

## Fair Work Legislation – Scope and Key Changes

The Fair Work Act 2009 (FWA) introduces major changes to Australian workplace laws. Such changes are clearly a swing of the pendulum and a tilt back towards more protection for employees.

We outline what we consider are the key changes that will impact on employers and employees.

It is not possible to cover in depth the significant workplace changes that have been introduced by the FWA. Further information can be obtained at [www.workplace.gov.au](http://www.workplace.gov.au).

### National Employment Standards

Division 2 part 22 of the FWA contains the National Employment Standards (NES). The NES will take effect from 1 January 2010. The NES are minimum standards that apply to the employment of National System Employees. The NES also underpin what can be included in modern awards and enterprise agreements. The NES cannot be excluded by modern awards or enterprise agreements.

The minimum standards relate to the following matters:

- a. Maximum weekly hours (38 hours plus reasonable additional hours) (sections 62 - 64).
- b. Request for flexible working arrangements (sections 65 - 66).
- c. Parental leave (sections 67 - 85).
- d. Annual leave (sections 86 - 94).
- e. Personal/carer's leave and compassionate leave (sections 95 - 107).
- f. Community service leave (sections 108 - 112).
- g. Long service leaves (section 113).
- h. Public holidays (sections 114 - 116).
- i. Notice of termination and redundancy pay (sections 117 - 123).
- j. A Fair Work Information Statement (sections 124 - 125).

Under Work Choices, minimum employee entitlements were legislated for employees in five areas (Australian Fair Pay and Conditions Standard (AFPCS)). These were:

1. Wages.
2. Maximum ordinary hours of work (38 hours a week together with reasonable additional hours).
3. Annual leave.
4. Personal leave (comprising paid personal/carer's leave, unpaid carer's leave and unpaid compassionate leave).
5. Parental leave.

New features introduced by the Fair Work Act, which did not exist under the AFPCS:

- A right for employees who are parents to request flexible working arrangements until their child reaches school age.
- Unpaid compassionate leave for casuals.
- Unpaid leave for prescribed community service activities and paid jury service leave.
- The right to receive payment at the employees' base rate of pay if absent from work on a public holiday.
- The right to request an extra 12 months unpaid parental leave (up to two years unpaid leave in total) which an employer can refuse on reasonable business grounds.
- The removal of the existing 10 day cap on personal leave being used for carer's leave.
- Up to three weeks of concurrent parental leave for couples (compared with only one week of concurrent leave under Work Choices).

### **Termination of Employment**

The philosophy behind the Fair Work Legislation is to provide a quick, flexible and informal system to balance the rights of employees to be protected from unfair dismissals, and the needs of employers to manage their workplace (Section 381).

It is important to understand that the changes to dismissal laws will have a substantial impact on dismissals going forward. Deputy President Acton has indicated that FWA anticipate a 62% increase in the number of applications for both unfair and unlawful dismissals.

The new system will enable an employee to bring an unfair dismissal claim in three circumstances:

- Any employee who is employed by an employer who has 15 or more employees must have been employed for more than 6 months (Section 383).
- Any employee whose employer employs less than 15 people must have been employed for more than 12 months (Section 383).
- If the employee is not covered by an award, the employee must be earning remuneration less than \$106,400.00 (to be indexed).

A claim for unfair dismissal must be made within 14 days of the dismissal (Section 394). This is apparently to ensure that reinstatement, where appropriate, remains a viable option.

It should be noted that 14 days would seem a short period of time. It may encourage frivolous or vexatious claims because applicants and their representatives may choose to lodge applications before obtaining advice or prior to investigating the circumstances of a dismissal, simply to preserve a claim. Also, the Act is unclear as to when a conference or hearing may be held following application.

An unfair dismissal occurs when a person has been dismissed and the dismissal was harsh, unjust or unreasonable, and the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy (Section 385).

