11. Termination of employment

Termination of the employment relationship is another element of human resource management that requires knowledge and understanding. Employers should aim to manage all terminations of employment effectively, whether instigated by the employer or the employee, to avoid legal ramifications and to end the relationship on the most positive note possible in the circumstances.

11.1 Types of termination

Termination of employment can be instigated by the employer or by the employee.

Termination by the employee

An employee may terminate the contract of employment in a number of ways. The most common are:

1. **Resignation** – The employee gives the employer notice (as required by the contract of employment, modern award or enterprise agreement) that they are ending their employment.
2. **Abandonment** – An employee effectively terminates their contract of employment when they fail to present for work as expected without explanation and reasonable efforts by the employer to contact the employee have failed.

Termination by the employer

A termination instigated by the employer is often referred to as a dismissal. The different types of dismissal are:

1. **Dismissal with notice** – Termination occurs in accordance with the terms of the contract of employment (or modern award, or enterprise agreement) by providing the employee with the required amount of notice or payment in lieu of notice.
2. **Dismissal without notice (summary dismissal)** – This is a dismissal without notice given to the employee and may be without any prior warning/s. Summary dismissal is usually the result of a serious breach of the contract of employment by the employee.
3. **Redundancy or retrenchment** – Dismissal, in these circumstances, occurs as a result of changes to the business's needs. It occurs when the employer no longer requires the particular job to be done by anyone.

11.2 Notice requirements

The period of notice required for a termination to be lawful can emerge from a number of sources. The notice periods may be prescribed by a modern award, an enterprise agreement, contract of employment, or the National Employment Standard contained in the Fair Work Act 2009 (Cth). Company policies, handbooks and letters of appointment may also be a source of the required notice periods.

11.2.1 Notice by employer

The Fair Work Act 2009 (Cth) prescribes the minimum notice requirements for all employees as follows:

Period of Continuous Service	Period of Notice
One year or less	One week
One year and up to three years	Two weeks
Three years and up to five years	Three weeks
Five years and over	Four weeks

In addition, the following conditions exist:

- Employees aged 45 years and over, with not less than two years' continuous service at the time of being given notice, are entitled to an additional week's notice.
- If the appropriate notice period is not given, the employee must receive payment in lieu of notice. Part of a notice period or a part payment may be given.
- If payment in lieu is made, the amount paid should be based on the ordinary time the employee would have been expected to work over the notice period.

11.2.2 Notice by employee

The minimum period of notice required to be given to the employer by the employee is either:

a. that prescribed by the enterprise agreement or contract of employment
b. if no period of notice is prescribed as above, a period of notice equal to the employee's usual pay period.

11.2.3 Reasonable notice

There may be some situations where an employee's stated terms and conditions do not set out a notice period and where the above table does not provide sufficient notice. In some cases, the courts will deem such relatively short notice periods inappropriate in light of ongoing development in the employment relationship. This is most common for senior professional or managerial employees.

In such situations, an employer must give an employee 'reasonable notice' under their contract of employment. Courts have implied this concept of reasonable notice into contracts of employment.

The period of notice deemed to be reasonable depends on each individual case and is determined by various factors, including:

- nature of the employment
- importance of the position
- employee's age, qualifications and experience
- length of service
- likelihood of the employee finding other suitable employment
- sacrifice that the employee made to work for the employer
- industry practice.

Employers faced with terminating the employment of managerial and professional employees should seek specialist advice. Contact the Victorian Chamber Workplace Relations Advice Line on (03) 8662 5333.

11.3 Unlawful termination

Every Australian worker is protected from unlawful termination, regardless of the size of the business they work in. Employers must not terminate employees for any of the following reasons, or for reasons which include one of the following:

- a person'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 (some exceptions apply, such as where it's based on the inherent requirements of the job)
- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.

11.4 Unfair dismissal (harsh, unjust or unreasonable)

The *Fair Work Act 2009 (Cth)* provides protection for employees, in certain circumstances, who claim that their dismissal was 'harsh, unjust or unreasonable'. Employees covered by a modern award, enterprise agreement or who fall within the high income threshold limit may make an application under this section of the legislation. 'Unfair dismissal' is the term often used in relation to applications brought under the Act.

