



NECA Legal t/as CTI Lawyers Webinar Series: Session 1

A Guide to assist Employers with
Termination of Employment





Presenter:



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Webinar Agenda

1. Legislation Overview
2. Resignation
3. Redundancy
4. Performance Management
5. Termination
6. Serious Misconduct
7. Unfair Dismissal
8. General Protections



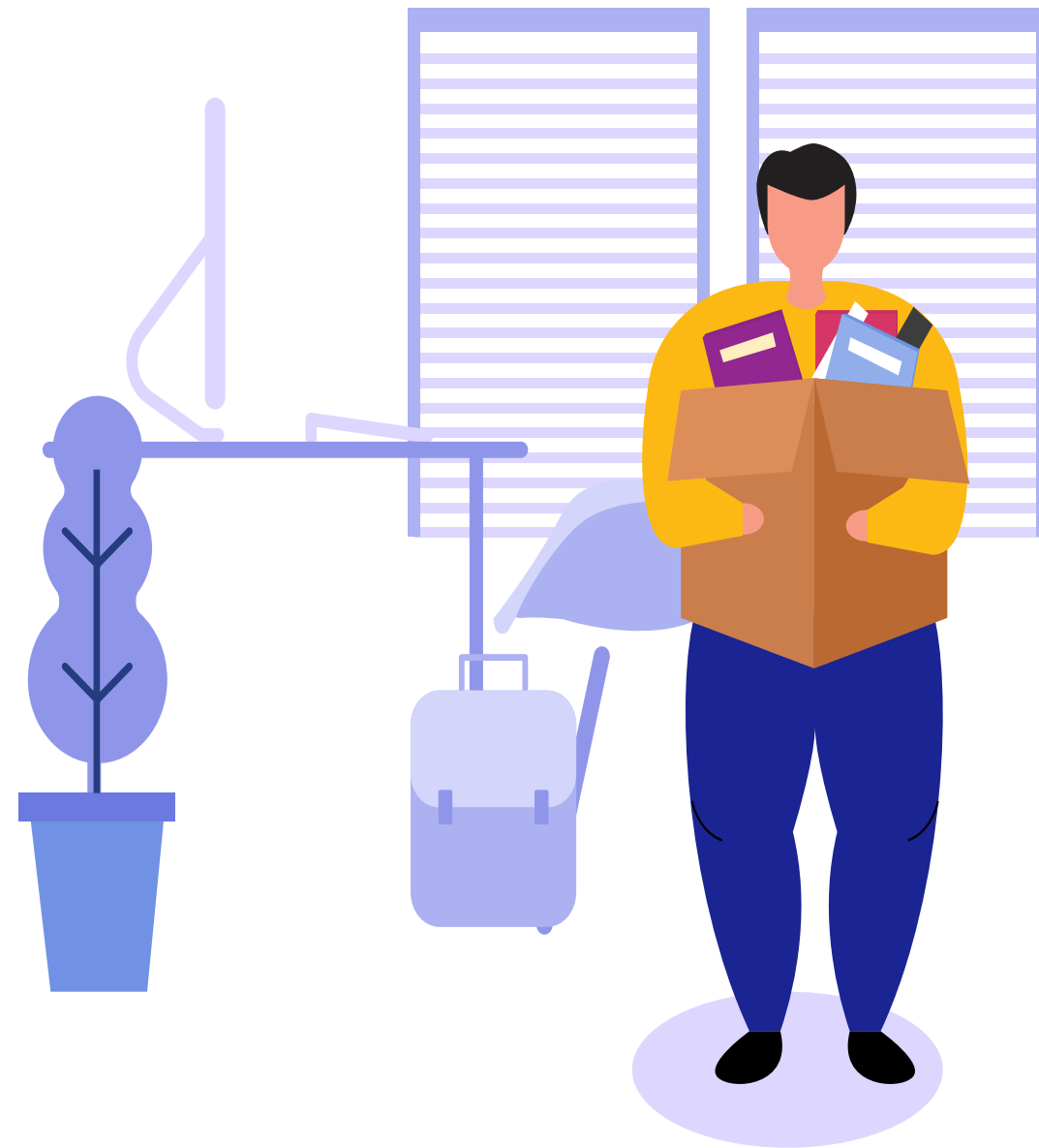
1. Legislation Overview



Fair Work Act 2009 (Cth)

The legislative requirements of the Fair Work Act 2009 (Cth) must be upheld when dealing with the termination of employees, unfair dismissal, and general protection.