The meaning of dismissal is defined in Section 386. A person will not be taken to have been dismissed if:

- Employed for specific period of time;
- Employed for a specific task or duration of a specified season;
- The person was employed under a training arrangement for a specified period of time;  
or
- If demoted, it is not deemed to be a dismissal if it does not involve a significant reduction in the employee's remuneration or duties.

### **Dismissal - Harshness**

Section 387 sets out the criteria for considering harshness. The FWA must take into account the following:

- Was there a valid reason relating to capacity or conduct.
- Whether the person was notified.
- Whether the person was given an opportunity to respond.
- Any unreasonable refusal to allow a support person present.
- Whether the person has been warned.
- The degree to which the size of the employer would likely impact upon the procedures followed.
- The degree to which the absence of HR management specialists or expertise will likely impact on the procedures.
- Any other matters FWA considers relevant.

Section 387 has the effect that if a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and other factors relating to unfair dismissal do not need to be considered. This is because Section 396 provides that if a dismissal is consistent with the Code, the FWA then do not go on to consider the merits of the claim. If an employer has not complied with the Code the claim will proceed and be treated in

the normal way. It will be interesting to observe whether in practice such claims are determined by the FWA without a hearing or conference.

(See Section 396)

For example, summary dismissal will satisfy the code provided it is based on reasonable grounds. That is, it is fair to sack an employee without notice or warning for:

- Theft;
- Fraud;
- Violence; and
- Serious breaches of Occupational Health and Safety processes.

Usually an allegation of theft or fraud needs to be reported to the police.

Other dismissals will be fair and satisfy the Small Business Fair Dismissal Code if:

1. The employee was clearly warned that he or she was not doing the job properly and would have to improve or otherwise be dismissed.
2. The employee was provided with a reasonable amount of time to improve performance or conduct.
3. Before dismissal, the employee was given reasons for the proposed dismissal and given the opportunity to respond.

It is important that employer's record discussions and meetings, written warning(s), checklists, witness statements and written statement of termination be retained and produced to FWA to confirm compliance with the Small Business Fair Dismissal Code.

### **Meaning of Genuine Redundancy**

Section 389 provides that if a dismissal is a consequence of a genuine redundancy, it will not be unfair.

A dismissal will be a genuine redundancy if the job was no longer required to be performed by anyone because of change to the operational requirements of the enterprise. Examples include:

- A machine now available to do a job performed by the employee.
- Due to economic downturn the employer only needs 3 people to do a particular task of duty instead of 5; or
- The employer is restructuring the business to improve efficiency and tasks done by a particular employer and distributed between several other employees and therefore the person's job no longer exists.

Section 389(2) provides that a dismissal is not a genuine redundancy if it would have been reasonable for the person to be redeployed.

Whether the dismissal is genuine does not go to the process for selecting individuals, however if the reason a person is selected is a prohibited reason, then such person would be able to bring an action in relation to that dismissal.

For example the "operational reasons" ground for termination will be removed. Under Work Choices employees were largely shielded from challenges to the unfair dismissals if it could be shown that the operational reasons were a ground or cause for the termination. Thus even if an employer could have done something else other than terminating the employer is irrelevant.

Under the FWA a redundancy will need to be genuine and will not be a ground for dismissal if the job still exists or the persons could have been redeployed. An employee will also be able to claim a redundancy was unfair if there was a failure to consult.

### **Remedies**

Under Section 390, the FWA may only order compensation if it is satisfied that reinstatement is inappropriate and that compensation is appropriate. Orders can only be made to compensate a person for lost remuneration. They cannot include a claim for shock, distress or humiliation (Section 392 sub paragraph 4).

In ordering compensation, the FWA must take into account the following matters:

- The effect of the order on the viability of the employer;
- The length of the person's service;
- The remuneration the person would have received or would have been likely to have received if they had not been dismissed and the efforts of the person to mitigate the loss suffered because of dismissal;
- The amount of any remuneration earned by the person from employment or other work; and
- The amount of any remuneration likely to be earned by the person during the period between the making of the order and actual compensation and any other relevant matters.