11.4.1 Exclusions

Under the *Fair Work Act 2009 (Cth)* certain employees or categories of employee are excluded from making an application alleging harsh, unjust or unreasonable dismissal.

The exclusions are as follows:

- where the dismissal was a case of *genuine redundancy*
- where the employee is not covered by an award or enterprise agreement and their annual rate of earnings exceeds the *high income threshold* ($148,700 as at 1 July 2019)
- the employee was under a contract of employment for a specified period of time, for a specified task or for the duration of a specified season
- the employee was under a training arrangement for a specified period
- certain casual employees.

Who is eligible to make an application?

An employee is eligible to make an application for unfair dismissal if they have completed the minimum employment period of:

- one (1) year—where the employer employs less than 15 employees (a **small business** employer)
- six (6) months—where the employer employs 15 or more employees.

11.4.2 Constructive dismissal

Constructive dismissal occurs when the principal contributing factor to an employee's decision to leave the workplace is some unreasonable act, or unreasonable failure to act, on the part of the employer. This terminology is used in dismissal claims where the employee resigned but is claiming the dismissal was at the employer's initiative. An employee found to be constructively dismissed may then argue that their dismissal is harsh, unjust or unreasonable.

11.4.3 Fair dismissal

In order to prevent applications being made alleging unfair dismissal and orders by the Fair Work Commission for reinstatement or compensation, employers should be aware of the requirements that the Fair Work Commission will consider when deciding whether a dismissal is fair or not.

There are two elements of fairness:

Substantive fairness is concerned with ensuring termination is the appropriate remedy in the circumstances or that 'the punishment fits the crime'. Employers must have a valid, defensible reason for their actions that they would be willing to defend in a court of law.

Procedural fairness relates to the process followed leading to the termination. Procedural fairness applies to dismissal with notice and dismissals without notice or summary dismissals. Procedural fairness in relation to a dismissal with notice requires an employer to have followed a disciplinary procedure, giving the employee warning/s about their performance or behaviour, and an opportunity to improve.

Procedural fairness in relation to a summary dismissal requires an employer to thoroughly investigate the circumstances before making a decision to dismiss the employee and to give the employee a fair hearing and an opportunity to defend themselves against the allegations made.

11.4.4 Disciplinary procedure

If an employee's performance/conduct is not at the level required, the employee should be advised their performance/conduct is not acceptable. The employer should determine how serious the problem is and how they are going to deal with it.

If required, the employee should be provided with appropriate training and/or guidance to assist them to reach an acceptable level within a reasonable timeframe. The employee should be made aware of the consequence if they fail to improve to an acceptable standard. The consequence may be, if there is no improvement within the given timeframe, that their employment is terminated.

Employers should be aware of qualifying periods and apply them properly. The qualifying period represents the period of time in which an employee is ineligible to lodge an unfair dismissal application and is an opportunity to assess a person's fit and competency in their role. Due to other claims that can arise (e.g. discrimination, general protections) it is important to maintain a clear and transparent process so the employer can, if required, demonstrate reasons for a termination that are clearly related to performance or conduct.

If the employer can display that they have given the employee every reasonable opportunity to improve their performance/conduct they will have the best chance of defending any claims in relation to the employment relationship if the employment is terminated.

Employees not fulfilling the requirements of their role generally fall into one of the following categories:

- **Underperformance.** This occurs when someone is falling below the standard required. It is not a conduct issue as much as a shortfall in performance. It often relates to matters of quality or quantity of outputs, meeting targets or deadlines.
- **Misconduct.** This occurs when a behavioural issue results in expectations not being met. It concerns the poor conduct of the individual, rather than any skills or knowledge deficit as with underperformance issues. It often relates to attitude issues, disregard for rules or failure to obey or adhere to set standards, for example attending work on time.
- **Serious misconduct** is contained in the Fair Work Act and is considered to be matters of such seriousness that the employment relationship is unable to continue.

A warning process can include informal and formal procedures aimed at resolving a problem by one of two ways:

- ideally, the employee improving their performance/conduct, or
- if failing to get an improvement in response to warning/s and support, termination of employment.

