

NEW UNFAIR DISMISSAL LAWS – Less complicated and Fairer for All?

By

Michael Taylor, Principal Consultant.

From 1st July the federal government's new unfair dismissal regime will apply.

Gone will be the general exemption for businesses employing fewer than 100 staff; as will the defence that employees were being terminated for '*genuine operational reasons*.'

The new system will focus on early intervention and informal processes to achieve the twin objectives of:

- Greater access to employment protection for a larger workforce population. It is estimated that by reducing the employment threshold down from 100 to the fulltime equivalent of 15 employees, an additional 3 million workers will gain prompt access to proceedings conducted by the A.I.R.C ('*Fair Work Australia*' – FWA from 1.1.10), for terminations that the applicant feels are either *harsh, unjust or unreasonable*.
- The burden on business, particularly small business, of defending unfair dismissal claims, will be significantly minimised.

This article highlights the main points of the new regime, as they will impact upon small to medium sized organisations working within the federal workplace relations system.

Main Features:

Instead of the former arbitrary limit of 100 employees, a new two tiered system of qualifying periods of employment will determine the threshold of an employee's entitlement to pursue an unfair dismissal claim – 12 months for employees of businesses with fewer than 15 employees and 6 months for businesses with more than 15. For the purposes of the new legislation, the 15 employee threshold includes regular casual staff.

Casual employees who have been employed on a '*regular and systematic basis*', with a reasonable expectation of continuing employment, will have similar rights to their weekly counterparts. This is a significant development for sectors, such as hospitality, leisure and recreation and health and fitness, that have traditionally relied heavily upon "permanent casuals".

Employees precluded from making claims will be persons:

- engaged for a specified period of time or specified task or season;
- to whom a training agreement applies and whose employment is limited to the duration of that agreement;
- not employed under a modern award or collective agreement whose remuneration exceeds \$106,400 p.a;

- are genuinely redundant to the ongoing needs of the employer.

Employees will need to lodge claims with the administering body (*'Fair Work Australia'*, after 1.1.10 and beforehand, the A.I.R.C), no later than fourteen days after termination.

Parties will be able to be supported by non-legal representatives or agents, (such as HMT Consulting), or trade union officials, in the case of employee applicants, however legal representation will only be allowed where FWA deems it appropriate. This is intended to foster the resolution of disputes in an informal and inquisitorial manner.

It is anticipated that FWA Commissioners will hold face-to-face conferences at employer's premises, or alternatively, use telephone conferencing facilities. Only where there are contested facts, will the FWA resort to a 'traditional' hearing format; however the views of the parties as to the most effective and efficient method of resolution, will be taken into consideration in determining how best to proceed.

Unlike previously criticised approaches to the issue of Wrongful Dismissal claims, which invariably led to employers making so-called '*go away payments*', the new system will place emphasis on re-instatement as the preferred remedy. Any compensation will be capped at 26 weeks of total remuneration, prior to termination.

Orders of the FWA will be binding upon the parties and therefore legally enforceable.

Central to the operation of the new system, as it will relate to organisations of fewer than 15 employees, will be the introduction of a new ***Small Business Fair Dismissal Code***. The Code will set out steps a small business employer needs to take in order for the dismissal to be fair. If an employee of a small business makes an unfair dismissal claim, FWA will first determine if the employer has complied with the Code. If so the dismissal will be considered fair. If the employer has not complied with the Code, the claim will be treated in the same way as any unfair dismissal claim, and FWA will go on to determine whether the dismissal was harsh, unjust or unreasonable.

By providing a clear process and guidance to follow when dismissing an employee, the Code is intended to mitigate an increase in claims against small business operators, and provide certainty to employers that work within the Code's framework.

Conclusion:

The federal government has worked hard to build a consensus around its new Wrongful Dismissal Regime to replace one of the most contentious parts of the *Work Choices* legislative package.

The FWA will be resourced to facilitate operation from a number of regional offices with steps already being undertaken to engage 30 Commissioners nationally, giving effect to union demands that the new system be administered by a "*strong umpire*".

For their part employers will gauge the success of the system on its demonstrated simplicity, clarity and ease of application.