



## Unfair Dismissal Law – Doing More Harm Than Good

On 26 May 2005 the Prime Minister announced that the Australian Government was intending to change Australia's unfair dismissal laws, by extending the probationary period before claims could be made from 3 months to 6 months and exempting businesses employing less than 100 employees. This article examines the current state of unfair dismissal laws in Australia and explains why the system is broken and needs fixing.

Unfair dismissal laws were first created by State governments in the 1970s.

At the time, they were seen as risky and experimental, but made with good intent - to give a court the right to examine reasons for dismissal and to give an unfairly dismissed employee their job back.

For the first few years there were only a handful of claims, usually by employees who were dismissed for no good reason and who were serious about wanting their job back.

### THE SYSTEM IS BROKEN

However, in the past two decades, the situation changed dramatically, especially since 1993 when the then Australian Government decided to create a national unfair dismissal law.

Over that time ten big problems with unfair dismissal laws have emerged:

- an unfair dismissal industry was created featuring lawyers and consultants touting for business;
- money became an objective - courts started ordering compensation rather than re-employment and a large number of employees wanted higher payouts, not their job back;
- legal expenses in defending claims skyrocketed;
- claims became easy to lodge and with little down-side risk;
- tribunals judged unfairness on warning procedures and red tape rather than simply the reasons for dismissal;

- tribunals gave dismissed employees easy first days in court with informal conferences that the employer was compelled to attend;
- tribunals decided that some resignations could be unfair dismissals;
- tribunals decided that genuine redundancies could be unfair dismissals and redundancy pay topped-up;
- tribunals decided that the strict time limits for making claims could be extended by weeks and months; and
- tribunals began urging employers to settle claims by paying out money to get rid of the case, by writing insincere references or retrospectively treating dismissals as resignations.

These problems remain to this day and are getting worse. They have done a serious disservice to the original intent of unfair dismissal laws. They are the reasons why the system is now broken.

Unfair dismissal laws no longer act as a brake on unfairness in the workplace and now create more unfairness than they fix.

### **UNFAIR DISMISSALS ARE NOT IN AN EMPLOYER'S INTEREST**

The key to understanding the problems with the system is to recognise two facts:

- unfair dismissal cases don't just involve unfair dismissals – they involve all dismissals, fair or unfair; and
- unfair dismissal laws do not just involve the rights of a dismissed employee. They also involve the rights of the employer, other employees (including an employee who replaces the dismissed employee) and unemployed people who want work.

Most employers dismiss employees fairly. While this might come as a surprise to some tribunal members, union officials and lawyers inside the system who only see or hear complaints, for the rest of us this should not be surprising.

Employers are in the business of operating efficient workplaces and need productive, motivated and satisfied people to do the job.

The core business of an employer is employing people, not dismissing them. Dismissing people for no good reason is not a rational act and not common practice.

Every dismissal involves cost to the employer who usually has to fill the position, loses productivity and has to recruit and train a new staff member.

Dismissing employees can also be a very harrowing and personally difficult task for many employers. In fact, some employers delay making difficult decisions to dismiss when they should.

It is simply not the instinct or in the best interests of the employer to dismiss staff for no good reason. This is especially the case when the labour market is tight, like it is at the moment. Most employers will readily say that finding good staff is not easy. Keeping hold of them is even more difficult. Dismissing them without good reason is far from the mind of most employers.

## **UNFAIRNESS AND INJUSTICE TO EMPLOYERS**

It is not just the cases of unfair dismissal that are brought before the courts. In fact, more often than not (i.e. in 75 per cent of cases) unfair dismissal claims involve a fair dismissal.<sup>1</sup> This is the hard data from the decided cases in the unfair dismissal courts.

Unfair dismissal laws are being used (and abused) by people who are not unfairly dismissed. Day in, day out good employers are in the unfair dismissal courts defending decisions which eventually are found to have been made for good reason - but only after much disruption to the business, cost and expense.

This is a demonstrably unfair situation for these employers. Three quarters have done nothing wrong. They have acted lawfully and legally in dismissing an employee or accepting their resignation and done so in the lawful management of their business. Yet these employers incur unrecoverable costs and expenses – in short, they lose out financially and personally.

