

Workplace Relations

February 2009

Employers Beware - Unfair Dismissal Laws to Change on 1 July 2009

The Forward with Fairness ('FWF') legislation will introduce several changes to the unfair dismissal regime. The aim of the amendments is to restore unfair dismissal rights which were ended as a result of WorkChoices.

Note that these unfair dismissal provisions will commence in 1 July 2009.

Eligibility

To be eligible to bring an unfair dismissal claim employees are required to meet the following conditions:

- A minimum service period of 6 months with an employer who employs 15 or more employees.
- A minimum service period of 12 months with an employer who employs less than 15 employees (classified as a 'small business').
- Non-award employees must earn an annual remuneration of less than the high income threshold, which will initially be \$100,000, but which will be indexed annually.

Seasonal employees and those who are employed/engaged for specific tasks will not be eligible to bring an unfair dismissal claim if they are dismissed because their work is no longer required at the end of the period or task.

However, such employees may be able to bring a claim if their employment is terminated at a time other than at the end of their employment contract providing they have served the minimum service period.

Genuine redundancy exemption

Currently an unfair dismissal claim cannot be brought where the employment was terminated for "genuine operational reasons" or for reasons that include genuine operational reasons. This occurs in a redundancy where the job the employee has been performing is no longer required due to changes in the employer's operational requirements

The unfair dismissal provisions will continue to not be available to employees dismissed in a case of 'genuine redundancy' however, under FWF the employer must also comply with any consultation obligations contained in applicable industrial instruments.

It is important to note also that the function of the genuine redundancy exemption has been significantly reduced due to the fact that a genuine redundancy will not exist if the employee could have reasonably been re-deployed either with the employer or an associated entity. This is substantially different from the current position under WorkChoices.



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Small Business Fair

Dismissal Code

A Small Business Fair Dismissal Code ('the Code') will be available for employers with less than 15 employees. A dismissal will be deemed fair if a small business can show genuine compliance with the Code when dismissing an employee.

The Code states that a summary dismissal will be fair if the employer has reasonable grounds to believe the employee is guilty of serious misconduct (such as theft, fraud, violence or serious breaches of occupational health and safety requirements) and the allegation has been reported to the relevant authority.

In other cases of dismissal, an employee must be provided with a warning of reason(s) why the employee is at risk of being dismissed and given a reasonable opportunity to respond and address the problem.

The hearing process

A claim for unfair dismissal must be made within 7 days of dismissal unless Fair Work Australia ('FWA') extends the period. Applications are currently required within 21 days of termination.

The method of adjudicating unfair dismissal claims will change. FWA will determine the outcome of claims by holding a conference with the parties involved in the dispute.

Some form of representation will be permitted at conferences, however parties will not be entitled to representation by a lawyer without FWA's permission. FWA may grant permission where representation would enable the matter to be dealt with more efficiently or where it would be unfair to refuse permission.

Remedies

Reinstatement will be the preferred remedy for an unfair dismissal, provided it is in the interests of both parties. Where reinstatement is not appropriate, compensation will be available, however it will be capped at a maximum of 6 month's pay.

Impact of FWF

Employers must be aware of the FWF amendments to unfair dismissal as they abolish the current 100 employee threshold and the 'operational reasons' limitation. As of 1 July 2009, more employees will be able to bring a claim for unfair dismissal.

An employer who in the past was exempt from a claim for unfair dismissal may now be at risk of a complaint being made against them if they fail to comply with proper procedure when terminating employment.

Employers need to be alert, not only to the risks associated with redundancies which are not genuine but also to the possible exposure to claims for unlawful termination and discrimination, if the terminations are not carried out properly.



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