Processes should be fair and transparent to both the employee and the employer in a delicate situation where both procedural and actual fairness is vital.

In general:

- Matters relating to underperformance should be supported by clarification of expectations, training and support prior to using formal warnings or disciplinary action.
- Misconduct can also be supported by clarification of expectations, training and support but may also attract disciplinary sanctions if evidence supports that the person did, or should have reasonably known, what was required and has breached a requirement.
- Serious misconduct generally results in serious outcomes such as final warnings or termination of the employment relationship.

11.4.5 Dismissal with notice

Informal process

An informal process is appropriate for minor performance/conduct improvement where matters may not have been bought to the employee's attention, or expectations may not be clearly communicated or understood. For example, poor performance/conduct may be caused by different factors such as lack of skills, training and/or guidance.

Informal discussion

This may include on the spot feedback or comments relating to a specific aspect of performance and may be enough to guide the employee in the right direction.

Informal coaching / counselling

Discuss performance/conduct with the employee detailing the employer's requirements and expectations:

- Give the employee an opportunity to respond.
- Detail any action required to rectify the issue. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- Document the discussion. The employee should sign the documentation to confirm the discussion in the counselling session. Keep a copy on the employee's file.
- Include a review timeframe if appropriate/required.

The employee's performance should be monitored and if the informal process does not resolve the performance/conduct issues you may need to proceed to a formal warning process. It important you document the steps taken throughout the informal process.

Formal process

Before making any decisions on disciplinary matters, ensure the person has the opportunity to consider the claims against them and respond accordingly.

The following standards are often used when determining whether allegations of misconduct are substantiated:

1. The balance of probabilities, i.e. whether there is sufficient evidence to substantiate allegations; and
2. The *Briginshaw standard*, which relates to the standard of evidence required if allegations involve a crime, fraud or other type of moral wrong doing, which if proven, would have serious consequences for the alleged wrong doer.

The Briginshaw standard outlines that the more serious the allegation against an individual is, the higher the standard of proof should be. Whilst this standard is not a requirement in workplace matters, it is a good test as to whether the matters and decisions would be defendable in a court.

The standard of proof differs between civil and criminal matters. In civil matters, the established standard is the 'balance of probabilities'. This is a lesser standard than the proof required in criminal matters, which is 'beyond reasonable doubt'.

First warning

- Arrange a formal meeting with the employee.
- The Victorian Chamber recommends advising employees they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person must NOT be acting in a professional capacity (such as a lawyer) and is there only to support the employee and not to participate in the discussion.

  However, if their support person is part of the union they do have the right to be able to be a representative, please call the Advice Line for further information 8662 5222.
- Detail any history of counselling (previous related matters).
- Detail any action required to rectify the performance/conduct. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- Give the employee the opportunity to respond to the allegations.
- Consider the employee's response to the allegations before deciding whether the matter warrants a warning.

- Advise the employee of the consequences that, if there is no improvement within the required timeframe, or a repeat of issues in the case of misconduct, further disciplinary action may be taken, up to and including termination of employment.
- Document the discussion. The employee should sign the documentation to confirm their understanding of the discussion.
- Keep a copy on the employee's file.

Second or further warnings

Follow the same process for a first warning.

Final written warning

- Arrange for a formal meeting with the employee.
- Detail any history of counselling (previous related matters and warnings).
- Advise the employee they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is there only to support the employee and not to participate in the discussion.
- Clearly detail the employee's performance since the previous warning.
- Give the employee the opportunity to respond to the allegations.
- Consider the employee's response to the allegations before deciding whether the issue warrants a final written warning.
- Advise the employee of the consequences that, if there is no improvement within the required timeframe, or a repeat of issues in the case of misconduct, their employment may be terminated.
- Clearly outline the action required to rectify the performance/conduct. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- Document the discussion. The employee should sign the documentation to confirm they understand and are fully aware of the consequences if there is no improvement.
- Keep a copy on the employee's file.

Termination of employment

Note: Small business employers (those with under 15 employees) should ensure they are familiar with the Small Business Dismissal Code when considering terminations. A termination that is consistent with the Small Business Code forms a valid defence to an unfair dismissal claim.

