Types of terminations

- by the employee
- by mutual consent
- by alteration of the employment contract
- by express terms
- due to the death of the employee or employer
- due to the transfer, merger or takeover of a business
- due to the frustration of the employment contract
- while an employee is on leave
- following parental leave

There are two main types of termination by the employer:

- resignation that is voluntary in nature
- repudiation of the employment contract for example, abandonment

If an employee terminates the employment relationship they have no access to unfair dismissal laws. There are situations where the termination may be viewed from a legal perspective as a "constructive dismissal" or "forced resignation".

An employee cannot be forced to continue in an employment contract that they no longer wish to however, they have to meet the following legal obligations in order to resign:

- they must give written notice of their intention to resign in accordance with the relevant award, employment agreement or policy
- if the employer has provided certain benefits that are contingent on the employee working for the business for example, payment of tuition fees, these may be repayable to the employer on the termination of employment
- if the employee is currently hired under a fixed-term or fixed-task and they resign early and there is no early termination clause in the contract they may be required to complete the contract or be in breach of the contract exposing themselves to potential damages for the breach

Notice Periods

An employee who wishes to resign needs to provide their employers with the notice period as required by the employment contract or relevant industrial instrument. The standard Modern Award clause also permits an employer to withhold wages if an employee does not give sufficient notice on resignation. The employer cannot withhold more than the equivalent amount that would have been paid should they have worked out their notice period.
Garden Leave
This is where the employee continues to be paid as per normal but is not assigned any work or tasks and not to attend work whilst on Garden Leave. The advantage of this approach is that the employee continues to be bound by the terms and conditions of their contract.

Payment in lieu of notice
Should an employee be happy to work through their notice period but the employer would prefer them to finish up immediately, this is permissible as long as the employer pays out their notice period and terminates the employee with immediate effect. Note that there should be a clause in the employment contract stating that this action can occur.

Failure to work the notice period
Some employees wish to finish early to start their new job as quickly as possible and may ask that they are let go early. If the employer is happy for this to happen they would not be required to pay out their notice period. If however, the employer refuses and the employee does not return to work the employee would be in breach of contract and the employer can sue as a result.

Withdrawal of notice by employee
Neither an employee nor an employer is obliged to accept a withdrawal of a resignation. If a withdrawal occurs by mutual consent it would be recommended to have this confirmed in writing.

Abandonment of employment
This is where an employee continues to be absent from work without a valid reason and where it is the view that they do not intend to return to work. There is no definition of what is deemed a reasonable length of time to assume abandonment but it is generally held that several days continuously absent from work would suffice. If you suspect that an employee has abandoned their role then follow these steps:

- Confirm that there is no authorisation on file for their absence
- Attempt to contact the individual either by phone, email or in person or by registered post to discover the reason for the absence and whether they intend to return to work
- If you are unable to make contact or the reason for the absence is unacceptable then move to terminate the employment
- Write to the employee again stating that their actions have been taken as abandonment of employment and a repudiation of their contract and therefore the employer is accepting that the employment has been terminated by the employee and this has been accepted
- Another option is that the employer sends by registered post a letter stating that failing to return to work or providing a suitable reason for the absence by a certain date will amount to abandonment and the employee terminating their contract effective their last day in the office. Then send the follow up letter stating that that their actions have been taken as abandonment of employment and a repudiation of their contract and therefore the employer is accepting that the employment has been terminated by the employee and this has been accepted
Termination by mutual consent
This is an unusual outcome but occurs when both parties agree to an ‘agreed separation’.

- The employer should first seek the employee’s consent to qualify the decision as termination by mutual consent. This will waive any rights to ‘unfair dismissal’ protections
- It is normal that the employee will not provide consent until the employee is granted an additional payment above the entitlements they would have received in any case. In this case it would be important to have a ‘deed of release’ signed to protect against future claims

Termination by alteration of the contract
Where businesses restructure or where the ownership changes there may be substantial changes to an employee’s terms and conditions. Where the changes are significant, it may have the effect of terminating the original contract and offering employment on new terms. The issue is that the employee can choose to accept or reject these revised terms. If the employee does reject the revised contract the individual may claim that the employee has been dismissed because the original contract has been withdrawn.

