



Unfair dismissal

The amendments to the *Workplace Relations Act 1996 (Cth)*, (“the WorkChoices Act”) were announced with great fanfare by the Howard Government in 2006, and changed the industrial relations landscape dramatically.

Fundamental changes included the changes made to the unfair dismissal laws, which affected all financial services businesses.

An **unfair dismissal** refers to a claim by an employee whose employment has been terminated “unfairly”. That is, the employee was not afforded procedural fairness and there was no valid reason for termination.

Current situation:

From **27 March 2006**, an employee may not make an application for compensation for unfair dismissal if they:

- (a) is employed by an employer with 100 employees or less (including regular casuals employed for longer than 12 months);
- (b) earn \$101,300.00 or more;
- (c) have been employed for less than 6 months;
- (d) is employed as a seasonal employee (even if the end of the “season” is not known or identified at the start of the term of employment). If the duration of the season is related to the nature of the work being performed, and is ascertainable at the point when it occurs, an employee will be deemed to be a “seasonal” employee; or
- (e) if their employment is terminated for “genuine operational reasons”,

which is defined as being “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”.

If an employee does not fall within any of the above exemptions, their unfair dismissal claim must be lodged within 21 days of their employment being terminated.

Changes to unfair dismissal:

One of the core pre-election promises of the Labor Party during last year’s election campaign was to make the WorkChoices Act fairer, and also to “scrap” the unfair dismissal laws. The Rudd Government’s industrial relations bill was introduced to Parliament in November 2008.

What will change?

The changes can be summarised as follows:

- (1) Financial services businesses which employ between 16 and 100 employees will again be open to claims from employees that they have been unfairly dismissed. Employees cannot lodge an unfair dismissal claim within the first 6 months of their employment.
- (2) Employees of a small business employer (15 employees or less) cannot lodge unfair dismissal claims unless they have been employed for a minimum of 12 months. Each full

time, part time and casual employee will count as one employee.

(3) The Act will create a Fair Dismissal Code. Under the Code:

- If a small business employer dismisses an employee after the 12 month period has expired, and the employer complies with the Code, the dismissal will be deemed to be fair.
- Small business employers will be able to dismiss an employee where there has been theft, fraud or violence by the employee, or a breach of occupational health and safety procedures.
- If the employee's behaviour is criminal, then a police report will be a basis for termination.
- If an employee is terminated because of poor performance, the small business employer is first required to have given the employee a valid reason, and also, a reasonable time within which to change their performance and rectify the problem. One warning is enough. Rectifying the problem might involve the small business employer providing additional training, and also ensuring that the employee knows the employer's job expectations.
- The Code requires only one warning for poor performance or conduct and makes termination for serious misconduct a simpler proposition than under the current law.

A draft non-compulsory checklist for complying with the Fair Dismissal Code has been prepared for small business employers to follow, and which will help to demonstrate compliance with the Code.

(4) The creation of Fair Work Australia is designed to:

- replace the Australian Industrial Relations Commission;
- conciliate and mediate unfair dismissal claims;
- resolve unfair dismissal claims without formal hearings;
- limit professional representation of the parties, by lawyers for example, in disputes; and
- promote reinstatement of the employee as a primary remedy, unless this is not in the interests of the employee or the employer.

The Government has promised that employers will not have to pay "go away" money to get rid of unmeritorious claims. How these rules will operate in practice is yet to be set out in detail by the Government. The key is likely to be the attitude and approach of the Fair Work Australia members charged with determining unfair dismissal claims, rather than the actual content of the law.

(5) Where a genuine redundancy exists, dismissing an employee will not constitute unfair dismissal. This replaces genuine operational reasons.

- The redundancy needs to be genuine. The employer must no

longer require the particular job being performed by the employee to be performed by anyone; re-filling the position with a new employee is not a genuine redundancy.

- The new legislation will contain a statutory test that will enable businesses which face genuine and significant financial strain to make employees redundant.

- (6) Unfair dismissal claims will need to be lodged within 7 days (not 21 days).
- (7) Employees who earn less than \$98,000 (to be indexed) will be able to make an unfair dismissal claim.

What if the employee makes a claim?

The small business employer may be required to provide evidence that it has complied with the Fair Dismissal Code. This may include:

- (1) Copies of any written warnings;
- (2) Statement of termination (including reason for termination); and
- (3) Details of the opportunity to rectify poor performance.

Compact recommends that this kind of documentation be kept.

Conclusion:

It is expected that the changes to unfair dismissal laws will come into force on **1 July 2009**. Of course, the Opposition has not confirmed that they will accept these changes, and allow passage of the Bill in its current form through the Senate – so watch this space.

Fair Work Australia, as the new industrial umpire, is designed to ensure a faster, less complex and less costly resolution of unfair dismissal claims for both employers and employees. Whether this will be the case remains to be seen – the “devil is in the detail”, especially for small businesses. Balancing the rights of employees and employers remains a politically charged issue.

In any event, it is important that employers familiarise themselves with the new laws and, when the Bill is passed, incorporate the new requirements in their human resources policies and procedures.

The law is current as at February 2009.

Please note that this paper is a summary of the law only and is not a substitute for legal advice. Holley Nethercote is able to assist companies in meeting their obligations in this area by providing practical and prompt legal advice. Licensing, training and creation of compliance programs are also available via an associated business, Compact- Compliance and Corporate Training – www.compliance-training.com.au.

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