- Arrange a formal meeting with the employee.
- Advise the employee they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is only there to support the employee and not to participate in the discussion. However, if their support person is part of the union they do have the right to be able to be a representative.
- Detail any history of counselling (previous related matters and warnings).
- Detail the employee's performance/conduct since the previous warning.

- Give the employee the opportunity to respond to the allegations.
- Consider the employee's response to the allegations. If the response is not regarded as satisfactory, termination can follow.
- Take sufficient time to weigh up the employee's response. Often this may involve scheduling a second meeting to advise decisions and outcomes.
- Provide the employee with the reason for the termination in writing.
- If the termination is not related to serious misconduct, ensure the employee is given the appropriate notice (or payment in lieu of notice), any outstanding wages and entitlements accrued such as annual leave, long service leave (if applicable) etc.
- Payment for outstanding entitlements should be made on the day of termination or within the next pay cycle.

11.4.6 Dismissal without notice / serious misconduct (summary dismissal)

An employee who has committed serious misconduct can be dismissed without notice following the substantiation of allegations.

Serious misconduct includes, in the course of employment, the employee engaging in theft, fraud, assault, intoxication at work, a serious breach of policies and procedures or conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the employer's business. (See also *1.1.2 Fair Work Regulations 2009 Reg 1.07*.)

Serious misconduct process

Immediately arrange a meeting with the employee when you become aware of the employee's suspected misconduct:

- Advise the employee of the allegations.
- Advise them of the process to be followed.
- If necessary, stand down the employee with full pay while the employer investigates the allegation.
- Alternatives to stand down include placing the employee on supervised shifts, or other interventions that minimise the potential risk of the person remaining in the environment at that time (for example, if someone is accused of assaulting a client, it would be unwise to leave them in an unsupervised environment whilst the matters are unresolved or unclear). However, if their support person is part of the union they do have the right to be able to be a representative, please call the Advice Line for further information 8662 5222.

Ensure you:

- Give the employee an opportunity to respond to the allegations during the process.
- Document all conversations and findings of the investigation (this may include statements from other employees, clients etc.).
- On completion of any investigation, arrange a meeting with the employee to discuss findings.
- Advise the employee they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is there only to support the employee and not to participate in the discussion.

- Discuss the findings of the investigation with the employee and allow them to see any evidence, documentation, witness statements etc., and consider the employee's response.
- Consider the employee's further response to the investigation. If not satisfactory, the employee can be terminated immediately.
- Provide the employee with the reason for the termination in writing.
- Pay the employee any outstanding wages and entitlements (always check the binding industrial instrument and seek further clarification if required).
- Payment for outstanding entitlements should be made at the time following termination.

11.4.7 Termination interview

When you have made a decision to terminate an employee's employment, the termination interview can become a difficult exercise. The following points will help you conduct a lawful and compassionate termination interview:

Prepare

- Establish an agenda or a list of issues to discuss, such as the reasons for the proposed dismissal, the actions you took to prevent the outcome and the dismissed employee's entitlements (such as notice and accrued annual leave). Collect any documents or evidence which may assist you and to demonstrate the performance issues, such as time cards and productivity data.
- Have copies of previous warnings issued in relation to the dismissal.
- Allow time on the agenda for the employee to ask questions or make comments.
- Clear time in your diary for the interview, and ensure you will not have any interruptions (e.g. divert your phone calls).
- Notify the employee of the interview, providing them with adequate warning (the interview follows several indicative discussions, so it should not be a surprise to the employee).
- Advise the employee that they may bring a support person to the interview should they so desire.

Interview

- Explain the issue/s of concern clearly and concisely, providing examples.
- Summarise the disciplinary procedure followed, leading to the decision to dismiss.
- Use only a few key points.
- Avoid showing personal feelings and offer constructive suggestions.
- Don't over-emphasise the past; rather, focus on positive future actions for career rebuilding.
- State the decision factually, and keep your voice quiet and conversational.
- Specify termination conditions, set dates and explain entitlements.
- Allow the employee opportunities to respond.