2. Resignation



Resignation

- Voluntary choice
- Instigation of employee
- Must be without duress
- Must avoid resign or “be sacked” scenario – constructive dismissal risk
- Heat of the moment – needs to be confirmed in writing





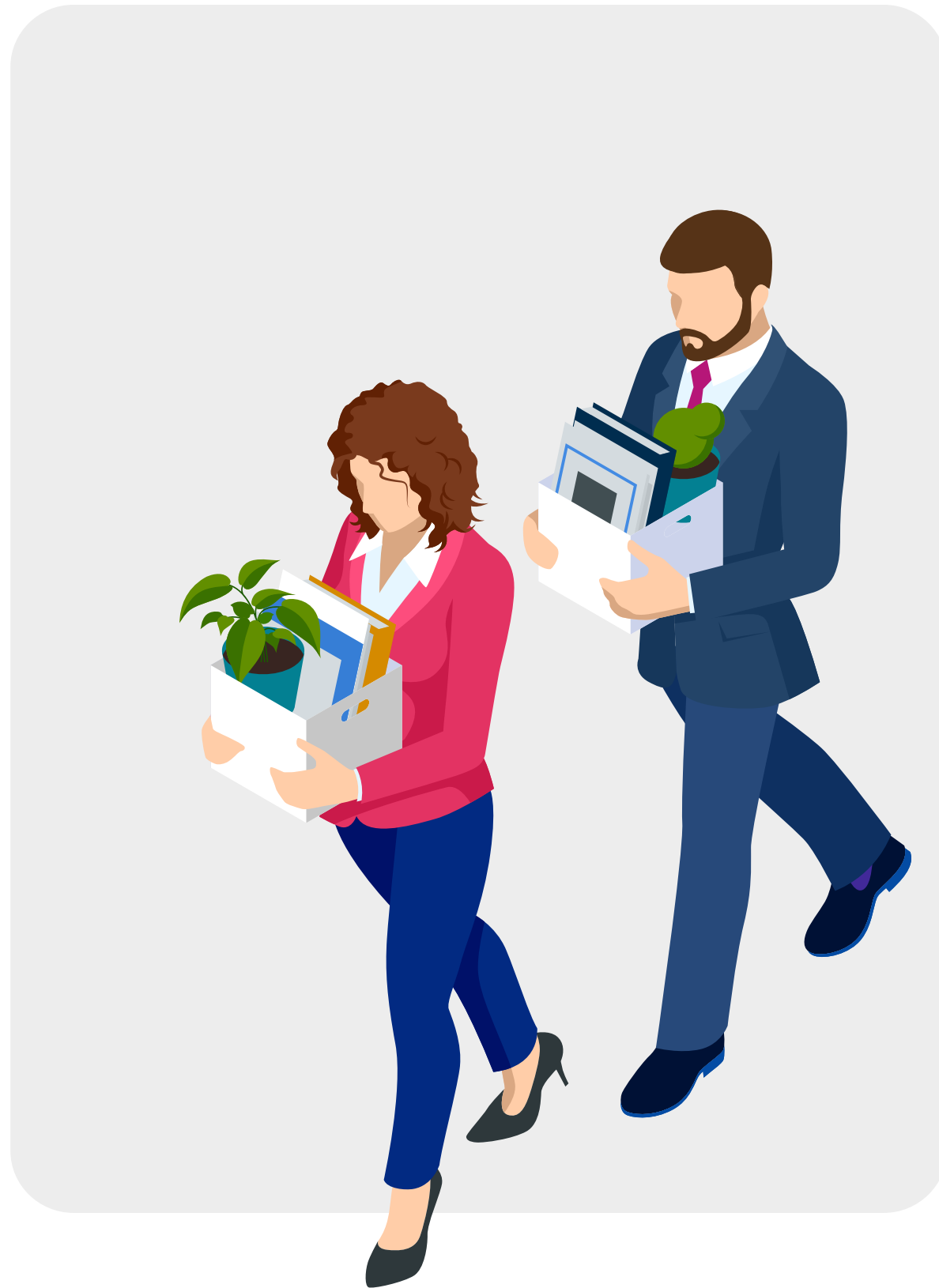
My employee has not provided me with notice – Can I deduct from his final pay?

