MTA EMPLOYMENT RELATIONS FACT SHEET

Fair Work Act 2009 – Unfair and Unlawful Dismissal

Updated February 2013

“A fair go all round”

The Fair Work Act 2009 Part 3-2 unfair dismissal applies. The system is based on the principles of a “fair go all round” and the procedures for handling unfair dismissal claims are less legalistic with the emphasis being on conciliation.

The termination provisions have been broken down into two streams.

- Unfair Dismissals (“harsh, unjust and unreasonable”); and
- Unlawful Termination

Unfair dismissals

Those employees that claim their dismissal was “harsh, unjust or unreasonable” may make an application to the Fair Work Commission (FWC) within 21 days after the dismissal took effect. The FWC may allow an application after the 21 days but this depends on the reason for the delay, the action taken by the employee to dispute the dismissal, prejudice by the employer, the merits of the application and fairness to the employee as against other persons in a similar situation.

In dealing with unfair dismissal applications, the Fair Work Commission will consider the following:

- Whether the application was made within the period required by the Act,
- Whether the person was protected from unfair dismissal,
- Whether the dismissal was consistent with the Small Business Fair Dismissal Code,
- Whether the dismissal was a case of genuine redundancy,
- 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),
- Whether the person was notified of that reason,
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person,
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal,
- If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal,
- The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal,
• 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,
• Any other matters that the FWC considers relevant.

This requirement of the Act is to be interpreted with a view to achieving a “fair go all round”, i.e., is fair to both employees and employers, ensures legal costs are minimised, and discourages frivolous and vexatious claims. If there are any matters involving contested facts, the FWC will conduct a conference or hold a hearing in relation to the matter.

**Who may apply to use the legislation?**

The Act determines who can make a claim but does it by excluding specified persons from being able to make a claim for unfair dismissal as follows:

1. Employed by an employer with less than 15 employees (calculated on a simple head count) and has been employed for less than 12 months;
2. Employed by an employer with 15 or more employees (calculated on a simple head count) and has been employed for less than 6 months;
3. Not covered by a modern award or enterprise agreement and earning over $123,300 per year;
4. A casual employee not engaged on a regular and systematic basis with a reasonable expectation of continuing employment;
5. A transferring employee on the sale of a business where the businesses are not associated entities and the new employer informed the employee that a new qualifying period applies;
6. Engaged under a contract of employment for a specified period of time, specified task, or for the duration of a specified season and the employment has terminated at the end of the period, task or season (Note: this arrangement cannot be used to avoid the unfair dismissal legislation);
7. Engaged on a training arrangement whose employment was for a specified period of time or limited to the duration of the training arrangement and the employment was terminated at the end of the training arrangement;
8. Demoted in employment but the demotion does not involve a substantial reduction in remuneration or duties and the employee remains employed by the employer.

**Remuneration threshold (non-award employees)**

Employees who earn over a certain amount and are not covered by an award or enterprise agreement are unable to bring an unfair dismissal claim against their employer.

This amount is indexed and is currently $123,300 per year.

• When assessing the remuneration include:
  • Salary (including commission and bonuses);
  • Superannuation; and
  • All other things from which the employee gains a “private benefit”

MTA Employment Relations has provided this information as a guide to the operation of the *Fair Work Act*. It is not intended to be legal advice and must be read in conjunction with the relevant provisions of the legislation.
In this latter category, all superannuation contributions plus the private portion of the use of telephones and motor vehicles are included. Placing a dollar value on private use of a telephone or motor vehicle is not an easy exercise. There are some tribunal decisions regarding this matter but also under the Fair Work Act it allows for agreements as to the value of such additional benefits as a part of the contract of employment or noted in the employees letter of appointment.

However, what is important is that once an employee’s remuneration exceeds the threshold figure in the Act, the employee is automatically excluded from having their claim determined by the Commission.

**Genuine redundancy exclusion**

If an employee is dismissed for “genuine redundancy” they are excluded from an application for unfair dismissal.

The Act provides that:

“(1) A person’s dismissal was a case of genuine redundancy if:

(a) The person’s employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise;

and

(b) The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person’s dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) The employer’s enterprise; or

(b) The enterprise of an associated entity of the employer.”

