminating a person's employment:

- Provide employees with specific details of any concerns with their conduct or performance and give them an opportunity to respond to the same;
- Provide employees with sufficient warning that if their conduct or performance does not improve, their employment may be terminated;
- Where appropriate, counsel or train employees as to how their conduct or performance can be improved; or
- Provide employees with a final opportunity to respond before terminating their services.

Where the relevant industrial authority finds that a termination was unfair, it can order re-instatement of the employee. It also has the power to order the payment of compensation of up to six months' remuneration.

Unlawful Termination

Federal industrial relations legislation also specifically precludes termination of employment (including redundancies) for various reasons, including:

- Temporary absence from work because of illness or injury;
- Union membership;
- Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- Absence from work during maternity or parental leave.

It is unlawful to terminate a person's employment for any of the reasons set out above, regardless of the employee's level of remuneration.