If award covered

If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.

If EBA covered may have clause like this

9.1.6 The notice of termination required to be given by Employees shall be the same as that required of the Company. If an Employee fails to give the requisite notice, the Company shall have the right to withhold wages and/or entitlements due to the Employee on termination, with a maximum amount equal to the equivalent pay for the period of notice.



3. Redundancy



Redundancy

- Job no longer required to be performed by anyone
- The employer has consulted as required by the Modern or Enterprise Agreement covering the employee
- The employer has considered (and offered if applicable) all opportunities for redeployment

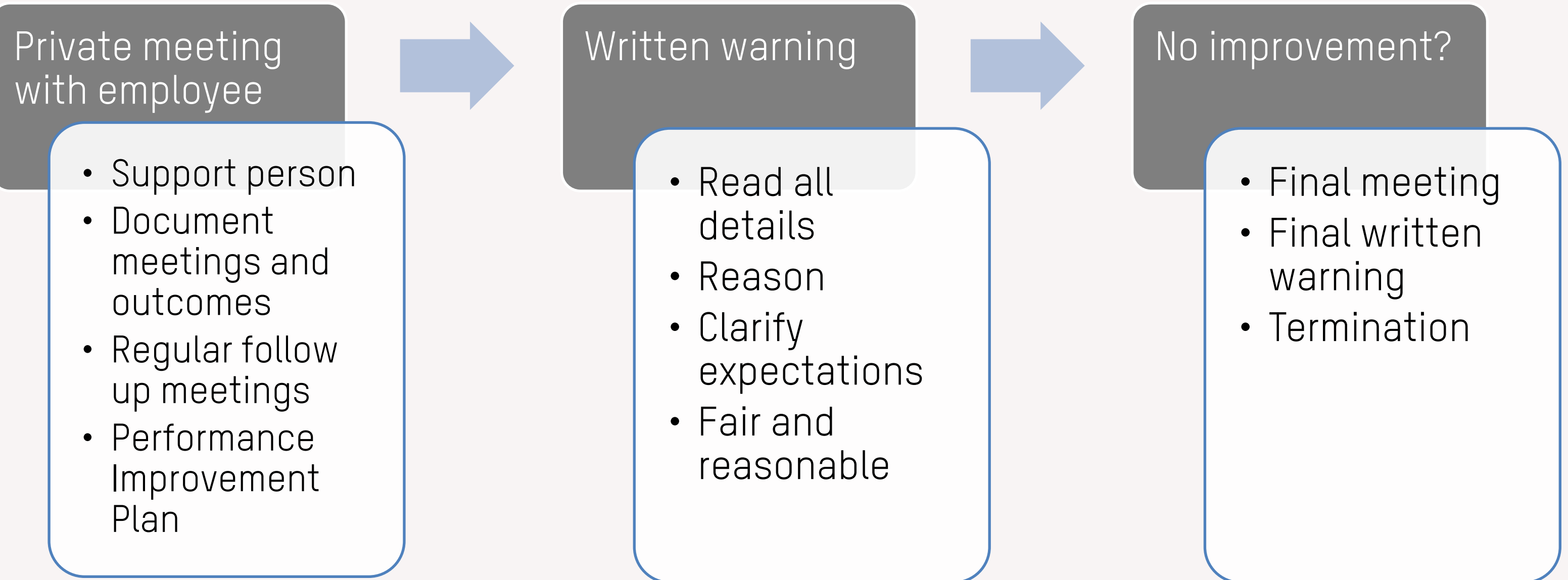


4. Performance Management





Steps to Performance Management





5. Termination





Termination

- **Valid reason for termination**
 - Conduct: something the employee has done;
 - Capacity: employee's ability to do the job for which they were employed; or
 - Operational requirements of business (ie. redundancy)
- **Notice of reason for dismissal**
- **Opportunity for employee to respond**

