

Employment Law Seminar

Fair Work Act 2009

Unfair Dismissal

Summary

- Statutory objects of the unfair dismissal provisions
- Who is protected from unfair dismissal/entitled to a remedy for unfair dismissal?

Summary

- Large businesses are covered by the Act
- Large businesses which are subject to the unfair dismissal regime
- Has there been a “dismissal”?
- An exemption: no dismissal if a “genuine redundancy”

Summary

- What is harsh etc. conduct ?
- Interpreting the Criteria
- Remedies and Procedure generally
- Remedies
- Procedure

Statutory Objects of the Unfair Dismissal Provisions

- To create a national legislative framework that balances the needs of 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 15 or more employees at the time the employee was given notice of dismissal (i.e. “not a small business” employer); and
- they are employed for 6 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.

Large Businesses are covered by the Act

- A large business must not act contrary to s.387 Criteria for considering harshness etc. of the Act;
- A large business is “not a small business employer” as defined in s.23 of the Act.

Large Businesses are covered by the Act

- A “small business employer” employer is an employer with “fewer than 15 employees”,
- Count, as one employee, each: full time, part time and regular employee and each regular and systematic casual employee (include employees of an “associated entity”). Note: the method of counting may change before 1 July 2009 to be 15 full time equivalent positions until 1 January 2011.

Large Businesses which are subject to the unfair dismissal regime

- So, the provisions deal with large business conduct against its employees which brings it within the unfair dismissal regime.
- In summary, large businesses are subject to the unfair dismissal regime if they have initiated an employment termination which is not a “genuine redundancy”, but is contrary to the criteria in section 387 of the Act.

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 “employer’s 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 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.

What is harsh etc. conduct?

- S. 387 of the Act set out eight criteria which the FWA “must” take into account when considering if large business conduct amounts to harsh unfair or unjust conduct.
- If the conduct is contrary to this section, then the employee might have a remedy.

What is harsh etc. conduct?

The eight criteria are:

1. Was there a valid reason for the dismissal related to the person's capacity or conduct;
2. Was the person notified of that reason;
3. Whether the person was given an opportunity to respond;

What is harsh etc. conduct?

4. Any unreasonable refusal by the employer to have a support person to assist in any discussions relating to dismissal;
5. If a dismissal due to unsatisfactory performance has occurred, whether there was a prior warning;

What is harsh etc. conduct?

6. The degree of impact of size of the employer's operation the procedures followed in effecting the dismissal;
7. The degree of impact of no HR expert; would this likely impact on procedures followed in effecting the dismissal;

What is harsh etc. conduct?

8. Any other matters that the FWA considers relevant
 - The above factors “must” be taken into account.
 - The Explanatory Memorandum states [Para 1541] that the factors are to be considered “in their totality”.
 - No one factor will be determinative.

What is harsh etc. conduct?

- Factor 4 (attendance of a support person) will “only be a relevant consideration when an employee asks to have a support person present in a discussion relating to a dismissal and the employer unreasonably refuses”
[Explanatory Memorandum Para 1542]

Interpreting Factor 4

- The Explanatory Memorandum on the Fair Work Bill 2008 was a document issued by Minister for Employment and Workplace Relations, Julia Gillard.
- Explanatory memorandum can assist in the interpretation of the meaning of an Act if the meaning of a provision in an Act is ambiguous or obscure.

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.