




Unfair Dismissal and Terminations

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Workplace Law Queensland is a division of msl
MELBOURNE SOLICITORS & LAWYERS

Unfair Dismissals - Objectives



381(1) The object is:

- (a) to establish a framework....that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
 - (b) to establish procedures for dealing with unfair dismissal that:
 - (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
 - (c) to provide remedies if a dismissal is found to be unfair, **with an emphasis on reinstatement.**
- (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended **to ensure that a "fair go all round"** is accorded to both the employer and employee concerned.

Unfair Dismissals - Protection



382 A person is **protected from unfair dismissal ...** if ...

- (a) the person is an employee who has completed ...at least the minimum employment period; &
- (b) a modern award or enterprise agreement applies, or the sum of the person's annual rate of earnings, and such other amounts (if any)... is less than the high income threshold.

383 The **minimum employment period** is:

- (a) if the employer is not a small business employer—6 months ending at the earlier of the following times: (i) when the person is given notice; (ii) immediately before the dismissal; or
- (b) if the employer is a small business employer—one year ending at that time.

384 (1) An employee's **period of employment ...** is the period of continuous service.

- (2) However (a) a period of service as a casual does not count unless (i) the employment was regular and systematic; and (ii) whilst a casual they had a reasonable expectation of continuing employment on a regular and systematic basis; and (b) does not count if there was a transfer of business and it was confirmed prior service would not be recognised.

Unfair Dismissal – What is it?



385 A person has been **unfairly dismissed** if FWA is satisfied that:

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

386(1) A person has been **dismissed** if: (a) their employment has been terminated on the employer's initiative; or (b) the person has resigned, but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.

(2) However, a person has not been **dismissed** if:

- (a) the person was employed under a contract of employment for a specified period, task or season, & the employment has terminated at the end of that event; or
 - (b) the employment was limited to the duration of a training arrangement; or
 - (c) the person was demoted but (i) the demotion doesn't involve a significant reduction in remuneration or duties; and (ii) the person remains employed with the employer.
- (3) Subsection (2) does not apply if a substantial purpose of the contract was to avoid the employer's obligations under this Part.

Unfair Dismissal – "harsh, unjust or unreasonable"



387 In considering whether a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) 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
- (b) whether the person was **notified** of that reason; and
- (c) whether the person was given an **opportunity to respond** to any proffered reason; and
- (d) any unreasonable refusal by the employer to allow a **support person** to be present; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been **warned about that unsatisfactory performance** before the dismissal; and
- (f) the degree to which the **employer's size** would be likely to impact on the dismissal procedures; and
- (g) the degree to which the absence of **dedicated HR management specialists or expertise** in the enterprise would be likely to impact on dismissal procedures; and
- (h) **any other matters that FWA considers relevant.**

Unfair Dismissal – Small Business Code



388

- (1) The Minister may declare a Small Business Fair Dismissal Code.
- (2) A person's dismissal was **consistent with the Small Business Fair Dismissal Code** if:
 - (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
 - (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

<http://www.fairwork.gov.au/Termination-of-employment/Documents/Small-Business-Fair-Dismissal-Code.pdf>

Unfair Dismissal – genuine redundancy



389(1) A person's dismissal is a ***genuine redundancy*** if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements; 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.

Unfair Dismissal – reinstatement



390 (1) Subject to ss(3), FWA may order reinstatement or payment of compensation if:

- (a) FWA is satisfied the person was protected from unfair dismissal; &
 - (b) the person has been unfairly dismissed.
- (2) FWA may make an order only if person has made an application under s394.
- (3) FWA must not order payment of compensation to the person unless:
- (a) FWA is satisfied that reinstatement of the person is inappropriate; &
 - (b) FWA considers an order for payment of compensation is appropriate in all the circumstances.

391 (1) An order for a person's reinstatement must be an order:

- (a) reappointment to the position they had immediately before the dismissal; or
 - (b) appointment to another position on terms and conditions no less favourable.
- (1A) If: (a) former position no longer exists & (b) that position or equivalent is with an associated entity; FWA may order reinstatement to the associated entity.
- (2) FWA may also make any order appropriate to maintain (a) continuity of employment; & (b) the period of continuous service.
 - (3) FWA may also make any appropriate order to pay an amount for lost remuneration (taking account of prospective & actual earnings (4)).