Document

When dismissing an employee, record your actions carefully. Remember you are preparing evidence you may need in a court of law. Sign the records and request the employee's signature on the notice of dismissal. Retain copies of all correspondence given to the employee, including the notice of dismissal.

11.5 Redundancy

The generally accepted definition of a redundancy is a dismissal not on account of any personal act or default of the employee dismissed but because the employer no longer requires the job that the employee has been doing to be done by anyone.

Employers should be mindful of the following considerations:

- Redundancy does not apply in circumstances that are due to the ordinary and customary turnover of labour.
- Termination of employment in circumstances of redundancy does not involve any consideration of fault on the part of the employee.
- Redundancy should not be used as a way to address poor performance or to avoid disciplinary procedure.
- Jobs become redundant – not people. Employees are retrenched as a result of redundancies.
- Redundancy can occur because of economic recession (loss of business), funding cuts, technological change, transfer of business (merger/acquisition/take-over), and/or re- organisation of operations.

11.5.1 Identifying genuine redundancies

The genuine need for redundancies will often be questioned by employees, their unions and industrial tribunals. In order to identify a genuine redundancy, you should ask yourself these questions:

- What was the reason for the redundancy?
- On what basis was the employee(s) chosen for redundancy?
- Has anyone else filled the redundant position?
- Who carries out the employee's duties now?
- Have any employees been employed since the redundancy? What are their duties?
- Is any overtime being worked? Have any casuals been employed?
- Were alternative duties considered for those affected by redundancies?

Further questions to ask are:

- Why are particular positions becoming redundant?
- What measures have been taken to avoid or minimise terminations?
- Has redeployment been considered? Have skills been assessed and deployed?
- Is job-sharing feasible?
- Is early or voluntary retirement feasible?
- Is retraining an option?

11.5.2 Requirements for lawful redundancies

The National Employment Standards (NES) provide the rules relating to redundancy and redundancy pay.

What's redundancy?

Redundancy under the NES happens when an employer either:

- decides they no longer want an employee's job to be done by anyone and terminates their employment (except in cases of ordinary and customary turnover of labour), or
- becomes insolvent or bankrupt.

Note: What constitutes ordinary and customary turnover of labour will depend on the relevant circumstances. Redundancy may happen when:

- the job someone has been doing is replaced due to the employer introducing new technology (i.e. it can be done by a machine)
- business slows down due to lower sales or production
- the business relocates
- a merger or takeover happens
- the business restructures or reorganizes.

Having made an operational decision that employees must be retrenched, criteria need to be established to determine which particular employees are to have their employment terminated. As we have seen with the other forms of termination, these criteria need to be fair and defensible. The more objective the criteria you use to select which employees are to be made redundant, the less likely you are to run into problems.

You should also take care not to breach any relevant anti-discrimination legislation (Refer *8.3.3 Performance management, disciplinary action and termination of employment*).

Reference should be made to particular modern awards, enterprise agreements, and contracts of employment or company policies for such clauses because preference provisions and other redundancy provisions may restrict the choice of which employees are to be made redundant.

Consultation

Once you have made a decision that may lead to jobs becoming redundant, modern awards and enterprise agreements require the employer to hold discussions with the employee/s concerned and their union(s).

To assist in these discussions, employers are often required to provide all relevant information in writing to the affected employee/s and their union/s, including number and categories affected, the number usually employed and the period over which the terminations will be made.

You should seek professional industrial advice (such as that offered by the Victorian Chamber) prior to inviting any third party into your redundancy processes.

Severance pay

In addition to the period of notice prescribed for ordinary termination of employment (refer *11.2.1 Notice by employer*, and points on other sources of notice), an employee whose employment is terminated must receive an amount of pay in respect of a continuous period of service. This pay is designed to compensate the employee for their severance from employment.

The amount of redundancy pay under the NES equals the total amount payable to the employee for the redundancy pay period. This is worked out using the table below, at the employee's 'base rate of pay' for his or her ordinary hours of work.

An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

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

Employee's period of continuous service with the employer on termination	Redundancy pay
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

Note: long service leave entitlements provide the rationale for diminishing the redundancy pay entitlement for employees who have a period of 10 years' continuous service or greater.

