

Employment Law Seminar

Fair Work Act 2009

Unfair Dismissal

Summary

- Overview of the Fair Work Act 2009
- Validity of federal unfair dismissal legislation
- Statutory objects of the unfair dismissal provisions
- Who is protected from unfair dismissal/entitled to a remedy for unfair dismissal?

Summary

- Small businesses which are subject to the unfair dismissal provisions
- Has there been a “dismissal” of an employee?
- An exemption from the unfair dismissal regime: where a “genuine redundancy” has occurred

Summary

- An exemption from the unfair dismissal regime: where the employer complies with The Small Business Fair Dismissal Code
- The Code and its contents
- Procedure and Remedies

Overview of the Fair Work Act 2009

- The High Court in *New South Wales v Commonwealth (2006) 229 CLR 1* confirmed that the Work Choices legislation was valid; therefore
- The unfair dismissal laws in the Fair Work Act 2009 which operate 1 July 2009 are based on that decision and are valid

Validity of the federal unfair dismissal legislation

For our purposes, the effect of this decision is:

- The Fair Work Act 2009 is not and does not need to be based on the conciliation and arbitration power in the Australian Constitution
- The Commonwealth can directly regulate small business employers by reference to their status as trading, financial and foreign corporations

Statutory Objects of the Unfair Dismissal Provisions

- To create a national legislative framework that balances the needs of small business with the needs of employees
- To establish quick, flexible and informal procedures for dealing with unfair dismissal
- To provide remedies to employees, with priority given to the remedy of reinstatement

Statutory Objects

- The procedure and remedies are intended to ensure a “fair go all round”
- A “fair go all round” refers to a phrase used by Sheldon J in *In re Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95T. This phrase is discussed in Procedure and Remedies (see below)

Who is protected from unfair dismissal/entitled to a remedy for unfair dismissal?

- A person is “protected” from dismissal if “covered” by the Act’s unfair dismissal regime
- A person is “covered” if:
 - They are an award or enterprise agreement covered employee; or
 - if they earn less than the high income threshold (initially, \$100,000 per annum for a full time employee)

Who is Protected?

A person is “covered” by the unfair dismissal regime if they are employed and:

- their employer employs fewer than 15 employees at the time the employee was given notice of dismissal (i.e. a “small business” employer); and
- they are employed for 12 months at the time the notice was given to them.

Who is Protected?

- A person is covered by the unfair dismissal regime if they are an “employee” in “employment”.
- This means a person who is engaged under an employment contract, being a contract for personal service.
- A contract between a company and an independent contractor is excluded from the unfair dismissal regime.

Who is Protected?

- To be covered by the Act, the employee must be continuously employed. So, weekly hire (part-time and full-time) employees on contracts of indefinite duration are protected from unfair dismissal.
- Where a casual had a “reasonable expectation of continuing employment” on a “regular and systematic basis”, they are protected from unfair dismissal.

Small Businesses which are subject to the unfair dismissal regime

- The provisions deal with small business conduct against its employees which brings a business within the unfair dismissal regime.
- For a small business to be subject to the unfair dismissal regime, a “dismissal” has to have occurred, which is not a “genuine redundancy”, but is contrary to the “Small Business Fair Dismissal Code”.

Has there been a “dismissal”?

- The unfair dismissal provisions apply if there has been a “dismissal” within the meaning of the Act.
- A “dismissal”, as it applies under the Act, is a termination of employment “at the initiative of the employer”.

Has there been a “dismissal”?

A termination of employment “at the initiative of the employer”, includes:

1. A termination of employment at the “employers initiative”; and
2. A “forced” resignation; and
3. Only some types of demotions.

Has there been a “dismissal”?

Demotions, which are not “dismissals” under the Act, are:

- A demotion without a significant reduction in remuneration or duties; and
- Where the demoted employee remains employed by the employer that effected the demotion.

Has there been a “dismissal”?

There is no “dismissal” under the Act where there is a contract for a specified time period, or specific task, or specific season and then the contract ends with the end of the period, task or season.

Has there been a “dismissal”?

- There is no “dismissal” where the employment is under a “training arrangement” which terminates;
- There is no “dismissal” where there has been a termination of employment due to a “genuine redundancy”.

A “genuine redundancy” is defined under the Act as:

- “the ... employer no longer requires the person’s job to be performed by anyone because of changes in the operational requirements of the ... enterprise”; and
- “the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy”

Exemption: no dismissal if due to a “genuine redundancy”

- There is no “genuine redundancy” if a redeployment was available but the employer did not redeploy.
- There is no “genuine redundancy” if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - The employer’s enterprise, or
 - The enterprise of an associated entity of the employer.

Compliance with the Small Business Fair Dismissal Code (the "Code")

- A "Small Business", that is, an employer with fewer than 15 employees, is covered by the Code.
- You count, as one employee, each full time, part time and regular employee and each regular and systematic casual employee (including those persons employed by an "associated entity").