A dissatisfied employee can commence an action for unfair dismissal for as little as \$52.40. Particularly if they use a ‘no-win no-fee’ consultant or solicitor, they will bear little or no up-front costs.

However for an employer, from the moment that application is lodged, the meter is ticking. From that moment, a prudent employer will be required to engage legal representation to help minimise the damage of the claim to their business.

Employees rarely come out of this process with nothing.

No matter how flimsy a former employee’s claim to unfair dismissal is, the system works to pressure employers to settle matters to minimise their legal costs. Even if they are eventually successful, in most cases an employer will have incurred a greater cost defending themselves against the claim than if they initially settled. For this reason, employer advocates or lawyers will usually advise an employer to settle on commercial grounds.

This is exacerbated by the ‘conciliation’ process which often sees pressure put on employers to settle claims (i.e. conciliate).

Of the over 7,000 claims made in the federal unfair dismissal jurisdiction in 2003-2004, only 429 – a tiny proportion – proceeded to a hearing. This is the system in action – putting pressure on employers to settle.

For employees and the unfair dismissal industry, this is good news. It means that in nearly every case, the employee (and the lawyer/consultant) wins and can expect a nice cash settlement.

Even when claims don't proceed, employers expend time and money engaging legal representation.

One case will suffice as an example. An employer in the motor retail industry dismissed an employee for physically threatening another employee. At the first conciliation meeting, the employee was accompanied by a solicitor and barrister – and a request for at least twelve weeks' salary as settlement.

The employer decided to fight the claim. However, at the second conciliation meeting, he was advised that the applicant had left the country.

The employer 'won'. The case was terminated.

However the employer had expended a significant amount of time and money on a claim completely without substance.

This kind of case is not unusual.

Because settlements of claims are confidential, we don't know exactly how much each settlement costs, however in 1996 it was estimated that the median amount awarded in compensation for unfair dismissal was \$6000<sup>2</sup> or \$7312 in today's figures.

This is in addition to the legal costs incurred by the employer, which can easily run into thousands of dollars.

It is not unusual for an employer to incur costs of \$10,000 if they want to defend a case in a formal hearing – and of course the maximum compensation that can be awarded to an employee is far in excess of this. ACCI is aware of cases where employers have faced simultaneous multiple applications from dismissed employees with costs running into seven figures and beyond.

Employer representatives report settlements where the majority of the payment goes straight into the pockets of the consultants and lawyers acting for employees! The employees themselves may walk away with little or nothing.

Employer representatives also report encountering 'repeat offenders' i.e. once employees realise that they can't lose at the unfair dismissal casino, there is nothing stopping them trying

their luck again and again and again. In some cases the employee may have chosen to resign but that doesn't stop them making a claim and hoping for a settlement with some financial reward.

## **DETERRENTS ON EMPLOYMENT**

One major area where unfair dismissal laws do more harm than good is the effect they have on the rights of people who are unemployed to get work in the labour market.

Employing staff involves risk and expense – both legal and human resource related.

Employees are a crucial component of any business' competitive advantage and when recruitment decisions don't work out, the costs to any business are substantial.

However in Australia, as well as lost productivity, recruitment costs and turnover costs, a bad employment decision also exposes employers to an unfair dismissal claim.

These laws are more severely felt by small and medium businesses than by larger employers which leads to many smaller employers minimising employment in an effort to reduce this risk.

We can only imagine what employment outcomes Australia might have been able to achieve without this law.

After 12 years of extremely good economic growth, Australia still has more than 500,000 unemployed people and double digit underemployment. Our employment growth has taken place in spite of our unfair dismissal laws – with some small businesses choosing to work longer hours, or do whatever they can, to avoid taking on extra permanent staff.

## **UNFAIR DISMISSAL LAWS HURT SMALL BUSINESS**

The stereotype of the employer as a corporation with very deep pockets could not be more wrong when it comes to unfair dismissal.

One third of all claims involve small business. Taking the federal jurisdiction alone, it means over 2000 small businesses across the country experienced unfair dismissal claims in 2003-2004.

