

WORKERS' RIGHTS WHEN YOUR JOB ENDS



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When your job ends

There are many different ways that your job may end and each way has different legal requirements and implications.

Resigning

Your contract, award or agreement should state how much notice you should give when resigning. If it is not written down then, as a general rule, the notice period should be at least equal to the pay period. For example, an employee who is paid fortnightly should provide at least two weeks notice. If you are a casual employee, you are not obliged to give any notice.

Sometimes people feel forced to resign. This may be for various reasons, such as being subjected to ongoing workplace bullying or discrimination. These cases may be considered 'constructive dismissal'. In some cases an employer may not say 'you're sacked', but may still force you to leave because of the things they say, do or fail to do. Or they may direct you to resign or otherwise you will be sacked. This is a complex area and it is important that you get advice before you resign. Once you leave it can be very difficult to make a claim for unfair dismissal or unlawful termination as you must be able to show that your employer's behaviour left you with no reasonable choice but to resign.

Instant dismissals "on-the-spot"

If you are dismissed for serious misconduct you are not entitled to any notice, or pay in lieu of notice. The Fair Work Act 2009 defines serious misconduct as including theft, fraud, committing an assault, being intoxicated at work, behaving in a way that causes serious and imminent risk to the health and safety of a person or to the reputation or viability of the business, or refusing to carry out a lawful and reasonable instruction. Your workplace agreement or policies may also include definitions of serious misconduct. If you are dismissed for serious misconduct you may also lose your entitlement to pro-rata long service leave.

When a fixed contract is completed

A fixed contract is a contract of employment that is 'fixed' for a certain period or for a particular task or project. The contract should state the termination date or circumstances in which the contract is fulfilled.

When you are demoted

If you are demoted and the new position involves a significant reduction in either pay or duties, then it may be considered that you have been dismissed. However, there are situations where a demotion may not be classified as a dismissal, so seek advice if this happens to you.

Winding-up of a business

If a company is in financial trouble, an administrator may be appointed to report on whether the company should continue to operate or be put into liquidation. In some cases, employees miss out on their entitlements (wages, annual leave, etc.) because there are insufficient funds to pay all of the creditors. In order of creditor priority, employees come after secured creditors such as banks, however they come before unsecured creditors such as company traders.

Before considering any offer by an administrator, employees should seek independent advice from an insolvency specialist or from a union if they are a member. The Federal Government has introduced a safety net scheme for employees who would otherwise miss out on their entitlements if the employer closed down. For more information contact the General Employee Entitlements and Redundancy Scheme. (The Where to go for more help section of this fact sheet provides contact details.)

Redundancy

If you lose your job because the job disappears permanently, according to the law you are considered to be redundant. This may happen due to changing operational requirements, the introduction of new technology, economic downturns, company mergers, take-overs or restructuring. Before making you redundant,

the employer should follow any consultation requirements in your award or agreement. If possible and reasonable your employer should redeploy you to another position with the employer or a related company. If you believe that the redundancy is not genuine, for example if the position still exists, or if you were not redeployed and reasonably could have been, or if the consultation requirements in your award or agreement have not been followed, you may be able to make a claim for unfair dismissal.

In addition to the employer giving you notice or pay in lieu of notice, you may also be entitled to severance pay. This is to compensate you for the loss of benefits (such as accrued long service leave) and for the inconvenience and hardship caused by the loss of employment. You should check your award or agreement for a clause on redundancy payments, including restrictions on when those payments apply. For those not covered by any such clause, there is an entitlement to redundancy pay under the National Employment Standards. This entitlement applies to all employees who have been employed for at least one year, unless they are employed by a small business with 15 or less staff. In general, casuals, employees on fixed term contracts and employees on training contracts are not entitled to redundancy pay.

However, you should note that unless you had an entitlement to redundancy pay under an award, agreement or contract of employment as at 31 December 2009, only your service with your employer from 1 January 2010 is counted towards your National Employment Standards (NES) redundancy entitlement. You may not be entitled to redundancy pay if you are moving from one employer to another in a transfer of business situation (for example, your employer's business has been bought by another business and you are going to work for the purchasing business).