Unfair Dismissal – compensation



- 392** (1) An order for compensation must be an order to pay compensation in lieu of reinstatement.
- (2) In determining compensation FWA must take into account all circumstances including:
- (a) the effect of the order on the viability of the employer; & (b) the length of service; &
 - (c) the remuneration the person would have/ likely received; & (d) efforts to mitigate the loss; &
 - (e) Earnings post dismissal; & (f) likely earnings by the time compensation paid; & (g) any other matter FWA considers relevant.
- (3) If FWA must reduce compensation if it is satisfied that the person's misconduct contributed to their dismissal.
- (4) Compensation must not include a component for shock, distress or humiliation for dismissal
- (5) Compensation mustn't exceed the lesser of (a) an amount under ss (6) – effectively 26 weeks pay; & (b) half the high income threshold.

393 FWA may order compensation be paid by instalments.

Unfair Dismissal – procedural matters



- 394**(1) A protected person may apply to FWA for a remedy (reinstatement or compensation).
- (2) must apply (a) w/i 14 days after dismissal took effect; or (b) a further period allowed under ss (3).
- (3) FWA may allow an extension if satisfied there are exceptional circumstances, taking into account:
- (a) reason for delay; & (b) whether applicant first became aware after dismissal took effect; & (c) action taken to dispute the dismissal; & (d) any prejudice to the employer; & (e) the merits of the application; & (f) fairness as between the applicant and other persons in a similar position.
- 396** FWA must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
- (a) whether the application was made within time;
 - (b) whether the person was protected from unfair dismissal;
 - (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
 - (d) whether the dismissal was a case of genuine redundancy.

Unfair Dismissal – procedural matters (cont'd)



397 FWA must conduct a conference if the matter involves facts the existence of which is in dispute.

398 FWA must conduct the conference in private, but must take into account any difference in the circumstances of the parties in considering the application and informing itself in relation to the application; although FWA must take into account the wishes of the parties in that regard.

399 (1) FWA must not hold a hearing unless it considers it appropriate, taking into account the parties' views & whether it would be the most effective & efficient way to resolve matter.

(2) If FWA holds a hearing, it may decide not to hold the hearing in relation to parts of the matter.

(3) FWA may decide at any time to hold a hearing.

400 (1) FWA must not grant permission to appeal from its decisions unless it considers that it is in the public interest to do so.

(2) an appeal from a FWA decision can only be made for a significant error of fact.

Adverse Action–



340 Protection

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

"civil remedy provision" : see ss 539(1) & (3).

Adverse Action– workplace right



341 (1) A person has a **workplace right** if the person:

A person has a workplace right if the person:

is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument;

or is able to make a complaint or inquiry: to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument;

or if the person is an employee - in relation to his or her employment.

Meaning of **process or proceedings under a workplace law or workplace instrument**

(a) - a conference conducted or hearing held by FWA;

(b) - court proceedings under a workplace law or workplace instrument;

(j) - dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) - any other process or proceedings under a workplace law or workplace instrument.

Adverse Action–



Adverse action can be claimed by a prospective employee against a prospective employer

An employer takes adverse action against an employee if the employer:

(a) dismisses the employee; or

(b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer.

Adverse action includes:

- threatening to take the above actions; and organising such action.

- Adverse action does not include action that is authorised by or under FWA or any other law of the Commonwealth; or a law of a State or Territory prescribed by the regulations.

"action" includes an omission.

Adverse Action–



FWA s539 provides that the maximum penalty where the claim is brought by a aggrieved employee is 60 penalty units ($\$110 \times 60 = \$6,600$) & s 540 entitles an employee to claim

"penalty unit" has the meaning given by s4AA of the Crimes Act 1914

SECT 544 Time limit on applications

A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:

- a civil remedy provision;
- a safety net contractual entitlement;
- an entitlement arising under subsection 542(1).

