Notice Periods & Communicating Termination/Resignation

This document aims to look at some of the questions raised on notice periods, be it notice by the employer to an employee after termination or an employee's notice after resignation.

Clubs should note however that this does not look at the process of termination itself and when this is justified and Clubs should seek other information about this topic. Additionally, where a face to face meeting is not possible when terminating, Clubs should also seek advice before using other means of notifying an employee.

Who doesn't get Notice?

Before looking at what notice may apply, there are certain types of employees who are not entitled to a notice period on termination or required to give notice when resigning unless they are covered by an enterprise agreement that states otherwise. This includes:

- **Casuals**
- Employees who are on a fixed term contract or a contract to undertake a specific task that comes to its end date
- Employees fired due to serious misconduct e.g. theft, fraud, assault or sexual harassment
- Have a training arrangement and are employed for a set period of time or for the length of the training arrangement (does not include apprentices who do get notice)

What Notice Period Applies – Employer Terminates

When terminating a contract of employment an employer must provide at least the appropriate minimum notice period prescribed by the *Fair Work Act 2009* (Cth) (**the Act**).

The minimum notice period is based on an employee's continuous years of service:

Period of Continuous Service	Minimum Notice Period
1 year or less	1 week
More than 1 year – 3 years	2 weeks
More than 3 year – 5 years	3 weeks
More than 5 years	4 weeks

Those aged over 45 who have worked for the employer for at least 2 years also get an additional week e.g. if an employee is 50 years old and is terminated then they are entitled to 5 weeks' notice.

Under the National Employment Standards (NES) however periods of service as a casual employee do not count towards the period of continuous service for notice on termination (unless a specific enterprise agreement covering the employee says it does) e.g. if an employee worked as a casual for 1 year and then 2 years f/t notice is based on the 2 years as f/t employee only.

An employment contract can't specify a notice period that is less than the legal minimum set out in an award, agreement or the Act. An employer has to always give the above notice period to an employee unless where notice is not applicable e.g. if they are being terminated due to serious misconduct.

If an employer gives more than the minimum notice period then an employee is only obligated to work for the minimum period and can elect to leave once this is done. Should an employee leave during the minimum period instead then they don't have to be paid for the extra notice.

Clubs are reminded that when terminating, a justifiable reason is needed and proper procedures need to be followed or they could risk claims for unfair dismissal or unlawful dismissal.

What notice period applies – employee resignation

Generally the minimum periods of notice under the applicable modern award or enterprise agreement that applies to an employee will apply when an employee resigns, however, there are circumstances where more or less may need to be given.

When an employee resigns, how much notice is required is not as straightforward as where it is the employer terminating and how much notice is relevant depends on if they are covered by a modern award or enterprise agreement and if their contract specifies any required notice period:

1. **Is there a notice period required to be given in the contract of employment?** - If yes, the contract notice period will apply if it is greater than any applicable notice required in the relevant modern award* or enterprise agreement. If the notice period in the contract of employment is less than that specified in the modern award or enterprise agreement then these will prevail instead.
2. **Is the contract of employment for a fixed term or specific task?** - The contract ceases at the end of the fixed term or specific task. No notice of resignation is required.
3. **If the employee is covered by an Award or Enterprise Agreement and there is no notice period in the contract of employment (and it is not for a fixed term or specific task)?** - The notice of termination provisions in the applicable modern award* or enterprise agreement will apply. These usually mirror the minimum notice period provisions under the National Employment Standards for termination of employment.
4. **If there is no contract of employment or notice period in the contract of employment and no award applies?** - Reasonable notice** will apply.

*Under the *Registered and Licensed Clubs Award* (**Clubs Award**), the notice period required to be given by an employee who resigns is:

Period of Continuous Service	Minimum Notice Period
1 year or less	1 week
More than 1 year – 3 years	2 weeks

More than 3 year – 5 years	3 weeks
More than 5 years	4 weeks

As with notice where an employer terminates the employment relationship any casual period of engagement is not counted towards the period of continuous service.

**In terms of what is meant by reasonable notice, this depends on a number of factors, including but not limited to:

- The employee's age;
- nature of the their position;
- length of service;
- remuneration and skill; and
- time it would take them to find similar employment

For example, reasonable notice for a junior low level employees is very likely to be less than a high level, high paid managerial employee.