If the FWA is satisfied that a person's misconduct contributed to the decision to dismiss, they must reduce the amount of compensation accordingly (Section 292(4)).

- Half the amount of the high income threshold; or
- The amount of remuneration received by the person or that they were entitled to receive in the 26 weeks before dismissal. A compensation cap is the lesser of (Section 392(5)).

Section 393 enables monetary orders to be made by way of instalments.

### **Procedural Matters**

Sub Section 394(2) provides that an application must be made within 14 days of the dismissal. There is discretion to extend the time frame, if exceptional circumstances exist (Section 394(3)). These factors are based on the principles set down in *Brodie-Hanns v MTV Publishing Limited* (1995) 671R298.

It is unclear why in relation to Unlawful Dismissal a longer period of 60 days under Chapter 6 (Section 774) has been inserted. This more than doubles the existing time limits and creates a longer period in which an employer will be uncertain if a claim is to be made.

### **Conferences (Section 398)**

Unfair dismissal conferences must be held in private and FWA must take into account the difference in circumstances of the parties and the wishes of the parties.

### **Hearings (Section 399)**

FWA can only hold a hearing if it considers appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

Under Section 593 unfair dismissal hearing must be in public, except where evidence is confidential.

Under Section 596 FWA may grant permission for a person to be represented by a lawyer or paid Agent in certain circumstances, which include:

- Whether the matter could be dealt with more efficiently.
- It would be unfair not to allow a person to be represented.

### **Rights and Responsibilities of Employers and Employers' Organisations**

Part 3 - 1 of the Fair Work Act sets out general protection against victimisation, discriminatory conduct or otherwise adversely affected.

Conduct that is prohibited includes:

- Not only dismissal but also adverse action on discriminatory grounds, such as race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer responsibility, pregnancy religion, political opinion, national extraction or social origin.
- Adverse action because of temporary absence from work because of illness or injury.
- Misrepresentation of an employment relationship as that of an independent contractual relationship.

- Threatening to dismiss an employee in order to engage such person as an independent contractor.
- Make a false statement in order to persuade an employee to become an independent contractor.
- Demanding payment of a bargaining services' fee.

The prohibitions enable civil remedies to be sought and this is set out in Division 1 of Chapter 4 of the FWA.

In relation to dismissals, where it is alleged that such dismissal is within the comprehension of Chapter 3 of the Act, an application can be made to FWA to deal with the dispute. The time limit to make such an application is 60 days from when the dismissal took effect (Section 366(1)) or in exceptional circumstances such further period as FWA allows. The time limit of 60 days is to be contrasted with the time limit of 14 days in which to bring an application for unfair dismissal.

### **Other Key Changes**

The Fair Work Act consists of 800 sections.

Other important changes include:

- **The replacement of state and federal awards with modern awards.**
- **Right of entry**

The most important change in this regard is that officials of registered unions are entitled to enter workplaces to investigate alleged contraventions of the FWA or relevant industrial instruments irrespective of whether such discussions relate to a member. It is sufficient that there are persons at the workplace who are eligible to belong to the union, whether a member or not.

- **Enterprise agreements**

A new form of enterprise agreements replaces the old collective and individual agreements allowed by the WRA. An enterprise agreement must pass a new "better off overall" test.

- **Regulation of enterprise bargaining**

A new obligation (Section 228) to bargain in good faith.

- **Transfer of business**

Part 2 - 8 provides for the transfer of enterprise agreements, certain awards and instruments if there is a transfer of business. Instruments which transfer have an indefinite life.

### **Conclusion**

Unfair dismissal entitlements for most employees have been restored. Previously it was estimated that 4.6 million employees worked for businesses with less than 100 people, and such people could not bring unfair dismissal claims.

The new safety net standards apply as from 1 January 2009. Employers and their advisors will need to be proactive to ensure that they comply with the new standards, or otherwise face prosecution, fines and related costs.

It is incumbent on employers particularly, to ensure that they are up to speed with the significant changes established by the FWA as the new workplace relations system will become fully operational by 1 January 2010.

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