

EMPLOYMENT UPDATE

JUNE 09

WORKPLACE RELATIONS LAWS CHANGE TOMORROW

The *Fair Work Act* starts tomorrow – 1 July 2009. The *Fair Work Act* is to be phased in over 1 July 2009 and 1 January 2010. In this Employment Update we will briefly summarise those changes commencing from 1 July 2009.

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It is expected that the changes under the *Fair Work Act* that commence on 1 July 2009 will lead to an increase in unfair dismissal claims and an increase in union involvement in workplace bargaining. They will also see the Australian Industrial Relations Commission replaced with the one-stop-shop – Fair Work Australia. It is important to note that these changes will only affect those employers/employees who are in the Federal workplace relations system.

UNFAIR DISMISSAL CHANGES

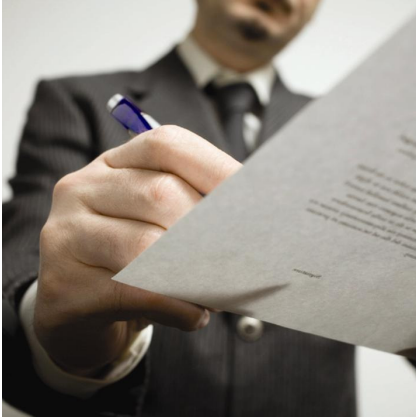
When WorkChoices started in March 2006 it introduced various exemptions to unfair dismissal claims. One of those exemptions was designed to assist small business. It provided that where an employee was employed by an employer with 100 or less employees, the employee was not be able to commence an unfair dismissal claim if their employment was terminated. The result of this was a dramatic drop

in unfair dismissal claims. From 1 July 2009, this exemption will no longer apply.

In its place, the *Fair Work Act* will provide 'small businesses' with a longer qualifying period for their employees. That is, employees of a 'small business' will have a 12 month qualifying period. This means that where an employee is dismissed within the first 12 months of their employment they will not be able to commence unfair dismissal proceedings. The qualifying period remains at 6 months for businesses that are not 'small businesses'.

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A 'small business' is a business that has less than 15 employees. Until 31 December 2010, this is calculated on full-time equivalent employees. However, from 1 January 2011, it will change and be calculated on head count, including casual employees.

The *Fair Work Act* will also introduce a Small Business Fair Dismissal Code for small businesses to follow when dismissing an employee after the 12 month qualifying period.

To commence an unfair dismissal claim, an employee must have completed their qualifying period. Whether an employee has served the qualifying period is assessed either when the person is given notice of termination by the employer; or when the dismissal actually takes effect, whichever happens first.

An employee's period of employment is defined as the period of continuous service the employee has completed with the employer. Generally, service as a casual employee does not count towards the period of employment. However, where the casual employee worked on a regular and systematic basis, and had a reasonable expectation of continuing engagement on a regular and systematic basis, they will be able to commence unfair dismissal where their qualifying period has elapsed.

Therefore, with the exemption for 100 employees or less being abolished, the focus from 1 July 2009 when an employee is dismissed, is whether the employee has completed their qualifying period.

Another exemption that will change from 1 July 2009, is the exemption to an unfair dismissal claim where an employee is terminated for genuine operational reasons. This will be replaced by an exemption for genuine redundancy. The legislation provides that a '*Genuine redundancy*' is where an employee's employment is terminated due to:

- the employer no longer requiring the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- the employer notified the employee about the decision to make the position redundant and discussed the reasons behind the decision and its affect on the employee concerned as soon as practicable after a definite decision was made by the employer to implement the change; and
- in doing so, the employer gave prompt consideration to any matters raised by the employee in relation to the decision; and
- the employer provided the employee with all relevant information in writing regarding the decision and the effect on the employee.

We envisage, as with the 'genuine operational reasons' exemption, this exemption will result in numerous decisions of the court as to what is a 'genuine redundancy'.

THE FAIR DISMISSAL CODE FOR SMALL BUSINESS

From 1 July 2009, there will be a *Fair Dismissal Code for Small Business* ('**Code**') and a *Small Business Fair Dismissal Code Checklist* ('**Checklist**') to assist small business employers to apply the Code.

