

# **WORKCHOICES - THE UNFAIR DISMISSAL REGIME AND CHANGES TO THE STRUCTURE OF WORKPLACE RELATIONS IN AUSTRALIA**

## **THE UNFAIR DISMISSAL REGIME**

### **Introduction**

In March this year, changes were made to the Workplace Relations Act. The new laws apply to employees of Constitutional corporations, and to all employees in Victoria and the Territories. They operate to the exclusion of most state laws and awards, the exception being anti-discrimination and equal opportunity laws. State OHS laws also remain in place.

The biggest and most controversial changes to the Workplace Relations Act have been the alterations made to the unfair dismissal regime. These include new entitlement thresholds which will see employers with less than 100 employees being exempt, as well as changes to the situations in which a worker can gain access to compensation for unfair dismissal.

### **Who is covered?**

The unfair dismissal regime is now no longer available to workers unless their employer employs more than 100 employees. This threshold does not include casual employees (unless they have been employed on a regular and systematic basis for at least 12 months, making them long-term casuals). The assessment of how many employees an employer has is taken at the time at which notice is given, not when termination takes effect, or when the employee makes an application to the AIRC.

The government is savvy to employers adjusting their business structure to fit under the 100 employee cap. The 100 employee threshold is calculated on the basis of an aggregate of workers employed by "related bodies corporate".

### **When can an application for unfair dismissal be made?**

Even workers who are employed by an employer who has more than 100 workers will find it difficult to show the AIRC that they have been unfairly dismissed. This is because employees can now be dismissed for reasons which include "genuine operational reasons", without being able to gain access to unfair dismissal compensation.

Section 643(9) of the Workplace Relations Act provides some clarification as to what is meant by operational reasons. Operational reasons are said to include:

reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.

It should be noted that an operational reason need only be one of a number of reasons for termination. It does not need to be the only, or the main, reason for termination.

The AIRC has held that the following grounds have been "genuine operational reasons":

- The employee's position being made redundant after a business restructure
- A downturn in business at a hostel, meaning fewer staff were required

An application for unfair dismissal can only be brought by workers who have been employed for 6 months. This statutory period can be shortened, if done so in writing and agreed to by both worker and employer before commencement of employment. It cannot be lengthened unless it is considered to be a 'reasonable' period, given the nature and circumstances of employment.

### **Fast-tracking cases**

Under the old regime, many employers were finding that they were the respondent in an unfair dismissal application that had little or no merit. As the AIRC is a no costs jurisdiction, the employer was then liable for the legal costs of defending the claim, and it would often be cheaper to pay the disgruntled employee a sum of money to settle the matter. The AIRC now has the power to deal with cases without a Hearing. They are able to do so in situations where there are jurisdictional objections (ie. the employer clearly employs more than 100 people, or where operational reasons were clearly a reason for the termination), or where the applications are frivolous or vexatious.

### **Conclusion**

The policy aims of the Federal Government are clearly apparent in the new changes. They make life much easier for small businesses, as they are now more easily able to increase or reduce the size of their workforce without fear of an unfair dismissal claim being brought against them. This policy aim is evident in the 100 employee threshold, along with the addition of the "genuine operational reasons" exemption. The effect of these two amendments will mean that far fewer employees will be entitled to apply for unfair dismissal compensation.

## **STRUCTURAL CHANGES**

### **Introduction**

Changes to the structure of industrial relations in Australia have been relatively minimal, although it is important to be aware of some new institutions, as well as some changes to the powers of existing ones.

### **AFPC**

The Australia Fair Pay Commission has been established to oversee the minimum wage determination previously operated by the AIRC.

### **Award simplification and rationalization**

The Award Review Taskforce has been set up to overview simplification and rationalization of awards. It will make recommendations to the government on the approach to be taken by the AIRC.

### **New powers for the AIRC**

The AIRC has had its powers to resolve industrial disputes severely curtailed. In particular, it is no longer able to compulsorily arbitrate or conciliate over industrial disputes, and there is now no power to make new awards other than as part of the award rationalization process.

The AIRC has been left with the power to provide voluntary dispute resolution services, provided that both parties agree. It can also regulate bargaining and industrial action, however they have themselves been restricted by the new laws. It retains the power to conciliate unfair dismissal and unlawful determination claims, and also to hear and determine unfair dismissal cases.

### **OEA**

The Office of Employment Advocate continues to oversee the operation of all AWAs.

### **New statutory minimum standards (Australian Fair Pay and Conditions Standard)**

New statutory minimum standards apply in relation to wages, maximum ordinary hours of work, annual leave, personal/carer's and parental leave, and public holidays. These minimum standards apply to ALL workers covered by the new system, and will over-ride any Federal workplace agreement or common law contract of employment which is less favourable than those imposed by statute.

### **Conclusion**

The general thrust of the changes made by the WorkChoices legislation has been to shift power away from the AIRC, and in doing so, from employee collectives such as Unions. It remains to be seen how effective the new legislation will be or whether, particularly in

termination matters, disgruntled employees will merely find an alternative avenue of complaint.

Please contact Jeannette Eid on 9009 5800 for further information about the changes to the Workplace Relations Act and how they relate to your business.

Although all care and skill has been used in the preparation of this article, it is intended only to provide a general summary of the legislative changes and should not be relied upon as a substitute for professional advice.