It is possible for an employer to apply to the Fair Work Commission for a determination reducing their liability to pay redundancy pay to a specified amount (that may be nil), if the Fair Work Commission considers it appropriate. The employer may apply for the determination if an employee is entitled to redundancy pay and the employer finds other acceptable alternative employment or cannot pay the amount.

In calculating severance pay (in conjunction with the terms of notice), the employer must examine sources of the employee's terms of employment (i.e. modern awards, enterprise agreements, contracts of employment and company policies etc.).

Exemptions to the payment of severance pay

Redundancy pay is generally not payable under the NES to any of the following:

- an employee whose period of continuous service with the employer is less than 12 months
- an employee of a small business employer (see *Redundancy and small business* below)
- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct
- a casual employee
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
- an apprentice
- an employee to whom an industry-specific redundancy scheme in a modern award applies
- an employee to whom a redundancy scheme in an enterprise agreement applies if both:
  - the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation
  - the employee is covered by the industry-specific redundancy scheme in the modern award.

Often, the terms of an award or agreement will say that you may not get redundancy pay if your employer finds an acceptable alternative position for you.

Redundancy and small business

An employer who is a small business employer is not required to provide redundancy pay on the termination of an employee's employment. A small business employer, for the purpose of determining redundancy pay, is an employer who, at a particular time, employs fewer than 15 employees. This is based on a head count of employees.

When calculating the number of employees employed at a particular time, all the following factors are to be taken into account:

- all employees employed by the employer at that time are to be counted
- a casual employee is not be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis
- associated entities are taken to be one entity
- the employee being terminated, and any other employees being terminated at that time are counted.

It is important to ensure that there is not differing provisions within your relevant Modern Award which may stipulate a requirement to pay leave even if you are less than 15 employee's please call the Victorian Chamber Workplace Relations Advice Line for further assistance on 8662 5222.

Employee leaving during notice period

An employee given notice by an employer for reasons of redundancy may terminate their services at any time during the period of notice. If this happens, severance pay is calculated as if the original notice period had run

its course, but the payment of due notice under either award or statute is discounted for the period of notice served.

Alternative employment

An employer in a particular redundancy case may apply to the Fair Work Commission to have the general severance pay prescription varied if they obtain acceptable alternative employment for the employee.

It is recommended that any employer wishing to make such an application should first discuss it with a Victorian Chamber consultant.

Time off during the notice period

During the period of notice of redundancy given by the employer, an employee is often allowed up to one day off during each week of notice, without loss of pay, to seek other employment. Please see your Award for further information.

Notifying Centrelink

Where a decision has been made to terminate 15 or more employees, the employer must notify Centrelink as soon as possible, giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out. This is a requirement under the provisions of the *Fair Work Act 2009 (Cth)*.

Superannuation benefits

Unless otherwise ordered by the Fair Work Commission, an employee who receives a benefit from a voluntary superannuation scheme will only receive the difference between the severance pay and the amount of the superannuation benefit they receive (in the case of employer contributions only). What this means is that where an employer has voluntarily introduced a superannuation scheme, and benefits are paid to an employee on termination, it is considered inequitable to make the employer pay severance pay, in addition.

Any employer seeking to discount a severance payment in this manner should check with a Victorian Chamber specialist consultants to see if their contributions can be discounted in this manner.

Transfer of business

Severance pay is not paid in cases of succession, assignment or transfer of business. If you have taken over a business from a previous owner, you should note that where a business is transmitted from one employer to another, and where existing employees become employees of the new owner:

- the continuity of the employee's employment is deemed to have not been broken by the transfer of the business
- the period of employment the employee had with the original owner (or any prior owner) is deemed to be service with the new owner.

Thus, on the purchase of the business, you may have financial obligations that accrued prior to your ownership.

Taxation

Taxation depends on the circumstances of each case, so each individual should seek tax advice.