Whilst a claim for unfair dismissal may occur, in instances of genuine redundancy such claim is unlikely to be successful. It is important that when making a decision to terminate an employee due to genuine redundancy, employers look at all other alternatives to terminating the employee, especially under this amendment re-deployment, and have gone through the appropriate consultation requirements.

The modern Vehicle Manufacturing, Repair, Services and Retail Award and Clerks Private Sector Award do not specifically include consultation obligations within the relevant redundancy provisions but there is a general obligation to consult in the event of a major change to production, organisation, structure or technology that are likely to have ‘significant effects’ on employment etc.

It is recommended by the MTA that appropriate consultation be provided. The following summarises an approach that is appropriate and indicates procedural fairness:
• The employer discusses with the employees affected and their representatives, if any, the introduction of the changes, the effects the changes are likely to have on employees, and measures to avert or mitigate the adverse effects of such changes on employees. Employers must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes. The discussions must commence as early as practicable after a definite decision has been made by the employer to make such changes.

• For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer’s interests.

However, even though “genuine redundancy” is used by the employer when responding to a claim for unfair dismissal, Fair Work Australia may be required to hold a conference or hearing to determine that this assertion by the employer is correct.

Steps in any claim made

Step 1 – Application to the Fair Work Commission
Applications must be filed with the Fair Work Commission within 21 days after the day of termination. The FWC may extend time depending on the reason for the delay and the effect on the parties and the merits of the case.

Step 2 – Initial matters to be considered
In the first instance, once an application has been lodged, and if an objection is raised, the FWC must decide the following matters before considering the merits of the unfair dismissal application:

• Whether the application was made within the period required,
• Whether the person was protected from unfair dismissal,
• Whether the dismissal was consistent with the Small Business Fair Dismissal Code,
• Whether the dismissal was a case of genuine redundancy.

Step 3 – Conferences and/or hearings
If a matter arising from an unfair dismissal claim involves facts which are in dispute, the FWC must then conduct a conference. To date the process has involved telephone conferences. Upon receipt of the application the employer or its representative must file a response to the claim prior to the conference. The MTA Employment Relations provide a service for completing and filing such documentation in consultation with the member and appearing on behalf of the member at the telephone conference or subsequently at a hearing. If the matter is not resolved at the telephone conference, the FWC will hold a hearing in relation to the matter or parts of the matter.
Step 4 – What the Fair Work Commission looks at when determining whether the termination was harsh, unjust or unreasonable

In deciding if a dismissal was harsh, unjust or unreasonable, the FWC will have to take into account the following:

1. Whether there was a valid reason for the termination related to the capacity or conduct of the employee (including its effect on the safety and welfare of other employees) or was a genuine redundancy;

2. Whether the employee was notified of that reason;

3. Whether the employee was given an opportunity to respond to any reason related to their capacity or conduct;

4. Where the reasons related to poor performance by the employee, whether the employee had been warned about that performance before the termination;

5. If there was any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;

6. The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal;

7. 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

8. Any other matters the FWC considers appropriate.

Matters such as length of service and past good performance may also be taken into account, and as such will impact upon the number of written warnings which the employers may be required to give.

Step 5 – Remedies and compensation

When FWA makes an order for a remedy it can include reinstatement to either the same position or similar position that is not less favourable in terms and conditions, or monetary compensation up to 6 months’ pay or half the amount of the high income threshold immediately before the dismissal (whichever monetary amount is lesser). The FWC must ensure that regard is given to all the circumstances of the case including:

1. The effect of the order on the viability of the employer’s undertaking, establishment of service;

2. The length of the employee’s service;
3. The remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

4. The efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and

5. 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;

6. 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

7. Any other matter that the FWC considers relevant.

In circumstances were reinstatement is “inappropriate” the FWC may order compensation. The reference to “inappropriate” rather than ‘impractical’ has led to a different approach to the reinstatement jurisdiction and resulted in fewer reinstatement orders where the employer can establish that any such order will create practical problems at the workplace.

The FWC must be satisfied that a remedy is appropriate in all the circumstances of the case, using the “fair go all round” principle and a new factor is now taken into account, namely the effect of any order on the “viability of the employer’s business”.