Strategies – Steve's PDF



- 1. Process –**
 - Avoid "motherhood" statements unless you REALLY mean them
 - KISS principle
 - Small Business Fair Dismissal Code is a good place to start
 - Don't Cut & Paste!
 - Consult with staff and foster acceptance, ownership and understanding
- 2. Documents -**
 - Living documents
 - Accessible
 - Accessed
 - Document the documents
 - Autograph hunter
- 3. Follow through/ Up**
 - Speed, not haste
 - Don't let management manage!
 - Recipe for success or detour to disaster

Gary Bermingham v Kings
Transport & Logistics (Aust) P/L
(U2009/11549), 19 FEB 2010



B was employed for 4 yrs & at termination was responsible for operational management of a transport/ delivery contract with a major furniture retailer.

B's termination letter stated: **"Gary has been found to be stealing from the business in a fraudulent manner, by overcharging our customers and pocketing the difference between the price Kings charges for a job and the price Gary is quoting the customer."**

Termination after K's management became aware, from another employee that B was taking money to pay for staff social events. This employee had made allegations of harassment against B.K conducted some cursory interviews, including with employees allegedly involved in the fraud. Subsequently a meeting called. B was not told that he could be represented or that he could access a support person. B advised that he was aware of the fraud allegation. He returned \$100 in an envelope and admitted that it had been wrongly taken from K. B was terminated post meeting.

K conducted further interviews with those involved and issued warning to at least 1 other employee. 1 of those warned was subsequently promoted to B's position.

B's evidence was that \$100 was put aside from amounts payable to K & conceded that, in retrospect, his actions were inappropriate. B asserted that he was stressed by work, impairing his decisions. Alternatively, B argued that this was within his managerial authority (although B was aware of, and had previously followed, a practice of gaining approval for social expenditures reimbursed from petty cash).

Gary Bermingham v Kings
Transport & Logistics (Aust) P/L
(U2009/11549), 19 FEB 2010



B argued termination process unfair as he was not given an opportunity to access a witness, the description of his action was not correct & he was refused a meeting with K's GM post sacking.

FWA concluded that B was not truthful in a number of respects. More than \$100 was collected on multiple occasions & B was colluding with 2 other employees. FWA couldn't conclude that B's stress was due to work alone or that it could excuse B's actions. B knew his actions were inappropriate, exceeded authority & varied from accepted process. **However** K's investigation approach was seriously deficient - it did not properly assess the conduct of the other employees & resulted in disparate & poorly informed actions & the K's HR management was remote & lacked professionalism.

FWA referred to North J in *Selvechandron*: **"...the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of (the Act)...."**

B had substantial responsibility & was deliberately dishonest. In itself, his behaviour represented a valid reason for his termination. The only significant element of unfairness shedding doubt about whether B's actions warranted termination was that the other 2 employees involved were only warned, 1 was subsequently promoted, & the circumstances relating to why this employee handed B \$100 of misappropriated funds just prior to the meeting went unexplained. K demonstrated an entirely inconsistent approach that could only be described as managerial incompetence.

Gary Bermingham v Kings
Transport & Logistics (Aust) P/L
(U2009/11549), 19 FEB 2010



The termination advice wrongly described the form which the misappropriation of monies took, which reflected the poor investigation process & limited or remote HR involvement/ expertise. However, as B admitted his behaviour was wrong, FWA did not consider that B could rely on this error.

FWA also concluded that the decision to terminate was made prior to calling the meeting, so K's process was again flawed. B was also not asked to respond to specific allegations which may have put K on clear notice of the involvement of other staff.

FWA also stated: - **"While the application of sound defensible and fair HR management processes mitigates in favour of extending the offer of a support person, (FWA) do not consider this factor necessarily requires that this happen."**

FWA also considered employer size and HR expertise.

FWA quoted the the High Court in *Byrne & Frew v Australian Airlines Pty Ltd*:

"..... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, & may be harsh in its consequences for the personal & economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

Gary Bermingham v Kings
Transport & Logistics (Aust) P/L
(U2009/11549), 19 FEB 2010



FWA considered that B's termination was not harsh or unjust, however the substantial inadequacies associated with the investigation etc meant that FWA regarded the termination to be unreasonable.

Little material was put to me with respect to remedy, however FWA considered reinstatement to be entirely inappropriate. In considering compensation, s392(2) specifies a number of factors: - satisfied that any amount ordered will not affect the viability of K's business. Had B not been dismissed on 12/08/09, it was most likely that he would have been within days following an appropriate investigation and have been without notice for serious misconduct.