Where an employee is employed by a small business and dismissed during the first 12 months of their employment, they are exempt from commencing unfair dismissal proceedings and the employer does not need to apply the Code. However, to dismiss an employee fairly after the 12 month qualifying period has elapsed, the employer must comply with the Code. As a matter of good practice, and to avoid confusion as to when it should and should not be used, we recommend the Code be used at all times.

The Code is a simple 6 paragraph document which, in summary, provides:

- **For under-performing employees:** The employer is required to inform the employee that they are under-performing and provide them with a valid reason as to why they are at risk of being dismissed. This reason needs to be based on the employee's conduct or capacity to do the job. The employee needs to be given the opportunity to respond to the issues raised as well as a reasonable chance to improve their performance and rectify the problem. Therefore, the employee should be warned and given the opportunity to improve – this all comes back to the principle of giving the employee a 'fair go'.

- **Warnings:** An employer is not required to give an employee multiple warnings. If a warning is given to an employee, it is desirable, but not necessary, for the warning to be in writing.
- **Summary Dismissal:** Employers have the right to dismiss an employee without warning or notice where the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to warrant immediate dismissal. This would include any conduct that is seriously affecting the business, for example, stealing, fraud, violence, and breaches of workplace health and safety procedures. Interestingly, the Code provides that an allegation is sufficiently serious where it has been reported to the police and the employer has reasonable grounds for making the report.
- **Witnesses:** The parties, including the employee, may have a witness with them at any meeting where dismissal is possible; however, the person cannot be a lawyer acting in a professional capacity. We recommend that a witness be present on either side where possible as the employer will need to prove compliance with the Code to defend a claim for unfair dismissal and witness statements will be required to support this.

Where the Code is complied with and the Checklist is completed, the employer will be able to use this to establish a defence to an unfair dismissal claim.

Unfortunately, there is no Code or Checklist for medium and large businesses. In saying that, we recommend that as a minimum, these businesses should apply the procedure in the Code and complete the Checklist. It will not

provide them with a defence to an unfair dismissal claim but it will provide them with guidance as to what Fair Work Australia will consider to be a reasonably fair procedure.

Another change that commences from 1 July 2009, is that unfair dismissal claims need to be commenced within 14 days of the date of the dismissal. Under the *Workplace Relations Act*, a period of 21 days was allowed. Fair Work Australia has the power to extend this period in certain circumstances.

FAIR WORK AUSTRALIA

From 1 July 2009, Fair Work Australia ('FWA') will operate alongside the Australian Industrial Relations Commission ('AIRC') until 1 January 2010. After 1 January 2010 the AIRC will be replaced by FWA. FWA will also replace the Australian Industrial Registry, the Australian Fair Pay Commission and the Workplace Authority with a single agency. The Workplace Ombudsman will be known as the Fair Work Ombudsman from 1 July 2009 to keep consistency with Fair Work Australia.

FWA is to perform its functions and exercise its powers in a way that is fair and just, quick and informal, open and transparent, and promotes harmonious and cooperative workplace relations. One of the intentions of the legislation with this new approach to unfair dismissal proceedings is that employers should no longer have to pay "go away money" since the process will be quick, simple and informal.

Legal representation

The *Fair Work Act* does provide for limitations on formal legal representation before FWA.

Whether legal representation will be allowed will ultimately be determined by FWA. We believe in practice, things will not change considerably. It is the case, under present legislation, that lawyers need to seek leave to appear at conciliation conferences and hearings before the AIRC. Generally, the AIRC will grant leave (particularly at the conciliation conference) because they appreciate that legal representation will, in most cases, assist the matter to be resolved. We consider it is likely that FWA will adopt the same approach but we will have to wait and see.

Parties can represent themselves before FWA as they can in the AIRC. In addition, we do not consider that the limitation on legal representation prevents legal advice being sought prior to any conferences or hearings and does not prevent, for instance, lawyers preparing submissions for clients to use, or for the lawyer to be present at the conference assisting their client.

Impact on unfair dismissal proceedings

FWA will be responsible for dealing with unfair dismissal claims and will have the discretion to hold a hearing or a conference to decide matters of fact. The *Fair Work Act* does not change the existing fundamental principle that a dismissal will be unfair where it is harsh, unjust and unreasonable. The *Fair Work Act* provides that a person will be unfairly dismissed when FWA is satisfied that:

- the person has been dismissed;
- the dismissal was harsh, unjust or unreasonable;
- the dismissal was not consistent with the Small Business Fair Dismissal Code (where relevant); and
- the dismissal was not a case of genuine redundancy.

