

# Dismissal from Employment

## Fact Sheet

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**IMPORTANT NOTICE:** The information outlined below applies to employees and employers who are under State industrial relations jurisdiction. Since the commencement of the federal government's workplace relations laws on 27 March 2006, employers who are constitutional corporations (including a financial or trading corporation – generally Pty Ltds or Limiteds) and their employees are now covered under federal industrial relations jurisdiction. These employees and employers should contact the Queensland Workplace Rights hotline on **1300 737 841** or visit [www.workplacerrights.qld.gov.au](http://www.workplacerrights.qld.gov.au) for further information and assistance on the laws.

## Dismissal from Employment

Queensland's *Industrial Relations Act 1999* (the Act) includes dismissal provisions which ensure that fairness to employees is balanced with the needs of employers to dismiss employees when there is a good reason.

If an employee feels they have been unfairly dismissed they have the right to make an application for reinstatement to the Queensland Industrial Relations Commission (the Commission).

## Are any employees excluded from the unfair dismissal provisions?

The unfair dismissal provisions of the legislation do not apply to the following employees:

- Short term casual employees (i.e. casuals who are not engaged on a regular, systematic basis for a period of one year or more and who do not have a reasonable expectation of continued employment);

**Note:** Short term casual employees are **not** excluded from the unfair dismissal provisions if they are dismissed for an invalid reason.

- Apprentices or trainees;
- Employees serving a probationary period.
  - All employees are subject to a probationary period for the first three months of their employment unless the period is shortened or waived completely by written agreement between the employer and employee.
  - Employees may be subject to a probation period of more than three months provided that the period is agreed in writing by the

employer and employee prior to employment starting and provided that the period is reasonable in the circumstances;

**Note:** Probationary employees are not excluded from the unfair dismissal provisions if they are dismissed for an invalid reason (see below for an explanation of invalid reasons for dismissal).

- Employees whose annual wages immediately before dismissal were more than \$106,400, who were not employed under an award or agreement and were not public service officers employed on tenure under the *Public Service Act 1996*; and
- Employees engaged for a specific period or task.

**Note:** Employees engaged for a specific period or task are *not* excluded from the unfair dismissal provisions if:

- the main purpose of engaging the employee in that way at the time of engagement was to avoid the unfair dismissal provisions, or
- the employee is participating in a labour market program and is dismissed before the period ends or the task is complete.

Please refer to the section on 'notice periods' in this fact sheet, to see which employees are excluded from the notice of dismissal requirements in the Act.

## When is dismissal unfair?

A dismissal is unfair if it is:

- for an invalid reason (i.e. the reason for dismissal is unfair or discriminatory); or
- harsh, unjust or unreasonable (i.e. the dismissal procedure is unfair).

## What are invalid reasons for dismissal?

Invalid reasons are listed in the Act. For example, a dismissal is invalid if it is:

- because of temporary absence due to illness or injury. This includes:
  - any period of paid sick leave, or
  - period/s of unpaid leave due to illness or injury of not more than three months in any one year;

**Note:** The *Workers' Compensation and Rehabilitation Act 2003* also provides that an

employer must not dismiss an injured employee (i.e. an employee who receives an injury as defined by the *Workers' Compensation and Rehabilitation Act 2003*, within twelve months after the employee becomes injured, solely or mainly because the employee is not fit for employment in a position because of the injury. A similar provision existed in the *Industrial Relations Act 1999* prior to 17 May 2006.