Paying an Employee in lieu of Notice

When an employee has resigned or is terminated, the default is that an employee works out their notice period. Another option however, is for the employer to pay them out their notice period instead. An employee does not have the right to choose to be paid notice in lieu however and if they want to then the employer would have to agree.

If a Club wants to pay in lieu, then they should clearly notify the employee of this and pay them the notice in lieu ASAP. If an employee works out a period of notice and then a Club decides to pay them in lieu instead, the period they have already worked does not count towards notice unless both parties mutually agree for the remaining period to be paid out instead in writing.

If the decision is made to payout the notice instead then the employee will need to be paid an equal amount that they would have received had they worked until the end of the notice period including:

- Any loadings
- Allowances
- Overtime
- Penalty Rates
- Incentive-based payments and bonuses
- Any other separately identifiable amounts

Where an employee is paid in lieu of notice, the time at which this is made is the point when their employment ends.

Final Pay

When an employee resigns or is terminated then they are entitled to be paid any outstanding entitlements, such as wages and unused annual leave and long service leave. This needs to be paid to the employee within 7 days of their end date and ideally on the same day as their final day if possible.

Any outstanding annual leave must be paid out to an employee and in the same manner as if they took it e.g. if they received annual leave loading then this needs to be paid on any paid out amount.

Where someone is terminated due to serious misconduct and they are entitled to long service leave, there may be provisions allowing for this to not be paid however although clubs should check relevant legislation.

Any unused personal/carer's (sick) leave is not payable on termination.

What if an employee doesn't give appropriate notice?

Where an employee is covered by an Award, there may be certain provisions that allow an employer to deduct a specified amount from any outstanding final pay, should they not comply with necessary minimum notice periods under the Award. **If the lesser notice period is agreed on however, then no recourse can be taken as the employer gave their consent for this to occur.**

Under Clause 35.1 of the Clubs Award, if an employee who is at least 18 years old does not give the required notice under the award, then an employer may deduct from any wages owed to them, no more than one week's wages at the award rate. This means that even if they are being paid above award, any deduction is limited to what would have been paid under the award. **Additionally, any deduction can only be from wages and must not be deducted from any outstanding leave entitlements.**

The above also only applies in the context of the Award based minimums, not any longer period that may have been put into their contract.

There is also the requirement for the deduction to not be unreasonable e.g. if there are legitimate grounds making the necessary notice impossible then it may be unreasonable to deduct money as result of this.

How should notice be given?

Section 117 of the Act requires an employer to give an employee notice of termination in writing and failure to do so may be in breach of the Act, but may not necessarily mean a termination of employment has not been affected. **An employer should always aim to give written notice to an employee so as to have evidence of termination**. As well as being given a termination letter in writing, this should also be given in a face to face meeting and appropriate disciplinary action and procedures taken before the termination occurred.

Generally, a termination of employment is considered not to take effect unless and until it is properly communicated to the other party. This could include notice being given verbally, although this would not satisfy section 117 of the Fair Work Act.

The Acts Interpretation Act 1901 (Cth) sections 28A & 29 provide how notice may be given. In particular, notice may be given to an employee by:

- delivering it personally
- leaving it at the employee's last known address, or
- sending it by pre-paid post to an employee's last known address.

Where giving the notice in person is not possible, the next alternative should be to send it to their address and make steps to confirm it was received e.g. with a phone call. It is of course also crucial that the opportunity to discuss the issues was given firstly to the employee.

In the case of an employee's resignation, an employer should request a resignation in writing so as to avoid any misunderstanding, although this may be difficult to obtain from an employee in some circumstances.

There is nothing to prevent an employer from accepting a verbal resignation, including over the telephone, however, an employer should seek confirmation in writing, from an employee or, in the latter case, at least verify the identity of the caller on the telephone.

It is good practice to send an acceptance of the resignation in writing especially where the employee will not put their resignation in writing. The acceptance of resignation should confirm that they gave their resignation and how this occurred and when. An employer's request for an employee's resignation in writing is to avoid disputes occurring as to whether they did resign or not.

Where verbal notice is given by an employee at the workplace, it may also be prudent for an employer to have a witness to the resignation.

Notice by email

If confirmation of termination is sent via email to an employee then an employer must firstly ensure that they were given the opportunity to discuss the issue face to face and if this could not be done due to a legitimate reason e.g. due to threats of physical violence or geographical reasons, then that they were still given the opportunity to respond to any issues in writing. If this is not done then this could result in future issues.