FWA has to be satisfied in relation to each point above for a person to be unfairly dismissed. In doing so it must take into account:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that FWA considers relevant.

FWA will be able to make a decision in relation to an unfair dismissal claim at a conciliation conference. This is very different to the position under the

Workplace Relations Act where Commissioners have no powers at a conciliation conference – their role was simply to try to facilitate a settlement between the parties. We consider it will be very interesting to observe how this new power will be implemented.

FWA must not hold a hearing in relation to an unfair dismissal claim unless FWA considers it appropriate to do so, taking into account:

- the views of the parties to the matter; and
- whether a hearing would be the most effective and efficient way to resolve the matter.

Reinstatement is the primary remedy and FWA has the power to reinstate an employee to an "associated entity" of the employer in limited circumstances. FWA may order compensation of up to 6 months remuneration only if it is satisfied that reinstatement is inappropriate and that compensation is appropriate. Generally, compensation awarded is well below the 6 month cap.

If compensation is to be awarded, FWA must take into account all the circumstances of the matter when determining the appropriate amount, including:

- the effect of the order on the viability of the employer's enterprise; and
- the length of the person's service with the employer; and
- the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

- the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that FWA considers relevant.

In addition, if FWA is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, FWA must reduce the amount it would otherwise order for compensation.

CHANGES TO WORKPLACE BARGAINING LAWS

From 1 July 2009, parties to a collective agreement (to be known as an enterprise agreement) will be required to negotiate in good faith.

Good Faith Bargaining is about promoting open communication in the workplace. WorkChoices did not require the parties to bargain in good faith. However, this is a significant feature of the new legislation. The legislation aims to achieve productivity and fairness and in doing so places an emphasis on enterprise-level collective bargaining underpinned by 'Good Faith Bargaining' obligations. This is accompanied by clear rules governing industrial action.

The obligations of both parties engaged in Good Faith Bargaining include:

- attending and participating in meetings at reasonable times;

- disclosing relevant information in a timely manner;
- responding to proposals throughout the bargaining process in a timely manner;
- giving genuine consideration to proposals and bargaining representatives and providing not only responses but reasons;
- refraining from unfair or difficult conduct that undermines freedom of association or collective bargaining.

Under Good Faith Bargaining parties are not required to accept agreements they do not agree to. The intention is that both parties work together to establish a mutually acceptable outcome. If the parties are unable to achieve this then FWA is empowered to make a 'Good Faith Bargaining order' that will be binding on the parties. It is envisaged that arbitration will not play a major part in this process but instead will be limited to circumstances concerning industrial action, issues where there is a threat to health and safety, a threat to the economy, or significant harm to the parties.

Importantly, after 1 July 2009 we consider it will be more difficult to have an agreement without union involvement. If one employee is a member of a union or eligible to be a member and they want that union to be party to the agreement, then the union will be able to be a party upon application to FWA.

MAIN IMPLICATIONS FOR EMPLOYERS

- The 100 employee or less exemption will no longer apply from 1 July 2009. This will result in a dramatic increase in the number of unfair dismissal claims.
- Employers need to ensure that they use an employee's qualifying period to determine whether an employee is suitable. If an employee is not performing to a satisfactory level and is showing signs of being unwilling or unable to improve, employers need to ensure they dismiss this employee within their relevant qualifying period.
- If the qualifying has passed, small business employers need to ensure they comply with the Fair Dismissal Code for Small Business when dismissing an employee. If complied with correctly, this will provide them with a defence to an unfair dismissal claim. Other businesses need to ensure they follow a fair procedure when dismissing an employee and as a minimum we recommend that they use the Code as a guide.
- As a result of these changes to unfair dismissal laws, employers should proceed with caution when terminating an employee's employment and consider obtaining legal advice on whether they have a valid reason for the termination and if so, what procedure they should follow.
- With regard to workplace bargaining, if you are looking to negotiate an agreement with employees in your workplace you need to ensure that you adopt a procedure for the negotiations that complies with the obligation to bargain in

good faith. You also need to be prepared for union involvement, particularly if you have a union presence in your workplace – even if it is just one employee. If there is no union presence in your workplace and you have a good relationship with your employees, we consider that the new laws should not cause you too much grief.

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