Types of changes that might cause dismissal could be:
- where the original duties and responsibilities have been substantially changed
- change of hours
- reduction in compensation which may include other benefits
- the working conditions are changed significantly
- the place of work is changed
- the role and responsibilities were reduced

A word of caution, it is essential that employers document any changes that impact the current terms and conditions of their employees. Any changes should be documented by a contract variation in writing. Without this documentation the employee could argue that the contract has been superseded by a verbal contract.

Termination by express terms
Where the termination of the employment occurs due to changes in the ‘express terms’ as agreed by the employee and employer. For example, a fixed-term contract, a fixed project contract or contracts that expire when a certain event triggers such as the cancellation of a project. In these cases there is no need to provide notice of termination, except in the case where a contract contains an early termination clause.
Termination due to death

Upon the death of an employee the contract is terminated. The same is the case on the death of the employer, if the employer is an individual. The estate of the employee is entitled to all monies owing to the deceased as at the date of death. When an individual dies, the assets are frozen until an employer receives appropriate legal documentation from the legal representative of the employee. The employer should hold off paying out any entitlements.

Termination due to transfer of the business

Where a company is taken over or there is a merger between two businesses there can be a termination of contract of all or some of the employees.

Where the company continues as the relevant employing entity the employment relationship remains. Where the change means that there is a new employing entity then new employment contracts will need to be drafted, negotiated and agreed. In this instance the terminations may mean retrenchment, regardless of the fact that the employees may be offered roles with the new employer. It also needs to be confirmed whether the new or old employer will pay for the retrenchments. The new employer also needs to ensure that the new employment contracts are correct under the legislation, award or agreement provisions. The transfer of a business is a complex area and the new employer should complete extensive due diligence before proceeding.

Termination due to contract frustration

This occurs when an event makes the contract impossible to perform. An example would be an employee being injured so that their capacity to perform their job is extremely limited. In this instance neither party is required to give notice or take any action to end the contract as it ends automatically. The party who terminates due to frustration must prove the frustrating event has happened and that it was not that party’s fault.

Termination whilst on leave

The employer should not terminate any employee on leave. The risk is that the employee can claim that the termination was due to the fact:

- that they were on leave and this could lead to a claim for discrimination, say if they were on personal leave
- that there was a breach of “workplace rights” general protections provisions, where employees are entitled to a benefit of a workplace law such as annual leave
- that the employer terminated someone on parental leave which is breach of the FW Act
- That because the employee was absent at the time they were not afforded procedural fairness
There are two exceptions here, one of abandonment and two where the employee completes an act of misconduct on leave which justifies summary dismissal.

In practice it is preferable to wait until the employee returns to work to give them an opportunity to respond prior to termination in order to follow procedural fairness. Where the individual refuses to return to work the employer should make it clear that failure to return will be taken as a refusing a reasonable and lawful direction and this may lead to termination.

**Termination following parental leave**

Under the FW Act employees returning from parental leave have an entitlement to 12 months unpaid parental leave and a “return to work guarantee”. The employee returning from parental leave is entitled to return to a position that they held immediately prior to taking the leave. If however, this role no longer exists then the employee is entitled to return to a similar position in terms of pay and status as long as they are qualified and suited to the role. The employer also has an obligation to advise the employee on leave of any significant changes to the pay, status or location. This guarantee prevents employers from giving the return to work employee a different job on the basis that the individual covering the role has performed the role better. To terminate an employee on parental leave would violate the FW Act unlawful termination provisions. As an employer post the return of an employee that has recently had parental leave, you would need to proceed with extreme caution and have a valid reason for doing so otherwise you could face a claim for unfair dismissal, unlawful termination or a discrimination claim.

Where an employer is replacing an individual on parental leave you are required to advise the incumbent that the role is temporary and that the individual upon their return from parental leave has the right to return to their role. This does not mean that the employer cannot retain the services of the individual covering the role in another suitable position.

Whilst an employee is on their parental leave they are unable to perform alternative employment and they are required to be the main caregiver to the child. It is also the case that employee’s on parental leave are not able to do piecemeal contract work for their employer whilst they are on parental leave as this would be deemed that they have in effect returned to work.