

# Termination checklist for Local Aboriginal Land Councils

Legal information for Local Aboriginal Land Councils

**This fact sheet covers:**

- ▶ steps your LALC should take when terminating a worker's employment

There are a number of important things your Local Aboriginal Land Council (LALC) should consider to avoid legal risks when terminating a worker's employment.



## Disclaimer

The information in this checklist is designed to give you an overview of these important points, and further information is available on [our website](#). This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.



## Caution

Wrongful termination of a worker can leave your LALC open to legal and financial risks, so it's recommended that you seek legal advice before terminating a worker.

## What steps should your LALC take when terminating a worker's employment?

If you are thinking about terminating a worker, your LALC must consider:

- whether termination is appropriate, and why
- how to terminate the worker's employment lawfully and fairly, and
- the required exit procedures



## Step 1: Deciding whether termination is appropriate

- **Have you clearly identified what the performance concerns are?**

Clearly and precisely identify what the performance concerns are, including identifying specific examples or occurrences in relation to each of the concerns.



### Example

The worker has:

- repeatedly failed to complete tasks correctly or to the required standard
- failed to follow directions from a manager, or
- been absent from work on a number of occasions without explanation

- **Have you evaluated the reasons behind your LALC's decision to terminate the worker's employment?**

A number of factors may lead you to consider terminating the employment of one of your LALC's workers, including capability, poor performance, misconduct or redundancy due to financial reasons or a restructure.

#### Capability, performance, and misconduct

- Capability relates to a person's ability to actually do the job.
- Performance relates to a capable employee not meeting performance or conduct standards.
- Misconduct tends to relate to deliberate and serious misconduct by an employee

Before discussing the possibility of termination with the worker or proceeding with termination:

- carefully detail the circumstances around the identified reasons, and
- consider whether alternatives to termination (such as a written warning, a transfer to another team or a change in duties) would be a more appropriate step

#### Redundancy

If your LALC proposes to make the worker's position redundant, make sure you are able to establish that it is a genuine redundancy.

A redundancy will be genuine where:

- the LALC no longer requires the worker's role to be performed by anyone due to changes in the LALC's operations (for example, a restructure)
- the LALC has followed any consultation requirements set out in the relevant employment agreement, modern award, or enterprise agreement, and
- it would not have been reasonable to redeploy the worker to another job or position within the LALC or an associated entity



### Case example – not genuine redundancy

Krzysztof Kiezun was made redundant by Innovative Asset Solutions due to a restructure under which the tasks usually performed by Keizun were no longer required by the business.

Innovative Asset Solutions failed to consult Keizun about the redundancy (which was a requirement under the relevant modern award) and only gave him notice of the timing for the changes and their effect. Innovative Asset Solutions did not communicate measures to avoid or reduce the adverse effects of the changes on Keizun.

At the time of Keizun's redundancy, there were job vacancies within the business for which he had the requisite experience and skill set. There were also other associated companies which may have presented vacancies. Innovative Asset Solutions assumed that Keizun would not be interested in the positions, however it was considered that these assumptions were untested and Innovative Asset Solutions failed to redeploy Keizun where it would have been reasonable to do so.

The redundancy was not genuine.

*Kiezun v Innovative Asset Solutions Pty Ltd [2022] FWC 1831*



For more information on redundancies, see:

- the [Fair Work Ombudsman's webpage](#), and
- our [webpage on termination and resignation](#)

- **Have you considered whether performance management or an investigation should be undertaken before termination?**

If the proposed reason for termination relates to the worker's poor performance in their role, your LALC must first consider undertaking a performance management process to identify the possible reasons for poor performance and engage with the worker to provide them with an opportunity to improve their performance.

Where serious misconduct is alleged, while your LALC is not required to manage the performance of the worker and may proceed with immediate termination (in line with the terms of the employment agreement and applicable modern award), you should first consider whether any further investigation needs to be carried out to confirm whether serious misconduct has occurred.

It is recommended that any discussion, informal or otherwise, should be documented. For example, a file note of the discussion which outlines the performance issues identified and the steps the worker should take to rectify the issues.



For more information on managing the poor performance of a worker, see [our performance management checklist](#).



- **Have you considered whether the worker is be terminated for serious conduct?**

Serious misconduct is defined under the *Fair Work Regulations (2009) (Cth)* and includes:

- wilful or deliberate behaviour by a worker that is inconsistent with the continuation of their employment, 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

Examples of serious misconduct include being intoxicated at work, theft, fraud, assault, and refusing to follow lawful and reasonable instructions from an employer.

An employer is not required to manage the performance of a worker who has engaged in serious misconduct and may terminate the worker's employment without notice.



### Case example – serious misconduct

Stephen Lambley was dismissed for serious misconduct when he assaulted another employee. No warning was required.

It was held that fighting in the workplace will usually be a valid reason for dismissal, as an employer is entitled to implement policies against fighting and ensure compliance with those policies by dismissing employees who breach those policies by engaging in fighting (unless there are extenuating circumstances).