According to Smith Family/NATSEM research, one in seven small business families are low income households and are taking home incomes under the poverty line.<sup>3</sup>

These are the people being forced to pay thousands of dollars to solicitors and employees to settle claims – all because they took the risk of employing someone.

It's no surprise that after going through an unfair dismissal claim, many small business employers become more risk averse to hiring people.

It is worth thinking about what a struggling small business owner would need to go through to get the thousands of dollars necessary to cover an unfair dismissal settlement.

There is no doubt that many small business owners and their families, faced with such costs, experience genuine hardship. Indeed some small business people have told employer representatives that the experience of a single unfair dismissal was enough to make them want to close their business.

An unwarranted unfair dismissal is also a frustration for other remaining staff, who see an undeserving former employee take advantage of the business and the system.

This is bad news for entrepreneurship, jobs growth and our economy.

Whilst employment decisions are based on a combination of factors, research commissioned by the Department of Employment and Workplace Relations has estimated that small businesses, had they been exempt from unfair dismissal laws, would have employed an additional 60,000 people.<sup>4</sup> If that were so, our unemployment figures would look a lot different.

In a wider sense, the term employer encompasses a very broad range of employing entities – large, small, not-for-profit, and for-profit organisations.

## **THE UNFAIR DISMISSAL INDUSTRY**

Most employers settle because enforcing their rights – i.e. getting justice – is more trouble and cost than it is worth. The unfair dismissal industry knows that, preys on it and plays on it.

In 2005, the federal unfair dismissal system passed a dark milestone – the filing of over 50,000 unfair dismissal claims under the *Workplace Relations Act 1996*.

This is an extraordinary achievement.

ACCI estimates that, on average, every employer involved in one of these claims bore total costs (including lost business time and productivity) of about \$10,000 per claim (a conservative figure, given the cost of some known payouts) which adds up to approximately \$500 million.

This is only the figure for the federal jurisdiction – there are also five state jurisdictions, all generating thousands of additional claims every year.

In reality, of course, some businesses would have been subject to multiple, damaging unfair dismissal claims.

Rational employers, hearing about the damage to their businesses or friends, colleagues, or the shop down the road look at ways to fireproof their own business.

Many conclude that there is only one way to fireproof their business from the unfair dismissal industry - and that is to have second thoughts about offering further employment.

## **REWARDING UNFAIRNESS – SOME RECENT CASE STUDIES**

Employers, and those familiar with the unfair dismissal system, will know that there is a massive gulf between everyday, common sense understandings of what passes as fair and what is considered fair by industrial tribunals and commissioners hearing unfair dismissal claims.

If nothing else, it has been the treatment of unfair dismissal claims by the system that demonstrates the need for the system to be changed.

Some unfair dismissal cases involve situations where an employer has acted to protect staff – for example to remove a violent employee or someone committing sexual abuse – only to find that an industrial tribunal punishes the employer.

There is an element of double jeopardy here – employers have obligations under a variety of laws, such as anti-discrimination laws, that require them to act to ensure their employees are not subject to various forms of discrimination and other risks. If they fail to act, it is the employer who is liable.

However when they act to fulfil their obligations, they are found to have breached unfair dismissal laws.

The examples of what tribunals have considered unfair dismissal defy reasonableness.

Most people would consider throwing faeces and urine on other employees fairly reasonable grounds for dismissal.

Not the Tasmanian Industrial Relations Commission (TIRC).

In a case involving just that very behaviour (*AWU vs Goldfields Limited* T9601 of 2001), the TIRC held that the employer had unfairly dismissed the employee, citing an inadequate investigation.

This was a case that went for 7 days.

At the end of it, a tribunal ordered the employer to reinstate the employee, despite the employee's conduct towards their fellow workers and the employer was legally compelled to obey.

In another case, an employee who had previously received several warnings for inappropriate workplace behaviour during working hours, prepared a sexist and defamatory newsletter about a senior female manager.

However the South Australian Industrial Relations Commission held (*Cocks vs Adelaide City Council* (2002) SAIRComm 6) the dismissal to be unfair and ordered the employee reinstated.