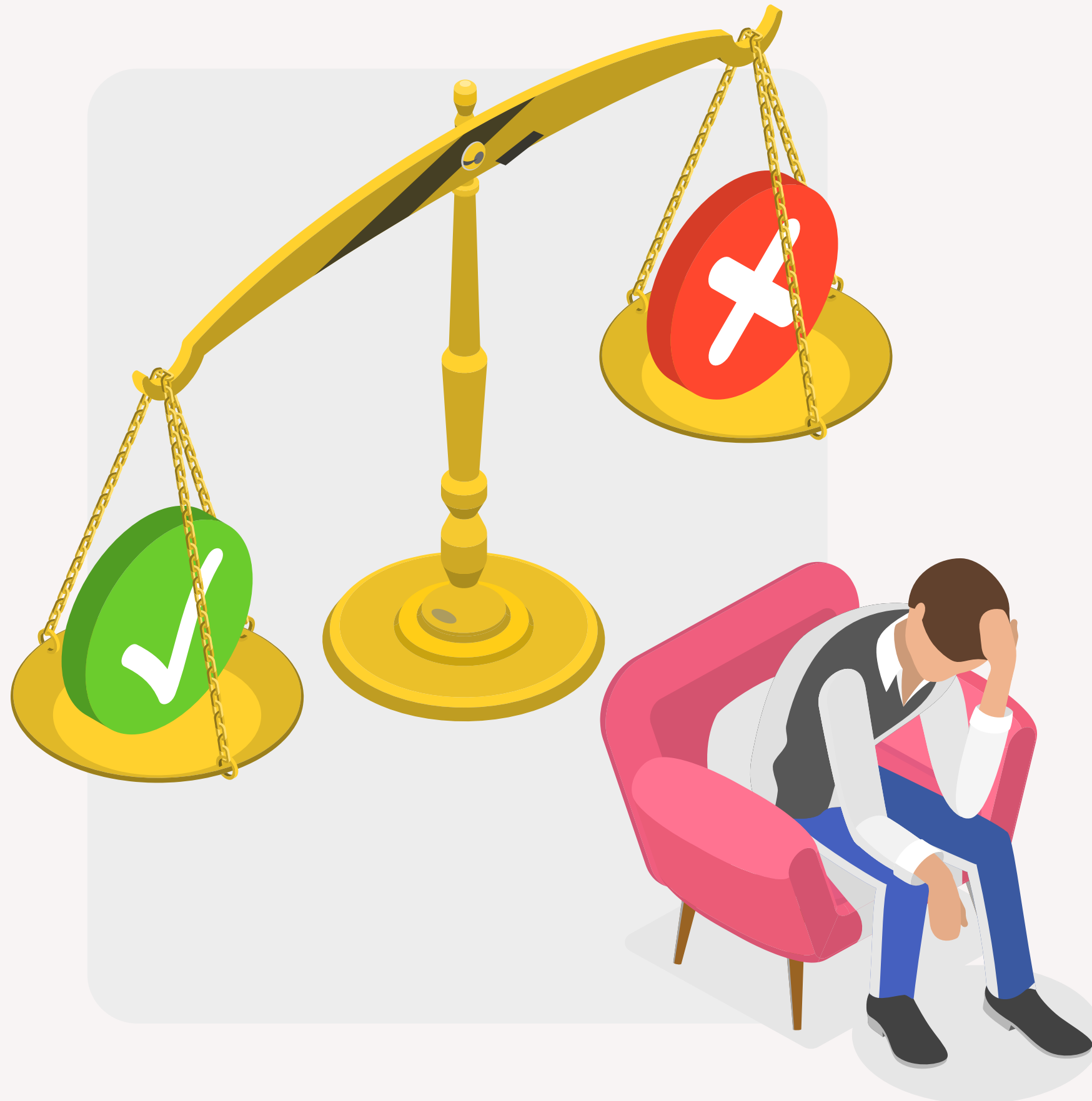


Notice of Termination



- Notice of termination, or
- Payment in lieu of notice
- MUST be in writing

| Period of Continuous Service | Period of Notice |
|--|------------------|
| 1 year or less | 1 week |
| More than 1 year but no more than 3 years | 2 weeks |
| More than 3 years but no more than 5 years | 3 weeks |
| More than 5 years | 4 weeks |



6. Serious Misconduct



Summary Dismissal – Serious Misconduct

- Fair Work Regulations 2009
- Employer exempt of requirement to provide notice of termination or prior warnings.
- Misconduct – intention to no longer be bound by contract of employment
- Termination should occur when:
 - it confirms major points of the allegation(s); and
 - the reason for the dismissal justifies summary dismissal



Serious Misconduct

- Willful or deliberate behaviour inconsistent with contract of employment;
- Causes serious and imminent risk to:
 - i. health and safety; or
 - ii. the reputation, viability or profitability of the business;
- Intoxication
- Theft
- Fraud
- Violence
- Serious OH&S breaches



Summary Dismissal Procedure

- Inform employee of allegations.
- Stand down with pay.
- Consider facts of investigation.
- Discuss allegations with employee and witness.
- Give employee opportunity to respond.
- Ask employee for reasons as to why they should not be terminated.
- Record interview details in employee's file (signed by employer, employee and witness).
- Written notice of termination – no notice period required.



7. Unfair Dismissal





- **Time Limit** – 21 days (Fair Work Commission)
- **Exclusions**
 - Qualifying periods
 - Apprentices & trainees
 - Short term casuals
