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[Home \(/\)](#) > [Termination \(/termination\)](#) > [Other types of termination \(/termination/other-types-of-termination\)](#) > [Q&A \(/termination/other-types-of-termination/q-a\)](#) > [Is loss of driver's licence a sackable offence?](#)

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Q&A

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# Is loss of driver's licence a sackable offence?

By [Paul Munro \(/Analysts/Paul-Munro\)](#) on 2 Mar 2016 | 5282 Views

Can we dismiss an employee who has had his driving licence suspended?

This question was recently sent to our [Ask an Expert \(/ask-an-expert\)](#) service.

**Q** Our company is a food manufacturer and we employ drivers to distribute our product to customers. A driver was charged recently with low-range drink driving and is currently absent on annual leave awaiting the outcome of his case. He was not driving for the company at the time of the alleged offence.

The employee has an unblemished driving record at work and has been employed with the company for about 12 years. What alternatives are

available to the employer in this situation? For example, can the company dismiss the employee because he is unable to perform driving duties due to licence suspension? Is the company obliged to find other work within the company until the employee regains his driver's licence?

**A** The company should await the outcome of the court case before making any decision about the employee's continued employment. However, if the employee loses their licence, the employer would need to consider a number of alternatives, which may ultimately include dismissal.

### **Performing other duties**

If, for example, the employee's driver's licence is suspended for 12 months, it would be difficult for the employer to accommodate the employee in their current position. The employer could investigate whether other duties could be performed in the interim, with the employee's agreement, particularly if dismissal is being considered as the final alternative.

However, while the employer may choose to reorganise work, it is not incumbent on them to do so. See *C v Endeavour Energy* [2014] FWC 741 (<http://www.austlii.edu.au/au/cases/cth/FWC/2014/7414.html>).

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This may be a viable option if the suspension is for a brief period (such as three months), particularly as a long-term employee may have access to accrued long service leave and annual leave entitlements.

This may include the option of taking leave on half pay, if permitted by the applicable legislation. However, this would not be a viable option for the employer if the licence suspension was 12 months or more.

Ultimately, if none of these alternatives is available, or a suitable arrangement cannot be agreed upon by the parties, dismissal would seem to be the only remaining alternative.

### **Valid reason for termination**

Courts and tribunals have usually determined that a driver's loss of a licence **for a substantial period of time** is a valid reason for dismissal. This is because the employee is unable to perform the inherent requirements of their employment. However, while there may be a valid reason for dismissal, the Fair Work Commission could still consider a dismissal to be harsh, unjust or unreasonable.

### **Factors that determine whether dismissal is unfair**

The employer should investigate the matter carefully and make the decision in a procedurally fair manner. Relevant factors include the following:

- obtaining documentary evidence of the length of licence suspension
- notifying the employee of the reason for dismissal
- taking into account the impact of the employee's absence from work on the operation of the business
- if dismissal occurs, providing the required period of notice and paying all the employee's entitlements. What may be a valid reason for a termination with notice, may not be a valid reason for instant dismissal. See *J v Wax Hed Inc Pty Ltd t/a Surf Toyota* [2014] FWC 1398 ([http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FWC/2014/1398.html?stem=0&synonyms=0&query=title\(Wax%20Hed%20\)\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FWC/2014/1398.html?stem=0&synonyms=0&query=title(Wax%20Hed%20))))

### **Case law**

The Fair Work Commission has determined the loss of driver's licence in a number of unfair dismissal matters. For example, it determined an employer had a valid reason for dismissal after an employee's driver's licence was suspended for 15 months. The possession of a valid driver's licence was a mandatory requirement of the job. The period of licence suspension was also relevant in this matter.

See *G v Isis Primary Care Limited* [2010] FWA 2101. Other decisions on this issue include *G v NAISDA Limited t/a NAISDA Dance College* [2011] FWA 8372 (<http://www.austlii.edu.au/au/cases/cth/FWA/2011/8372.html>);

*K v Linfox Australia Pty Ltd* [2015] FWC 3967  
(<http://www.austlii.edu.au/au/cases/cth/FWC/2015/3967.html>).

### Work-related offence

While not applicable in the above situation, if the offence relates to the job in some way, such as culpable driving by a truck driver while driving a company motor vehicle, it can be argued that a valid reason related to conduct exists. But that may not be the case with culpable driving by a finance or pharmaceutical industry employee, for example.

The other relevant factor here is whether the reputation of the business is likely to be damaged by the employee's conviction. Culpable driving is likely to damage the reputation of a transport company or car dealership. Another aspect includes its possible impact on the safety and welfare of other employees and other people at the workplace.

The bottom line: Whether an employer considers other alternatives when a driver loses their licence will depend on the length of time the licence is suspended. An employer should commence any investigation subsequent to the outcome of the employee's drink driving case being determined by the court.



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**Paul Munro (/Analysts/Paul-Munro)**

Posted on  
**2 Mar 2016**

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