One can only imagine the effect on the morale of female employees at that business.

In another case (*NUW vs AB Oxford Cold Storage* S4389 of 2000), an employee was dismissed for punching a fellow employee.

The Australian Industrial Relations Commission held the dismissal to be harsh.

Once again, the employee was reinstated and the capacity of an employer to fulfil their obligations under other (i.e. OHS or anti-discrimination) laws was essentially undermined.

Behaviour such as this is currently rewarded in the unfair dismissal system.

In the secrecy of an unfair dismissal conciliation, and sometimes in open court, employers are being punished for reasonable behaviour and actions which would enjoy widespread community support.

Unfair dismissal laws are not just damaging employers, businesses and our economy – they are also directly threatening the health and wellbeing of employees.

The case for urgent action is clear.

## **TIME FOR REFORM**

Those opposed to reform are mounting a scare campaign. A recent Roy Morgan Research poll (27 July 2005) found that 70 per cent of people disagreed with proposals to exempt businesses with less than 100 employees from unfair dismissal laws.

Yet other recent data has found that 18 per cent of employers would be likely to employ more people if they did not have the burden of unfair dismissal laws.<sup>5</sup> 18 per cent of employers is about 200,000 businesses. If they each just employed one person more, that is a job for one in every three unemployed people. Yet even that data was claimed by the defenders of the current unfair dismissal system to be a good reason to keep the laws the way they are!

The public campaign for reform is a battle against sensationalism and untruths.

Hampering and discouraging employers from employing is hardly in the broader interest.

Payouts to employees dismissed in reasonable circumstances are unjust and legally sanctioned extortion.

We have to ask if it is reasonable to continue to reward unfairness.

It is time for federal and State governments to act in the national interest. That involves an honest and wholesale examination of the unfair dismissal system and an exemption of small business from unfair dismissal laws.

It also involves reform of unfair dismissal laws as they apply to other businesses.

## CONCLUSION

ACCI advocates a range of broader measures to improve the unfair dismissal system and try to prevent mischievous and inappropriate claims.

These measures include:

- improving the prospects of resolution at conciliation conferences;
- limiting automatic access to arbitration following conciliation;
- a tighter test of what is an ‘unfair dismissal’, including providing employers with greater rights to make dismissal decisions to protect their employees from violence, harassment, or unsafe work practices;
- relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration;
- preventing excluded employees from making similar claims under other acts or laws;
- extending the qualifying period to the first six months of employment;
- increasing the filing fee to \$100;
- excluding unfair dismissal claims based on genuine redundancy;
- limiting the scope for constructive dismissal claims;
- requiring consideration of businesses size and the presence of an HR manager for all dismissals, not just those for ‘unsatisfactory performance’;
- providing a schedule of legal/representative fees and for costs orders to be generally available against solicitors, not just parties;

- not permitting extensions of time in cases of failure by an applicant's representative;
- requiring the Australian Industrial Relations Commission to conduct its hearings expeditiously;
- requiring the dismissed employee to have a statutory obligation to mitigate loss;
- requiring back wages orders to be discounted by earnings/income during the period of non-employment;
- compensation orders not including non-economic loss (pain, suffering, hurt feelings); and
- small business-specific measures:
  - a longer qualifying period for small business (9 or 12 months);
  - less procedural requirements (valid reason plus opportunity to explain);
  - family members to be excluded from claims; and
  - flexibility in the time and location of conferences.

Unfair dismissal reform is in everyone's interest.

Limiting the harmful effects of unfair dismissal laws by tightening up the system and creating well devised exemptions for smaller businesses are essential steps in the right direction.

**End Notes:**

- <sup>1</sup> Parliamentary Bills Digest No 95 - 28 February 2001.
- <sup>2</sup> Parliamentary Bills Digest No 95 - 28 February 2001.
- <sup>3</sup> *Financial Disadvantage in Australia 1990-2000*, Smith Family/NATSEM, 2001.
- <sup>4</sup> Parliamentary Bills Digest No 112 - 11 February 2005.
- <sup>5</sup> D&B Australia Business Expectations Survey - June 2005.