 - Fixed term employees
 - Project employees
 - Genuine redundancy





Considerations for Unfair Dismissal

- Harsh, unjust or unreasonable
- Valid reason
 - Conduct and capacity
 - Must not be capricious, fanciful, spiteful or prejudiced
- Procedural fairness
 - Prior warnings
 - Notice given to employee
 - Opportunity for employee to respond
 - Opportunity for employee to improve



8. General Protections



- Time Limit- 21 days
- No exclusions
- Reverse onus of proof
- Does not have to be 'sole or dominant' reason
- Steps:
 - Conciliation;
 - Federal Court or Federal Circuit Court; or
 - Arbitration (if parties consent).





Workplace rights

Rights under workplace laws and industrial instruments and the capacity to exercise those rights



Industrial activities

Freedom to be or not to be a member or officer of a union and participate in lawful union activities or industrial action.



Discrimination

Between employees or in terms and conditions on grounds that are unlawfully discriminatory, or because of temporary illness or injury.



Adverse Action

Cannot be taken against anyone for exercising workplace rights or engaging in lawful industrial activities, or for discriminatory reasons. It includes acting, organizing, or threatening to:

- Dismiss an employee
- Injure in employment
- Alter an employee's position to his/her prejudice
- Refuse to employ a person/ engage a contractor



6. Q&As



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Disclaimer: This presentation does not constitute legal advice and reliance should not be placed upon material presented to solve a specific industrial relations issue.



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