B gained alternative employment in November 2009 but at a lower rate of pay. On this basis, the maximum amount that could be countenanced would be 1 wk's pay. However, s392(3) imposes a mandatory requirement that misconduct must reduce compensation; so FWA decided against awarding any amount to B in lieu of reinstatement.

Ms Vicky Kekeris v A. Hartrodt
Australia Pty Ltd T/A a.hartrodt
(U2009/12724), 19 FEB 2010



K commenced on 19/03/90 and was terminated on 30/09/09. During April 2009 AH had introduced new freight tracking software and as a result only 3 team leaders were required instead of 4. AH assessed the abilities of each of the 3 supervisors considered for redundancy and chose K, having ruled out redeployment as no other role without lower pay and redundancy of another.

S.396 (d) requires that FWA decide whether a dismissal was a case of genuine redundancy before considering the merits of an application for unfair dismissal. The evidentiary onus is on AH to establish, on the balance of responsibilities, its contention that the dismissal was a case of genuine redundancy (i.e. demonstrate **both** that it no longer required K's job to be performed by anyone because of changes in its operational requirements & that it was not reasonable in all the circumstances to redeploy K. The Explanatory Memorandum provides additional guidance. (paras 1548ff).

FWA was satisfied that AH's restructure took place because of 'genuine operational requirements' associated with the introduction of the software. The test is whether the job previously performed by K still existed; and the evidence clearly disclosed that none of the supervisory positions that existed prior to the restructure survived.

It was then clear that the only positions K would have considered being redeployed to were the 3 team leader positions she was overlooked for. Accordingly K's termination was a case of genuine redundancy and her application was dismissed.

Mr Brendan Freeman v Litchfield
Trading Company
(U2009/11886), 19 FEB 2010



Lodged 20 days after the 14 day period allowed in s394 FWA.

There are important differences between s.394 & s.643 WRAct 1996, namely:

- (a) The limitation period has been reduced from 21 days to 14 days;
- (b) Under s.394, FWA may only exercise its discretion where satisfied there are 'exceptional circumstances' (no such previous limitation);
- (c) s.394 prescribes factors that FWA must take into account in lieu of caselaw;
- (d) the factors in s.394(3) are exhaustive.

FWA quoted High Court in *Brisbane South Regional Health Authority v Taylor*:

" *The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. ... First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. ... The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.... It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. ...Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension.*

Mr Brendan Freeman v Litchfield
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(U2009/11886), 19 FEB 2010



On 18/09/09 F lodged a FWO complaint electronically. The FWO documents made no reference to there being any claim of unfair dismissal. During the course of the FWO's investigation, F became aware of the 14 day limitation period and lodged on 08/09/09.

F submitted that he mistakenly lodged his application with the wrong authority (FWO) because the FWO website is misleading and that as soon as he realised the error he filed the correct application with FWA. LT argued website clear & no reference to unfair dismissal on it, numerous links to correct site, telephone & free advice available to direct to the correct place.

Original copy of FWO was not produced to establish unfair dismissal included in complaint.

When the applicant first became aware of the dismissal (paragraph (b))

- This factor was not relevant to these proceedings which involve an allegation of constructive dismissal.

Action taken to dispute dismissal (paragraph (c)) - No evidence that prior to 08/09/09 F took action to inform LT that he was making a claim for constructive dismissal.

Prejudice to employer (paragraph (d)) - No evidence of prejudice to LT or to suggest that LT's capacity or ability to defend the application has been adversely affected by the delay.

Merits of application (paragraph (e)) - This factor is based on one of the *Brodie-Hanns* principles.

Mr Brendan Freeman v Litchfield
Trading Company
(U2009/11886), 19 FEB 2010



In considering that principle, FWA considered that it must endeavour to make some assessment of its merits. In *Kyvelos v Champion Socks Pty Limited*:

In considering whether to accept an application which has been lodged outside the time ... the Commission may consider whether, on the basis of the material relied on by the parties, the applicant has a sufficient case on the merits although the discretion should be exercised having primary regard to the circumstances which led to the late lodgement (but this does not require the hearing of evidence as to the merits)"

On the material FWA was not in a position to conclude that the unfair dismissal application was without merit.

Fairness with other persons in similar position (paragraph (f)) - Not a relevant factor.

Conclusion - Exceptional circumstances were not established.

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