



Law at Work Report

Devine Law at Work

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Unfair Dismissal Law Set to Change (Again) in 2009

On 17 September 2008, the Federal Government announced that its new unfair dismissal law will now take effect on **1 July 2009**, rather than the previously touted 1 January 2010). In terms of application of the law, the change will have the greatest impact on small employers (fewer than 15 employees), who were exempt from unfair dismissal law as a consequence of the commencement of the Work Choices amendments to the *Workplace Relations Act 1996* (the Act).



Background

While a protection against unfair dismissal had been included in awards for many years beforehand, provision for protection from unfair dismissal first became a feature of federal industrial legislation in 1993, having been introduced by the then Keating Labor Government. These provisions were subsequently replicated in State industrial jurisdictions.

When a new Act was introduced by the then Howard Coalition Government in 1996, unfair dismissal provisions were also included. Changes were not made to those provisions until the commencement of the Work Choices amendments to the Act in March 2006. At that time, 'small employers' (defined as having fewer than 100 employees) were exempted from the application of the unfair dismissal provisions of the Act.

Other changes to the unfair dismissal provisions which were introduced by the Work Choices amendments were:

- the ability to extend a probationary/qualifying period to up to six months (three months had been the standard applied prior to this);
- the exemption of an employee, whether of a small or large employer, from the unfair dismissal provisions if the dismissal could be shown to be for 'operational reasons'.

Since the introduction of unfair dismissal laws, unfair dismissal claims have been considered and decided upon by the relevant Industrial Relations Commission. Claims ordinarily had to be made within 21 days. Claims were first the subject of conciliation and

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then, if conciliation was not successful, arbitration. The primary remedy provided for under the Act for an unfair dismissal has been reinstatement; however, in practice, compensation (capped at a maximum of six months pay) has been the more common remedy.

The protection from unfair dismissal has only been available to certain categories of employee, albeit a large proportion of most workforces. Those currently **exempt** include:

- employees the subject of a probationary/qualifying period of up to six months;
- employees the subject of a fixed term contract and those employed for a specific project;
- employees who earn more than a threshold amount (currently \$106,400 and indexed each 1 July);
- casual employees (including those employed for less than 12 months on a regular and systematic basis);
- seasonal employees;
- employees who have been dismissed for 'operational reasons'.

It is anticipated that these exemptions will be replicated in the unfair dismissal provisions in what will be a brand new Act. The Substantive Bill, as it is currently known, which if passed will become the new Act, is to be introduced into Parliament by the end of this year.

The New Law

The key changes which will take effect to unfair dismissal law on **1 July 2009** are:

- a 'small business employer' will be redefined as an entity with fewer than 15 employees (previously fewer than 100 under Work Choices) - each full time, part time and long term casual (more than 12 months) will count as one employee;
- small business employers will be able to make use of a Fair Dismissal Code to determine whether the proposed dismissal will be considered fair (see the box on the next page for details);
- the probationary/qualifying period applying to employees of **small** business employers will be capable of extension from the current 6 months up to 12 months—this means that a small employer which dismisses an employee who has provided less than 12 months service will not be at risk of an unfair dismissal claim;
- claims will have to be lodged within 7 days of the dismissal (previously 21 days);
- claims will be made to a new entity, Fair Work Australia (claims were previously considered, conciliated and then heard by the Australian Industrial Relations Commission which will cease to exist on 1 January 2010);
- claims will essentially be determined 'on the papers', however there will be scope for informal conferences;
- legal representation will only be permitted in exceptional circumstances (currently it is permitted only with leave, although this is usually granted);
- decisions will usually not involve a public hearing, however such a hearing may be required where the case involves "particularly complex issues" and in such circumstances legal representation may be permitted.

What will *not* change

Key aspects of the unfair dismissal provisions in the current Act will remain unchanged:

- reinstatement will remain the primary remedy;
- the maximum compensation which can be awarded will remain six months pay - the information produced by the Federal Government to date stresses that compensation will normally "be well beneath the cap";
- an employee dismissed for operational reasons (e.g. genuine redundancy) will remain ineligible to make an unfair dismissal claim;





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- eligibility to make an unfair dismissal claim will remain subject to an income threshold.

Observations

The changes to unfair dismissal law proposed by the Federal Government represent a hybrid of the past (both the position prior to Work Choices and the Work Choices amendments) and something new.

Unfair dismissal claims have always been relatively easy for employees to make. The changes to unfair dismissal law proposed by Federal Government will see the making of these made claims by employees easier still. While the significant simplification of the rules around unfair dismissal has been touted as making life easier for employers as well as employees, only time will tell if this goal is actually achieved. The simplification of the process may well result in a greater number of unfair dismissal claims being made.

While claims will have to be made in a significantly shorter time frame (7 days) than the current scheme (21 days), employers know well the tendency of the relevant Industrial Relations Commission to grant extensions to the time in which applications must be made. A similar approach may be adopted by Fair Work Australia.

While the process of making decisions 'on the papers' may, at first glance, look attractive, in practice parties who are in dispute over a dismissal may well prefer a forum in which they get to 'have their say' and in which they are able to work towards resolving the matter themselves, as has been the case to date through the conciliation stage of such claims.

With the overwhelming focus of the changes to unfair dismissal law on simplification, there is a considerable risk that consideration of the important issue of whether a person has been unfairly dismissed or not and whether s/he should be reinstated/compensated will be reduced to a merely administrative function by the decision maker, an approach which may prove to be unsatisfactory to employee and employer alike.

The Fair Dismissal Code essentially reiterates core principles which have underpinned unfair dismissal legislation and case law for 15 years. While designed to benefit small employers in particular, no doubt employers large and small will find the Code a useful resource. Larger employers will however continue to have their processes and decisions held to a higher standard than smaller employers.

The most significant change will be for employers of fewer than 100 employees and more than 15 years who, since March 2006 have been exempted from unfair dismissal laws.

All employers will need to ensure that managerial, supervisory and HR personnel are all informed about the new laws and that dismissal processes are legally compliant.

FAIR DISMISSAL CODE

At this stage only basic information is available regarding the Fair Dismissal Code (Code). However what we know at this stage is:

- the Code will apply to **small business employers** (< 15 employees);
- an employee is not eligible to make an unfair dismissal claim if s/he is dismissed in the first 12 months of employment by a particular employer;
- if the employee is dismissed after the first 12 months of employment and the employer has followed the Code, the dismissal will be deemed to be fair;
- except where summary dismissal is justified (see below), an employer is required to give:
 - (a) a **warning** to an employee that he/ she is at risk of being dismissed;
 - (b) a **valid reason** for the warning;
 - (c) the employee an **opportunity to respond** to the warning;
 - (d) the employee a **reasonable chance to rectify the problem** (e.g. additional training, confirmation of employer expectations);
- warnings may be given either verbally or, preferably, in writing;
- multiple warnings are not required;
- employers may dismiss an employee without either notice (summary dismissal) or a warning if the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to do so;
- for a summary dismissal to be fair, it is sufficient but not essential for an allegation of theft, fraud or violence to be reported to police;
- in a discussion when dismissal of an employee is possible, the employee can have another person present to assist, provided that the other person is not a lawyer acting in a professional capacity;
- small business employers will have the benefit of a checklist to complete prior to or at the time of dismissal to ensure that all requirements have been met;
- a small business employee may be required to produce evidence of compliance with the Code if a dismissed employee makes an unfair dismissal claim; for example, a completed checklist, written warnings, a statement of termination or signed witness statements.



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