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Termination entitlements under the National Employment Standards:

If your employment is terminated, your employer must follow due process. You are entitled to:

- a valid reason for the dismissal;
- a fair and transparent process leading up to the dismissal;
- written notice of the date of termination (unless you are a casual);
- wages due at the time of dismissal;
- a separation certificate (if your employer refuses to provide one, contact Centrelink who can obtain one);
- request to have a support person present at discussions regarding the dismissal, which your employer should not unreasonably deny.

Outstanding payments

As well as the entitlements above, if your employment is terminated you are entitled to:

- payment for annual leave not taken;
- redundancy entitlements, if applicable;
- written notice or payment in lieu of notice (see below); and
- depending on how long you have worked with your employer, and depending on the circumstances of your termination, you may be entitled to payment for long service leave not taken or pro-rata long service leave (unless, in some cases, if you were dismissed for serious misconduct).

If you are not paid your correct entitlements and your employer will not agree to pay them, you can make a complaint to the Fair Work Ombudsman (FWO).

Period of continuous service	Redundancy entitlement
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

If you are to be dismissed (other than for serious and wilful misconduct), your employer must give you the period of notice required by your award or agreement, or pay you the equivalent in lieu of notice. The amount of notice required depends on how many years of continuous service and any award or agreement provisions. If you were absent from work, on leave, injury, or for any other approved reason, your continuity of service should not be affected. If you are a casual employee check with FWO or your union if you are a member to see how much notice you are entitled to. If there is no award or agreement fixing minimum periods of notice, then the following periods apply.

Years of service	Minimum period of notice
Up to one year	1 week
One to three years	2 weeks
Three to five years	3 weeks
Over five years	4 weeks

Employees over 45 years of age with at least two years continuous service must be given an extra week of notice. Some awards and employment contracts contain longer notice periods. If you are unsure, contact the FWO.

If your job was terminated and you did not receive notice, or your pay in lieu of notice, then you are eligible to lodge a complaint with the FWO. If you are unsure, seek further advice. Time limits apply for lodging complaints so don't delay. (The *Where to go for more help* section of this fact sheet provides contact details.)

Trainees and Apprentices

The employment of trainees and apprentices is regulated by the Training and Skills Development Act 2003. A traineeship or apprenticeship can only be terminated if the termination is approved by the Training and Skills Commission. In most cases approval requires the agreement of the employer and the trainee/apprentice. An employer or trainee/apprentice can apply to the Industrial Relations Commission for termination of a contract of training, or for a resolution if they wish to dispute the termination of a contract of training. Please note: Apprentices and Trainees are not automatically excluded from notice of termination by the NES because of the limited duration of their training agreement. Notice of termination may depend on the terms of the employment contract. Care needs to be taken to distinguish between the training agreement and the contract of employment.

Where can I get more help?

Your union

SA Unions
Ph: (08) 8279 2222
www.saunions.org.au

Working Women's Centre

Ph: 1800 652 697
www.wwc.org.au

1st Floor, Station Arcade
52 Hindley Street
Adelaide, SA, 5000

Legal Services Commission

Ph: 1300 366 424
www.lsc.sa.gov.au

82-98 Wakefield Street
Adelaide SA 5000

Young Workers Legal Service

Ph: (08) 8279 2233
www.ywls.org.au

Fair Work Australia (FWA)

Ph: 1300 799 675
www.fwa.gov.au

Level 6, Riverside Centre,
Nth Terrace, Adelaide, 5000

Fair Work Ombudsman (FWO)

Ph: 13 13 94
www.fairwork.gov.au

Level 2, 148 Frome St.
Adelaide SA, 5000

General Employee Entitlements Redundancy Scheme Hotline (GEERS)

Ph: 1300 135 040 (for claims against insolvent companies)
www.deewr.gov.au

Traineeship and Apprenticeship Services

Ph: 1800 673 097
www.dfeest.sa.gov.au

Telephone Interpreter Service

Ph: 13 14 50

Legal disclaimer: The Fair Work Ombudsman (FWO) is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws. The information contained in this publication is: general in nature and may not deal with all aspects of the law that are relevant to your specific situation; and not legal advice. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered. This information was published on 8 June 2011. The FWO does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information. This material has been funded by the Australian Government through a Fair Work Ombudsman initiative to produce educative materials on the Fair Work Act.