In a case, an employee was dismissed for being absent from work on personal leave after her medical certificate had expired. The employer dismissed the employee by email without attempting to contact the employee first. It was found that the employee was not notified of the reason for her dismissal. It was held that it was not satisfactory that the employee was not given an opportunity to discuss the dismissal after it had taken effect.

If a face to face meeting is held first or the opportunity for one is given and is ignored by an employee and the dismissal can't be given in person, then employers still need to exercise caution in confirming dismissal via email. This is due to the fact that there could be disputes as to whether this was actually received by the employee and when.

If termination is ever confirmed by email as giving it in person or via post is not possible then an employer should firstly seek to get an employee's consent to have it sent via email. If this is also not possible, then an

employer should ensure they request a read receipt and should follow up the email with a call at the minimum.

If it is the employee resigning and they do so via email then confirming the resignation via email is acceptable.

Notice by Text Message

In dismissing an employee, as discussed earlier an employer must give notice in an appropriate form, preferably face-to-face. Giving notice via a text message to a person's mobile phone, will almost always be viewed as inappropriate, and should not be done.

Where there is the threat of physical violence or some geographical impediment then while a face to face meeting may not be appropriate, other alternatives to sending a notice via text should be explored such as phone call or video call initially and/or then sending a confirmation letter in the post.

There have been numerous instances where cases have come down harshly on dismissals being done via text, including the case of *Wallace v AFS Security* [2019] FWC 4292. The decision to communicate the dismissal via text was described as being "unnecessarily callous" even in the circumstances where text messages and other electronic means of communication between the parties was often used.

Whilst one of the main issues in these cases concerned the fact the employee was never provided with an opportunity to respond to the issues first, which must be done, confirming a dismissal via text should be avoided regardless and instead done face to face or via sending of a letter via registered post.

Can Notice be Withdrawn?

Circumstances have occurred where an employee seeks to withdraw a notice of termination. Where an employer does not allow an employee to withdraw their resignation, it is possible that the employee could claim unfair dismissal on the grounds the employer was unreasonable in not accepting the withdrawal of notice.

Notice, once given by an employer, cannot be withdrawn, except with the agreement of the employee. The reason for this is that an employee may have already obtained employment with another employer, with the result that if an employer could unilaterally withdraw notice, the employee could be bound by two concurrent contracts of employment.

The same logic applies to the withdrawal of notice by an employee. The requirement for an employee to give the appropriate period of notice is to allow an employer sufficient time to fill the position. If an employee could withdraw notice at any time it could result in the replacement employee being left without a job, having already terminated his/her employment with the previous employer to accept the vacated position. An exception to this is where the mental state of the employee at the time of the resignation meant the giving of notice was not considered a voluntary act.

Heat of the Moment Resignations

If the words of a resignation are unambiguous, then an employer is entitled to treat them as such. However, words may be said by an employee "in the heat of the moment", which industrial tribunals refer to as 'special circumstances'.

Where special circumstances arise it may be unreasonable for an employer to assume a resignation and accept it forthwith. Where a resignation is ambiguous or said during a heated moment, a reasonable period of time should be allowed to lapse and if it is still unclear if resignation was intended, an employer should attempt to contact the employee and see if resignation was really intended. Failure to do so is at the employer's risk.

Evidence may be forthcoming which indicates that in the 'special circumstances' the intention to resign was not the correct interpretation when the facts are judged objectively. In the case of *Sean Jen Eyong v Vital Packaging* [2017] FWC 887 an employee during a disciplinary meeting became agitated and angry and whilst trying to be calmed down swore and stated "I resign". The employee collected their belongings and left but the next day attended work, showing an intention to remain employed. He was told to leave and then lodged an unfair dismissal claim. The Commission held that whilst his statement of resigning was not ambiguous, the fact he said it whilst angry amounted to "special circumstances" and it was unreasonable for it to be accepted.

Where an employee resigns in an emotional or angry state or the resignation is ambiguous, a cooling-off period should be given to them and they should then be approached to see if they intend to confirm their resignation or not. Whilst a cooling-off period should be given, the employee then needs to clearly and unambiguously set out their position to their employer. Should a period of time be given but the employee does not clearly indicate whether they do or do not intend to resign then an employer will likely be justified in holding a resignation occurred.