

Employment Update

April 2009

Unfair dismissal under the *Fair Work Act*

by David Thompson and Costa Brehas

The Fair Work Bill received Royal Assent on the evening of 7 April 2009 and has ushered in a new era of workplace relations in Australia.

Most of the provisions of the *Fair Work Act 2009* ("**the Act**"), including the new unfair dismissal rules will come into effect on 1 July 2009. The remaining provisions, including the commencement of the new National Employment Standards and modernised awards, will commence on 1 January 2010.

The Regulations to the Act have yet to be introduced and will provide further detail regarding its operation.

Two further bills were introduced in March 2009 which will deal with various incidental issues including the transition from the current industrial relations system to the new system and will repeal the current Workplace Relations Act 1996.

This article is the first in a series which will consider relevant aspects of the Act in further detail starting with the new unfair dismissal provisions.

Commencement of unfair dismissal proceedings

From 1 July 2009, national system employees who are unfairly dismissed will have 14 days from the date of dismissal to bring an unfair dismissal claim (as opposed to the current 21 day period).

Unfair dismissal proceedings will be brought through a new body namely, Fair Work Australia ("**FWA**"), which will replace the Australian Industrial Relations Commission ("**AIRC**"). As with the current position, FWA will have discretion to extend the time period for bringing unfair dismissal claims.

Removal and replacement of existing "small business" exemption

From 1 July 2009, businesses that engage 100 employees or less will no longer be able to seek immunity from unfair dismissal claims. Instead, a new definition of a "small business employer" will apply based on whether an employer has fewer than 15 employees. This definition will change as follows:

- (a) From 1 July 2009 to 31 December 2010 it will mean those businesses having fewer than 15 employees on a "*full-time equivalent basis*". This will entail averaging out of the ordinary hours worked by all employees over the 4 weeks prior to the dismissal of an employee by adding all of those hours and dividing the total by 38. Small business employers will therefore have to keep accurate records of all of the hours worked by their employees in order to be able to prove that they do not exceed this threshold.
- (b) From 1 January 2011 it will mean a business having fewer than 15 employees by *individual head count* (i.e. not only full-time and part-time employees but also casual employees engaged on a regular and systematic basis).

Minimum employment (qualifying) periods

An employee of a small business employer will only be able to institute unfair dismissal proceedings if he/she has been employed with the business for at least one year.

After this one year period a small business must be able to demonstrate that it has followed the processes set out in a new "Small Businesses Fair Dismissal Code" in order to be able to successfully defend an unfair dismissal claim.

Employees who are engaged by businesses other than a "small business" (i.e. employers of 15 or more employees) will only be able to institute unfair dismissal proceedings where they have been employed for at least 6 months.

The minimum employment periods referred to above will start afresh where there is a transfer of business under the Act provided that:

- the old employer and the new employer are not associated entities; and
- before the transferring employee commences employment with the new employer it has informed that employee in writing that it does not recognise that employee's period of service with the old employer.

Limitations to unfair dismissal claims

The current limitations as to who may bring an unfair dismissal claim will continue under the Act (e.g. true fixed term or contract employees or trainees). In particular, the employee must either be governed by an award or workplace agreement or if the employee is a common law employee his/her annual remuneration must not exceed a specified threshold which will be indexed. This threshold will be \$100,000 (as opposed to \$106,400 that currently applies).

Genuine redundancy

Existing provisions permitting employers to defend unfair dismissal claims where the reason / part of the reason for the dismissal is based on "genuine operational requirements" have been narrowed under the Act to apply to circumstances where there has been a "genuine redundancy". This will require the employer to comply with any award or enterprise agreement obligations to consult with employees/the union about the redundancy, before proceeding with the dismissal.

Small businesses that employ less than 15 employees (i.e. calculated on an individual head count basis) will be exempted from redundancy pay obligations where the dismissal arises out of a genuine redundancy.

Fair Work Australia to determine unfair dismissal matters

From 1 July 2009 FWA will operate in tandem with the AIRC (until the AIRC ceases operating at the end of the year). During this transition period the transitional bills contemplate that unfair dismissal claims brought prior to 1 July 2009 under the *Workplace Relations Act 1996* ("WRA") will continue to be heard by the AIRC under the WRA. However, any subsequent appeals will have to be brought before a full bench of FWA.

Fair Work Australia will have the discretion to conciliate an unfair dismissal dispute or refer it to a hearing after taking into account the views of the parties. A hearing may be held at any time (i.e. before, after or during a conciliation conference).

Further details of how conciliations and hearings will be conducted will become clearer once the Regulations have been released. Suggestions have been made that FWA may accept evidence provided to it during the course of a conciliation conference and may make decisions on issues of fact without either party being given the opportunity to cross-examine the other concerning evidence that may be given during the course of these proceedings. If this occurs, it represents a significant alteration of the current position.

Issues that FWA must consider before dealing with the merits

Before dealing with the merits of an unfair dismissal claim, Fair Work Australia must determine whether:

- (a) the application has been brought within the prescribed time period;
- (b) the application has been made against a person who is protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code (if applicable); and
- (d) whether the dismissal was as a result of a genuine redundancy.

New criteria when considering whether dismissal was harsh, unjust or unreasonable

Fair Work Australia must take into account a number of matters specified in the Act when determining whether a dismissal was harsh, unjust or unreasonable. In addition to the usual issues relating to having a valid reason for the dismissal related to a person's

capacity or conduct it must take into account:

- (a) the effect of the person's conduct on the safety and welfare of other employees; and
- (b) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

New remedies for unfair dismissal

As is currently the case, the primary remedy is reinstatement. If, however, it is not possible to reinstate an employee who has been unfairly dismissed, Fair Work Australia may order the appointment of that employee with an entity that is related to another business entity of the employer. This is a remedy that will cause angst for many businesses.

Legal representation

Fair Work Australia will have the discretion to permit either party to be legally represented at a conciliation conference or a hearing. Where employers are represented by employer associations or employees are represented by unions, their industrial officers will have the automatic right to representation.

Conclusion

The coming financial year will no doubt see a resurgence of unfair dismissal claims under the Act. The effectiveness of the new system in dealing with these claims remains to be seen.

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