Code contents

- The employer has to be a “small business employer” at the time the employee was given notice of the dismissal.
- A dismissal will not be unfair where it is consistent with the Code, which is a code declared by the Minister.
- The Code is contained in a Fact Sheet, released by the Minister in Sept 2008.

Code contents

- The Code sets out the circumstances where a *summary dismissal* has occurred and such dismissal is justified (i.e. an employer has dismissed an employee without notice or warning given to the employee).
- A summary dismissal is justified in cases of: theft, fraud, serious breaches of OH&S procedures and violence.

Code contents

- A *summary dismissal* is considered fair in cases of theft, fraud or violence where allegations of same are reported to the police and the employer has reasonable grounds for so reporting.
- However, it is not essential that such conduct be reported to the police.

Code contents

- The Code also sets out where a dismissal, other than a summary dismissal, is warranted, for underperforming employees.
- If the dismissal is a dismissal, other than a summary dismissal, the employer has to give the employee a “valid reason” for dismissal.

Code contents

- A “valid reason” takes into account both the employer’s reasons for dismissal and the communication of those reasons to the employee prior to his/her dismissal.
- The “valid reason” is to be based on: the employee’s conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.

Code contents

A valid Dismissal Process:

- Multiple warnings are not required, nor do they have to be in writing (although written warnings are desirable).
- In a meeting, the employee can have a person to assist them, provided they are not acting in a legal capacity.

The dismissal process and the Code

A valid Dismissal Process:

- The employer has to give the employee a “fair go”
- A “fair go” involves the employer communicating to the employee, as follows:

The dismissal process and the Code

A valid Dismissal Process:

- warning the employee of the problem, identifying areas for improving performance, failing which the employee risks dismissal;
- before initiating a dismissal, the employer must give the employee the opportunity or reasonable chance to rectify the problem.

Evidence of Dismissal and the Code

- A checklist, attached to the Code, warns that evidence may be required from the employer to show that the employer has complied with the Code.
- The checklist is provided to assist, rather than require, the employer to adduce the relevant evidence.
- Other suggestions include: completing the checklist, keeping copies of written warnings, providing a statement of termination and signed witness statements.

Procedural Fairness and the Code

- For allegations of serious misconduct, the code does not specifically provide for an opportunity for the employee to respond to allegations of misconduct.
- For allegations of less serious misconduct, procedural fairness is limited to a single warning which need not be in writing and the code does not provide for an opportunity to respond to allegations.

Procedure and Remedies

- Remedies and Procedures are intended to ensure a “fair go all round”.
- The above phrase is a phrase used by Sheldon J in *In re Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95.

Remedies and Procedure

Re: Loty

In *In re Loty*, Sheldon J observed that a court should weigh the following factors, in considering whether an unfair dismissal warranted reinstatement:

- The employer's right to manage its business;
- The circumstances surrounding the dismissal;
- The utility of re-establishing the relationship;
- Whether reinstatement would work, if made subject to conditions.

Remedies that are available to an employee:

- Reinstatement is the primary remedy
- Reinstatement has to be “inappropriate” before compensation is considered or awarded
- Reinstatement means reappointment to the old position, or one that is no less favourable than the position the employee had immediately before the dismissal

Remedies

In addition to reinstatement, Fair Work Australia (FWA) can order service to be deemed continuous. Consequently the gap or break in employment caused by the dismissal does not affect benefits such as long service leave or annual leave, which are dependent upon the accrual of an appropriate amount of continuous service.

- Compensation can be ordered, in lieu of reinstatement
- Compensation has to be “appropriate in all the circumstances of the case”
- FWA can, in addition, order payment for remuneration lost

Compensation calculations have to take into account:

- length of employee service;
- viability of the order on the employer's enterprise;
- lost remuneration;
- employee efforts to mitigate loss;
- remuneration earned between the dismissal and the compensation; and
- any other relevant order

Remedies

- Employee misconduct “must” reduce the amount of compensation.
- There is no component in compensation for shock, distress or humiliation or analogous hurt.

Compensation is capped at the lesser of:

- 26 weeks, calculated back from immediately before dismissal, and
- the statutory amount (i.e. half of the amount of the high income threshold of \$100,000 p.a., indexed annually).

Procedure

- Applications are made to FWA, 7 days after the dismissal “took effect”, or within such period as FWA allows.
- An extension of time, based on “exceptional circumstances”, might be available.
- It is not clear whether determinations will include the publication of reasons for decision.

FWA has two discretions:

- Firstly, to conduct “initial inquisitorial enquiries” to ascertain whether contested facts exist; then
- Secondly, if there are contested facts, to either conduct a conference or determine that a hearing should occur.

However, there is no hearing, unless FWA considers it appropriate.

The FWA, in the exercise of its discretion to conduct a hearing, must take into account:

- The parties' views; and
- Whether a hearing is the most effective and efficient way to resolve the matter.