The criteria necessary to qualify as a bona fide redundancy payment are set out in section 27F of the Income Tax Assessment Act and are briefly as follows:

- The termination payment must be made in consequence of the dismissal of the employee from employment by reason of the bona fide redundancy of the employee.
- The date of termination must be before the employee's 65th birthday or such earlier date on which their employment would necessarily have come to an end by reason of their attainment of a particular age or by completing a particular period of service.
- The Commissioner of Taxation must be satisfied that the employer and employee were dealing with each other at arm's length, or that the amount of the termination payment does not exceed the amount that could reasonably be expected to have been paid if the parties had been dealing with each other at arm's length.
- At the time of termination, there must not be any arrangement to employ the employee after the date of termination.

Statements of service

All terminated employees, including those terminated summarily for misconduct, must be given a Statement of Service. The employer should provide the employee with a written Statement of Service specifying the period of their employment and the classification or the type of work they performed.

This does not mean that the employer must provide a reference. A statement of service needs to state only the name of the employee, the duration of their employment and their position.

In each of the above cases, employers must also complete a statement of termination for the Australian Taxation Office, if requested by the employee. This is a formal requirement and is not discretionary.

Penalties

An employer who is found to have dismissed an employee unfairly may be exposed to the following penalties under federal legislation:

- payment in lieu of notice
- payment of compensation up to $74,350 (as at 1 July 2019) indexed, or six months' salary
- re-instatement of employment of an employee
- payment of wages lost during the period between the hearing and the reinstatement
- substantial legal costs and costs for the time involved in handling the matter.

11.6 Consultation obligations to communicate redundancies

When eliminating a large number of jobs, employers usually find themselves communicating the least valuable information. They are often preoccupied with explaining "why". Communication efforts, according to employees, should focus almost entirely on "who goes" and "how much will I get".

Employees facing redundancy are desperate for particular information:

- How many people are going?
- What are the criteria for selecting them?
- When do the terminations happen?
- How much is the severance package?

The fact is that 80 per cent of employees leaving their jobs do so voluntarily. What employees do want is information. But, what sort of information?

According to a number of employee surveys of companies undergoing redundancy programs, the last question employees wanted answered was, "What is the background information on the merger/down- sizing/ organisational change?" This same research showed that money was uppermost in employees' minds at the time of change. Generally, the information employees required was conveyed to them poorly.

When communicating information on severance pay, for example, think of how employees are going to receive this information. Once again, research shows that when faced with a problem they can't solve, employees turn to (in order):

1. supervisor's advice
2. experienced co-worker's advice
3. unwritten company policy
4. company supplied manuals.

Communication model of a redundancy program

Employers must carefully plan the communication of a redundancy program using this model, for example:

Consider how you say it

For each topic listed, run a short seminar with a small group of supervisors. Have them answer some of the questions that might arise:

- Which positions will be made redundant?
- How much severance pay will the affected employees get? What is the redundancy timetable?
- What other information do you need?

Support these sessions with a short, simply-written document that contains facts concerning the impact of the redundancy program.

Consider what you say

The most important things to get right are the rules for determining which positions will be made redundant and, most important, the severance package. These points may often be discussed with the union(s) if there is a union presence at the workplace.

Keep the redundancy rules simple.

Remember that the uncertainty that can surround redundancies is more destructive to employees and the organisation than the reality. This means that open and timely communication can lessen the impact of the redundancy decision.

The method of handling redundancies determines the outcome: either confused, anxious, rumour-filled employees, uncertain of what's happening to them, or an organisation that knows what it is doing and where it is heading.

Handling supervisors' questions

Consider setting up a communication process or a 'hotline' dedicated to answering questions from your front-line communicators, the supervisors. Some businesses choose to use outside consultants to provide this resource. This allows supervisors to remain anonymous, if they wish, and relies on verbal as opposed to written communication.

Test their knowledge

It is important that supervisors fully understand and are prepared for the questions that employees will ask them. Supervisors who can't answer these questions will seriously undermine the process.

One way to ensure this information is understood is to test the supervisors. This is best done following each of the information seminars.

Carrying out redundancies is too important a task to handle without the aid of effective communication.

11.7 Documentation

11.7.1 Counselling Record Template

11.7.2 Final Warning Letter

11.7.3 Termination Summary Dismissal Letter

11.7.4 Warning Letter