*DP World Sydney Ltd v Lambley [2013] FWCFB 9230*



### Caution

Your LALC should seek legal advice on the process for terminating a worker due to serious misconduct to ensure the LALC is not exposed to legal action.

## Step 2: Terminating lawfully and fairly

- **Have you checked the employment agreement, relevant modern award, or enterprise agreement and the LALC's workplace policies and procedures for requirements regarding termination?**

The employment agreement between your LALC and the worker will set out requirements in relation to termination (for example, the period of notice your LALC is required to provide the worker).

If the employee is still within their probation period, the requirements around termination may differ (for example, the period of notice may be shorter).

There may also be additional requirements set out in the relevant modern award (if one applies) or National Employment Standards (**NES**) (for example, the period of notice is longer if the worker is over 45 years of age and has over two years continuous service) and in the LALC's workplace policies and procedures.

Where there is no documented employment agreement, no relevant modern award, and no relevant enterprise agreement, your LALC should follow the requirements around termination set out in the NES.



For more information on the NES, see [the Fair Work Ombudsman's website](#).

• **Have you calculated the worker's final payment?**

A worker may accrue certain entitlements during the course of their employment (for example, annual leave and long service leave), or at the time of their termination (for example, pay in lieu of notice, or redundancy pay).

To calculate the final payment your LALC owes a worker, check the employment agreement, modern award or enterprise agreement (if one applies). You can also contact the Fair Work Ombudsman to confirm which entitlements apply.

It's typical for a final payment to include:

- unused annual leave
- payment in lieu of notice if the worker is not going to work through the notice period up to their official last day, and
- pro-rata long service leave, if applicable under relevant long service leave legislation or the modern award or enterprise agreement covering the worker

If the termination is due to a genuine redundancy, a redundancy payment may also be required.

Special tax rules apply to some termination payments so it's important to get advice from your accountant to ensure the appropriate tax treatment.



For more information on calculating a worker's final payment, see [Fair Work Ombudsman's webpage on ending employment](#).

• **Have you considered whether the worker may be eligible to bring an unfair dismissal claim?**

Unfair dismissal is when the Fair Work Commission is satisfied that a worker has been dismissed and the dismissal was:

- harsh, unjust or unreasonable
- not consistent with the Small Business Fair Dismissal Code (if applicable), and
- not a case of genuine redundancy

A worker may be eligible for a remedy under the national unfair dismissal laws if:

- the worker is a national system employee
- they have been employed for at least six months in a large business or 12 months in a small business, and
- either a modern award or enterprise agreement covers their employment, or the worker earns less than the high-income threshold

When the Fair Work Commission decides if a dismissal was harsh, unjust or unreasonable, it considers:

- if there's a valid reason for the dismissal related to the person's capacity or conduct
- if the worker was notified about the reason and given an opportunity to respond



- if there was any unreasonable refusal to allow the worker a support person to assist in any discussions relating to dismissal
- if the dismissal was for unsatisfactory performance, whether the worker was warned about their performance before the dismissal
- the size and human resources capacity of the organisation, and
- any other matters that it considers relevant, which might include any factors such as the harshness of the dismissal in the worker's particular circumstances

If your LALC is a small business employer (it has fewer than 15 employees, including casual employees, employed on a regular and systematic basis), a worker will not be unfairly dismissed if the Fair Work Commission is satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code.



### Case example – unfair dismissal

Jean-Claude Attieh was dismissed by the Australian Catholic University (**ACU**), following two performance improvement plans.

Under the first performance improvement plan in Attieh's performance and conduct issues were considered resolved. In 2022, Attieh was placed on another performance improvement plan. While some of the performance issues improved successfully, remaining issues related to his working relationship with Ministry team members, particularly Father Mirko. After further correspondence and issues raised regarding his working relationship with Father Mirko, Attieh's employment was terminated.

It was held that there was no valid reason for the dismissal, and it was unfair, finding:

- there was no definitive list of reasons for the dismissal
- it was unfair to rely on dated and completely resolved issues in the first and second performance improvement plan as valid reasons for dismissal, and
- the expectation to achieve a 'positive, vibrant attitude' when working with Father Mirko did not constitute a valid reason for dismissal nor did the other alleged performance issues raised following the second performance improvement plan

*Attieh v Australian Catholic University [2023] FWC 1103*



### Case example – fair dismissal

Caroline Cunneen was dismissed for performance issues that had been subject to a performance improvement plan. Cunneen had been a NSW public servant for 31 years.

It was found that there were legitimate concerns with Cunneen's performance.

While consideration was given to Cunneen's personal circumstances, including the illness and death of her father in the last year of her employment, the performance improvement plan was carried out in accordance with policies and procedures and Cunneen was unable to improve her performance to the required standard. In particular, Cunneen was unwilling to accept criticism and continued to challenge the performance improvement plan process.

The dismissal was not unfair.