- because an employee filed a complaint, or was involved in legal proceedings against an employer;
- discriminatory (i.e. based on sexual preferences, family responsibilities or contravenes the *Anti-Discrimination Act 1991*);
- due to membership or non-membership of a union or participation in certain union activities;
- because the employee refuses to negotiate for or make a certified agreement, Queensland Workplace Agreement or Australian Workplace Agreement;
- because an employee or their spouse
  - is pregnant or has applied to adopt a child; or
  - has given birth to or adopted a child; or
- because an employee has applied for, or is absent on, parental leave

### **When is a dismissal harsh, unjust or unreasonable?**

To decide whether a dismissal is harsh, unjust or unreasonable, several issues are considered by the Commission, including:

- whether an employee was notified of the reason for dismissal;
- whether the dismissal related to:
  - the operational requirements of the employer's business (e.g. the position is no longer required); or
  - an employee's conduct, capacity or performance;
- if the dismissal relates to the employee's conduct, capacity or performance whether the employee had been warned or given an opportunity to respond to allegations about it; and
- any other matters the Commission considers relevant.

Even if a dismissal is carried out in accordance with the above considerations, it might still be regarded as harsh, unjust or unreasonable if there was not a good enough reason to justify dismissal.

### **What is required of employers?**

To ensure dismissal is lawful, the employer should comply with the Act. Following are some suggested additional guidelines employers may consider to ensure fair and just dismissal.

- Set the ground rules - and follow them. The initial step in good employer/employee relations is to establish ground rules about work standards, policies and practices.
- Provide job descriptions so that employees know their duties.
- Ensure employees are trained for the job and agree with and understand the standards of work expected from them.
- Establish a disciplinary policy and procedure that is fair to everyone. This should include a system for identifying and resolving workplace problems. Once a policy is established it should be used consistently for each dismissal. Employers should be aware that all agreements and most awards contain dispute resolution procedures.
- Make sure employees understand this disciplinary policy and procedure.

An employer who is dissatisfied with an employee's conduct or standard of work should explain their concern to the employee.

The discussion allows the employee to respond while also making sure the employee understands the consequences of continued poor performance and is given the opportunity to improve or overcome the problem.

### **What should be included in a disciplinary policy?**

A suggested process for a disciplinary policy could include the following stages:

1. The employer or their representative initially has a counselling session with the employee, fully explaining the corrective action required.
2. If the employee repeats the incident, a first warning is issued by the employer or their representative, in the presence of the employee's chosen representative (e.g. their union representative).
3. A further repeat will result in a final warning being given by the employer or their representative, again in the presence of the employee's chosen representative.

4. If the first incident is considered severe enough, the first warning could be regarded and recorded as a final warning.

More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

## Should employers keep records?

Documentation of disciplinary meetings and action is very important. Employers should keep formal, confidential records of any counselling or disciplinary sessions and performance-related discussions.

Records should be sighted and initialled by the employee as true. The employee should also receive a copy of the records. Such records will provide important evidence if the matter proceeds to the Queensland Industrial Relations Commission.

## What should happen if an employee needs to be dismissed?

If an employer has followed the proper procedures and the problem still exists, they may decide that dismissal is the only solution. In such cases, the employer must ensure:

- the dismissal is not for an unfair reason;
- the employee knows the reason for dismissal and has an opportunity to respond to the employer in relation to that reason; and
- they give the appropriate notice or compensation in lieu.

Putting the reason for the dismissal in writing will help to clarify the situation and prevent any misunderstandings.

## How much notice of dismissal should an employee be given?

Employees must be given proper notice before they are dismissed (except in cases of serious misconduct or where payment in lieu of notice is given to the employee). The period of notice depends on how long an employee has been employed.

The Act specifies the following minimum notice periods to be given by an employer to an employee. If an employee is covered by an award or agreement that provides for a notice period less than that contained in the Act, then the notice period prescribed by the Act must be given if that employee is dismissed.

Period of continuous service	Notice Period
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks

If an employee is over 45 and has at least two years continuous service with the employer, the minimum notice period is increased by one week.

Instead of having an employee work the notice period, the employer can choose to pay them wages in lieu of notice. To do this the employer must pay the employee the amount of wages they could have expected to earn had they continued to work during the notice period.

A period of annual leave cannot also count as a period of notice that an employer gives to an employee.

Apprentices and Trainees: Specific provisions apply for the termination of an apprentice or trainee. The Act provides that the employment of an apprentice or trainee may be terminated during the probationary period by the employer giving the apprentice or trainee one week's notice.