General Protections – Adverse Action

From 1 July 2009, employers, employees and independent contractors employed or engaged by corporations have the ability to make adverse action claims under the Fair Work Act 2009 where a workplace right has been breached, or is threatened to be breached. Employers need to be aware of the concept of workplace right and what can constitute adverse action under the Act.

A workplace right is defined in the Act to encompass:

- An entitlement, benefit, or responsibility under a workplace law, workplace instrument or an order made by an industrial body (examples include an award, agreement, or orders made by the Fair Work Commission (FWC));

- Initiation or participation in, a process or proceedings under a workplace law or workplace instrument (including, but not limited to, a conference before the FWC, court proceedings, protected industrial action, appointing a bargaining agent, making a request for flexible working arrangements or dispute settlement); or
• Making a complaint or inquiry to a body having capacity to seek compliance with a workplace law or workplace instrument (This is broad in its application and extends to the ability to make a complaint to the person’s employer, the FWC, or a union).

The circumstances in which an adverse action can be said to be taken against another person are very broad, and can involve but are not limited to threatening to take action or organising actions such as:

• Dismissing an employee,
• Injuring or altering the position of an employee to his/her prejudice,
• Discriminating between the employee and other employees,
• Terminating a contract with an independent contractor,
• Refusing to engage an independent contractor or employee.

Under the new laws, where an adverse action claim is made, it will generally be dealt with at first instance by a Fair Work conference. If the conference does not resolve the dispute then the employee may proceed to run a case either in the Federal Magistrates Court or Federal Court. It is important to note that an application must be made within 21 days, although the FWC will have discretion to accept an application lodged out of time.

If a matter proceeds to a court hearing, the onus of proof is with the employer to prove the reason for the claimed action was a lawful one. A finding of adverse action may require an employer to reinstate the employee, pay an uncapped compensation amount, and pay penalties of up to $33,000 a breach.

It is important that employers understand these new adverse action provisions and the potential for alternative claims beyond those traditionally found under the anti-discrimination jurisdiction.

Employers should review their policies and procedures regarding employment practices including termination, discrimination and equal employment opportunity to ensure that they can adequately identify and manage issues giving rise to adverse action. Having these policies and procedures in place demonstrates an employer’s desire to prevent discrimination and other complaints in the workplace and effectively respond to any complaints.

**Unlawful Termination**

Unlawful terminations - which are claimed to have been made on prohibited grounds will initially be dealt with by the FWC, but if not resolved will be referred to either the Federal Court or a Court of competent jurisdiction to be arbitrated. All employees have access to the Court if the termination was carried out on certain unlawful grounds.

Section 772(1) - Employment not to be terminated on certain grounds:
MTA Employment Relations has provided this information as a guide to the operation of the Fair Work Act. It is not intended to be legal advice and must be read in conjunction with the relevant provisions of the legislation.

“An employer must not terminate an employee’s employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

a) Temporary absence from work because of illness or injury of a kind prescribed by the regulations;

b) Trade union membership or participation in trade union activities outside working hours or, with the employer’s consent, during working hours;

c) Non-membership of a trade union;

d) Seeking office as, or acting or having acted in the capacity of, a representative of employees;

e) The filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

f) Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

g) Absence from work during maternity leave or other parental leave;

h) Temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.”

Remedies and Compensation

The Federal Court may make one or more of the following orders in respect of unlawful terminations (dismissal on prohibited grounds):

1. A penalty on the employer of up to $33,000;
2. Reinstatement of the employee;
3. Payment of compensation by the employer to the employee, subject to the same limits as for orders of the Industrial Relations Commission; and
4. Any other remedy the Court considers necessary, and any other consequential orders.

The FWC may order payment of costs

A prescribed scale of costs will be developed for the FWC proceedings where costs can be awarded, in limited circumstances, against an unsuccessful applicant. For example, employees who make a claim vexatiously, without reasonable cause, or unreasonably fail to discontinue, or unreasonably prolong or obstruct an unfair dismissal proceeding. Awarding of costs can be applied in both unfair dismissal and unlawful termination proceedings.
An application for an order for costs is to be made within 14 days after the determination or discontinuance of the matter. These costs may include:

- Legal and professional costs;
- Expenses arising from the representation of a party by a person or organisation other than on a legal professional basis; and
- Expenses of witnesses.

Members who require further assistance utilising this information should contact MTA’s Employment Relations Services on (02) 9016 9000.