*Cunneen v Secretary of the Department of Transport [2018] NSWIRComm 1081*



For more information, see:

- the Small Business Fair Dismissal Code published on the [Fair Work Ombudsman's webpage on unfair dismissal](#), and
- the [Fair Work Commission's webpage on the Small Business Fair Dismissal Code](#)

- **Have you considered whether the worker may be eligible to bring a general protections claim?**

Under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**), workers are given 'general protections' which, among other things, prohibit an employer from taking adverse action (including termination) against a worker because:

- the worker has a workplace right
- the worker has or has not exercised a workplace right, or
- the employer is attempting to prevent the worker exercising a workplace right

Workplace rights include making a workplace complaint or inquiry, taking leave in accordance with the NES, being temporarily absent from work due to illness or injury, or making a request for flexible working arrangements, among other things.



### Case example – eligibility to bring a general protections claim

Steven Kennewell was employed as a casual truck driver by Cardinia Waste and had worked for the company for only a few weeks when he was dismissed. He was dismissed after making complaints to, and inquiries of, his supervisor about his pay rates and employment status.

Kennewell took court action against Cardinia Waste alleging that it had taken adverse action against him in contravention of the Fair Work Act by dismissing him because he had queried his employment status and rates of pay.

The Court noted that there had been previous instances where employees, who had complained about the company failing to pay them their award entitlements, had been dismissed. They had taken their cases to the Fair Work Commission, and each of those cases had been settled on confidential terms.

The Court agreed that Cardinia Waste terminated Kennewell's employment because of his exercise of his workplace rights, so Kennewell was eligible to bring a general protections claim.

*[Kennewell v MG & CG Atkins trading as Cardinia Waste & Recyclers \[2015\] FCA 716](#)*



For more information on protections at work, see the [Fair Work Commission's webpage](#).

- **Have you ensured that procedural fairness is observed at all times?**

Procedural fairness is a term that means that the decision-making process or procedure used to reach an outcome needs to be fair to all parties involved.



For example, procedural fairness requires that a worker be notified of and given an opportunity to respond to the employer's reasons for termination before their employment is terminated. A worker should be given the opportunity to have a support person at any meetings.



### Case example – no opportunity to respond to warnings

Jitendra Joshi was dismissed by Panasonic for poor performance.

The Fair Work Commission found that Panasonic had prepared a script about warnings to be given to Joshi before disciplinary meetings took place. This suggested that the meetings had pre-determined outcomes.

The Commission concluded that the meetings were simply a 'mechanical process' that did not genuinely afford Joshi an opportunity to respond to the warnings or affect the outcome of the meeting.

There was no valid reason for dismissal and the termination was unfair.

*Joshi v Panasonic Australia Pty Ltd [2010] FWA 2946*



For more information on procedural fairness requirements, see [our performance management checklist](#).

- **Have you considered seeking a negotiated exit with the worker?**

A negotiated exit (sometimes referred to as a settlement agreement or severance agreement) involves negotiating an agreement to provide the worker with a monetary or other benefit on termination, in exchange for the worker giving up their right to bring any legal claims against the LALC.

This type of arrangement should be documented in a legally binding agreement that is prepared by a lawyer, so your LALC should seek legal advice if you are considering seeking a negotiated exit with a worker.

### Step 3: Exit procedures

- **Have you confirmed termination of the worker's employment in writing in a letter of termination?**

Employers must provide workers with written notice of their last day of employment. The letter of termination should set out the reasons for the termination, the date of termination (including whether they are required to work their notice) and the worker's last day and summarise the steps that have been taken up until this stage and any further steps to be taken.



A template letter of termination is available on the [Fair Work Ombudsman's webpage on notice and final pay](#).





- **Have you arranged for any LALC property in the worker's possession to be returned?**

Make arrangements for any LALC property (such as documents and records, keys, tools and work vehicles or mobile phones) in the worker's possession to be returned before their last day.

Also consider whether security and IT systems access, accounts or passwords need to be disabled or changed after the worker leaves.

- **Have you reminded the worker of any post-employment obligations in the employment agreement which continue to apply after their termination?**

Remind the worker of any obligations in the employment agreement that will continue to apply after their employment ends, such as post-employment restraints and obligations around confidential information and intellectual property.

- **Have you arranged for the worker's employment records to be retained and stored?**

Under the Fair Work Act, an employer must keep employment records for seven years, including all records in relation to termination of a worker.



## More information

See our [Legal resources for LALCs webpage](#) to find resources specifically targeted to LALCs. In particular, see:

- [Hiring Checklist for LALCs](#)
- [Performance Management Checklist for LALCs](#)

[Our website](#) also has resources for not-for-profit community organisations on a range of related topics which may be useful to your LALC:

- Our [managing people webpage](#) – This part of our website covers the relationships your organisation will have with clients, employees, members and volunteers, including recruitment, resignations and disputes. In particular, see:
  - [Employee entitlements](#)
  - [Employee termination and resignation](#)
  - [Disputes with employees](#)

Justice Connect's LALC Service provides free legal information, training and advice to LALCs. To find out more visit [our website](#) or [contact the LALC Service](#).