Under the legislation some employees are not entitled to the notice provisions of the Act.

These are:

- all casual employees;
- employees engaged by the hour or day;
- employees engaged only for a specific task or period;
- employees serving a probationary period (as defined in the Act);
- apprentices or trainees (except during the probationary period);
- employees in a labour market program; and
- employees whose annual wages immediately before dismissal were more than \$106,400, who were not employed under an award or agreement and were not public service officers employed on tenure under the *Public Service Act 1996*.

Even though employers of these employees are excluded from the requirements to give notice of dismissal under the Act, their award or agreement may specify that notice must be given to them. In such cases employers must comply with the provisions of the relevant award or agreement.

## In cases of misconduct, can an employee be dismissed without notice?

Yes. If an employee engages in misconduct serious enough that it is unreasonable for the employer to continue the employment, the employee may be

dismissed instantly. Examples of misconduct by an employee include theft, assault and fraud.

Each instance of alleged misconduct should be investigated and considered on its own merits to determine whether instant dismissal is warranted.

## **What if an employee worked for the previous owner of a business?**

When a business changes hands (e.g. is sold) and the new employer continues to employ the existing employee, the service with the previous employer is transferred to the new employer.

If such a 'transferred' employee is later dismissed the new employer is required to give notice for the total period of service that the employee had with both old and new employers.

However, if the previous employer gave notice or payment in lieu at the time of the transfer, only service with the new employer is taken into account in calculating a later period of notice.

## **How much notice is an employee required to give?**

The Act sets down minimum periods of notice for dismissal. The amount of notice an employee must give when resigning from employment is governed by their award or agreement and may differ from the notice of dismissal periods in the Act (e.g. the amount of notice in an award or agreement may be a set period of two days or one week which does not increase because of the length of service).

For those employees not covered by any award or agreement, the amount of notice for resignation should be a period agreed with their employer.

The Act provides that any Award or Agreement (Federal or State) made after 1 September 2005, requires that an employee must give to an employer 1 week's notice to terminate their employment, unless the Award or Agreement provides otherwise.

Apprentices and Trainees: Specific provisions apply for the termination of an apprentice or trainee. The Act provides that the employment of an apprentice or trainee may be terminated during the probationary period by the apprentice or trainee giving the employer one week's notice.

## **What is required of employees?**

Employees should understand their rights and responsibilities, as set out in the legislation and in any awards or agreements that apply to them.

It is also important to establish an understanding with the employer about acceptable work standards. It is important that both parties abide by these agreed standards.

Employees should ensure they understand:

- the terms of their award or agreement;
- what is expected of them, their responsibilities as an employee and what they can expect from their employer (a position description can provide this information);
- grievance and disciplinary procedures;
- notice entitlements according to their award or agreement and the legislation;
- the need to keep notes about incidents related to work performance and any counselling they receive from their employer; and
- the processes and procedures to follow if they are dismissed.

Employees considering further action as a result of dismissal should clarify the following details.

- What was the reason for dismissal?
- Was the incident that resulted in dismissal an isolated one? (The employer may believe it is justifiable to dismiss an employee for a few slips in performance. However, to do this could be harsh, unjust or unreasonable - and therefore unfair.)
- Was the reason for the dismissal related to the employee's conduct, capacity or performance, or to the operational requirements of the business?
- Did the employer follow a formal counselling process and were genuine efforts made to remedy any perceived difficulties in conduct, capacity or performance?
- Has the employer been fair, just and reasonable?
- Has the employer given the required notice or payment in lieu?

## **What can an employee do if they believe that they have been unfairly dismissed?**

If after considering the circumstances of their dismissal, and the information contained in this brochure, an employee still believes that they have been unfairly dismissed, they can lodge an application

for reinstatement with the Queensland Industrial Relations Commission.

This application must be lodged within 21 days of dismissal. However, in special circumstances extensions may be granted on application to the Commission.

A union can also apply to the Commission on behalf of the employee.

## **What is the first thing that happens?**

When an application is received by the Industrial Registrar, the circumstances of the employee's employment are checked to determine whether the employee is excluded from the unfair dismissal provisions of the Act, as outlined above.

Where the Registrar believes that the employee is excluded, the employee will be advised of this in writing. If the employee still wishes to proceed with the application, they must notify the Registrar in writing within 21 days after the Registrar's notice is received.

If the employee does this, the matter will be dealt with by the Commission.

## **What happens next?**

Before a formal hearing is arranged, the Commission will organise a conciliation conference between the employer and employee in an attempt to settle the matter.

The conference is important as it gives the employer and employee the chance to come to an agreement. Both sides are able to state their case in a controlled and impartial atmosphere.

Conferences can eliminate the need for a formal hearing.

In Queensland, the majority of unfair dismissal cases do not go any further than the conference stage.

If the Commissioner believes that the matter cannot be settled by conciliation or that the employee is excluded from the unfair dismissal provisions of the Act they must:

- issue a written statement explaining why they believe the matter cannot be settled or that the employee is excluded; and
- inform the parties of the merits of the application and of the consequences of further proceedings (e.g. costs may be awarded against either party).

The Commissioner may also recommend that the application be discontinued.

If the applicant takes no further action their application will automatically lapse six months after the Commissioner takes the above actions.

It is only when attempts at conciliation fail that the Commission, being advised by the employee that they wish the matter to go to hearing, hears the case and makes a decision.

## **When can the Commission order that a dismissed employee be reinstated or re-employed?**

If after considering all relevant matters in a formal hearing the Commission is satisfied that a dismissal is unfair, it can order the employer to reinstate or re-employ the employee. Reinstatement is the first remedy considered in all unfair dismissal applications.

The Commission can order that the employee be reinstated to the position that they held immediately before their dismissal, on conditions that are at least as favourable.

If the Commission considers that reinstatement is not practical, it can order that the employee be re-employed in any other position that the employer has available and that the Commission considers suitable.

In addition to any reinstatement or re-employment order, the Commission may also order payment of any remuneration lost as a result of the unfair dismissal, e.g. loss of wages from the date of dismissal to the date of reinstatement.

The employee may also be ordered to repay any amounts that the employer paid at the time of dismissal e.g. pro rata holiday pay.

## **Can the Commission order that a dismissed employee be paid compensation?**

If, and only if the Commission considers that reinstatement or re-employment is not practical, it can order the employer to pay compensation to the employee.

The maximum compensation that can be awarded to an employee covered by an award or agreement cannot be more than six months wages.

If the employee was not employed under an award or agreement, the maximum amount of compensation that can be awarded is \$45,200 or six months wages – whichever is the lesser amount.

## What about costs?

The Commission can award costs against applicants where applications are frivolous, malicious or without reasonable cause.

Costs can also be awarded when a party (employer or employee) unreasonably causes the other party to incur costs.

## Where can I get an application form?

An application form to apply for reinstatement may be obtained from your local Wageline office by telephoning 1300 369 945 or visit our website at:

[www.wageline.qld.gov.au](http://www.wageline.qld.gov.au)

Alternatively, an application form can be obtained from the Industrial Registrar's office at Level 14, Central Plaza 2, 66 Eagle Street, Brisbane, telephone 3227 8060 or their website at:

[www.qirc.qld.gov.au](http://www.qirc.qld.gov.au)

## Where can I get more information?

### Contact

- Wageline  
4<sup>th</sup> Floor, Centro Lutwyche  
543 Lutwyche Road, Lutwyche Q. 4030  
(or) PO Box 820, Lutwyche Q. 4030
- Wageline Information Centre: Ph: 1300 369 945\*
- Fax: (07) 3872 0519
- Web site: [www.wageline.qld.gov.au](http://www.wageline.qld.gov.au)
- Telephone Interpreter Service: Ph: 131 450

\* Local call cost (mobiles & payphones may be extra)

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