# UNFAIR DISMISSAL IN THE FAIR WORK COMMISSION – A PRACTITIONER'S QUICK GUIDE

## Background

The unfair dismissal regime has existed in Australia since 1993. Originally, workplace laws were enacted under the conciliation and arbitration power of the Australian Constitution (s 51(xxxv)). In 1993, the Keating Labour Government introduced the *Industrial Relations Reform Act* which, among other things, created the first federal unfair dismissal laws applying to all constitutional corporations, making use of the corporations power (s 51xx). The State of Victoria challenged the constitutional basis of the legislation in *Victoria v Commonwealth* (1996) 187 CLR 416, however the High Court held that the legislation's reliance on the corporations power to enact the laws was sound. The Industrial Relations legislation was subsequently amended and renamed the *Workplace Relations Act* 1996.

In 2006, the Howard Liberal Government sought to amend the *Workplace Relations Act* 1996 to introduce a unified national system of employment and industrial laws which set minimum standards of employment across Australia (known as the Workchoices legislation). Again, the constitutional basis for the new wide-ranging laws was the corporations power. At the time of its enactment, the Australian Labour Party was in power in each of the states and territories of Australia. These governments joined together to bring a High Court challenge against the constitutional basis for the legislation (*Workchoices Case* (2006) 229 CLR 1). The High Court held that the Workchoices legislation was a valid exercise of the corporations power.

Although the Workchoices legislation did not last long, the most significant changes remain in the current regime today. Since the enactment of the *Fair Work Act* 2009, all states and territories (apart from WA) have referred their industrial law making powers over to the Commonwealth so that all private sector employees (whether incorporated or not) are subject to the federal legislative regime.

## Fair Work Act 2009

The *Fair Work Act* 2009 contains compulsory terms and conditions of employment for all "national system" employees.

"National system" employees are those covered by the Fair Work Act and include:

- All Commonwealth employees
- All employees of a private enterprise (constitutional corporations)
- All waterside and maritime employees, flight crew officers in interstate or overseas trade or commerce

Employees not classed as "national system" employees are:

- Employees of local and state governments
- Sole traders and partnerships
- Fixed contract employees who are dismissed at the end of their contract term
- Trainees who are dismissed at the end of their training term

(Independent contractors, sole traders and partnerships are not covered by a contract of employment and are therefore not classed as "employees" in the national system).

Employees not classed as "national system" employees, nevertheless enjoy the benefit of national entitlements under the Act, including general protections (Part 3-1) and protection from unfair dismissal (Part 6-4 of the Act). This is a testament to the far-reaching nature of the legislative workplace regime in Australia.

**Distinguishing causes of action**

In relation to the cessation of an employment arrangement, there are four major causes of action a practitioner ought to consider when deciding whether or not to bring a claim to resolve a dispute. Not all causes of action are handled by the Fair Work Commission, therefore it is important to distinguish which cause of action is best suited to the circumstances of your client:

**Unfair dismissal** is a right of action under the Fair Work Act which applies to dismissals that are alleged to be "harsh, unjust or unreasonable" in accordance with the requirements of the Act. The unfair dismissal regime is only applicable to national system employees and employers. The Fair Work Commission has jurisdiction to deal with all unfair dismissal claims.

**General protections** claims are those which allege that a violation of certain protections provided under the Fair Work Act has occurred (s 342). Some claims involve an employment termination, others a change in employment conditions or hiring practices. Some examples of general protections provided in the Act are:

- Freedom of association (s 346);
- Protection against discrimination (on the grounds of race, colour, sex, sexual orientation, age physical or mental disability, martial status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin) (s 351);
- Protection from dismissal on the grounds of temporary absence from work due to illness or injury (s 352); and
- Protection from 'sham' contracting arrangements (ss 357 - 359).

The Fair Work Commission has jurisdiction to deal with general protections claims at first instance.

**Unlawful termination** claims are those brought by employees who are not classified as national system employees and who are ineligible to bring a general protections (adverse action) claim (s 770). Many of the provisions relating to unlawful terminations overlap with those relating to general protections under the Fair Work Act (s 772). The Fair Work Commission has jurisdiction to deal with unlawful termination claims at first instance.

**Wrongful dismissal** claims are a class of their own. These are employment terminations that involve a breach of some aspect of the contract of employment. The remedies for wrongful dismissal are contractual in nature. Common law remedies for wrongful dismissal can include specific performance or compensation for lost earnings as well as damages for future wages and benefits that would have been earned had the contract been performed. Claims for wrongful dismissal are dealt with at common law. The Fair Work Commission has no jurisdiction to deal with these claims.

## Unfair dismissal - hierarchy of forums

The Fair Work Commission, the Federal Circuit Court and the Federal Court each have jurisdiction to deal with unfair dismissal matters, as well as other types of employment disputes under the Fair Work Act including adverse action claims and unlawful termination claims.

In relation to unfair dismissal claims, the Fair Work Commission is the forum in which a claim must first be brought. If unresolved at the conciliation stage, unfair dismissal matters will proceed through to a hearing and final resolution in the Commission. If a party is dissatisfied with the outcome, certain appeal rights may exist to have the matter adjudicated by an Appeal Bench, and thereafter judicially reviewed by the Federal Circuit Court or the Federal Court.

(Parties wishing to bring a general protections claim or an unlawful termination claim must first conciliate their claim in the Fair Work Commission. If conciliation does not result in a resolution, the parties may then obtain a certificate from the conciliator and, so long as the Commission is of the view that the matter is not devoid of merit, can be brought for hearing in the Federal Circuit Court or the Federal Court).

## Jurisdiction of the Fair Work Commission

The Fair Work Commission is an administrative decision making body.

The Fair Work Commission only deals with matters arising under s 576 of the Fair Work Act. In addition to unfair dismissal, general protections and unlawful terminations, the Commission also deals with matters such as workplace bullying, remuneration disputes and modern awards (among others).

Decisions of the Fair Work Commission do not involve an exercise of judicial power (*Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers' Union* (1987) 163 CLR 656 at [28]). Rather, decisions in relation to unfair dismissal claims in the Fair Work Commission involve an exercise of arbitral power conferred by the Fair Work Act 2009. As such, Courts have no associated power to hear unfair dismissal claims per se. This was confirmed recently by Judge Emmett in the Federal Circuit Court in *Amirbeaggi v Parramatta Eye Centre Pty Ltd & Anor* [2017] FCCA 1915 at [33]-[41].

Remedies available in the Fair Work Commission for unfair dismissal claims include reinstatement or compensation. Compensation awards are based on the employee's wages and awards are capped to a maximum of half the high income threshold (which at 1 July 2017 was $142,000, therefore setting the compensation cap at $71,000).

The Fair Work Commission is a no cost jurisdiction.

**Jurisdiction of the Federal Circuit Court & the Federal Court**

Section 39B of the Judiciary Act 1903 (Cth) confers on Federal Court jurisdiction to review a decision of the Fair Work Commission on the basis of jurisdictional error only. Where jurisdictional error is made out, the remedies include the common law writs of certiorari and mandamus, prohibition and declaration.

Alternatively, section 8 of the *Administrative Decisions (Judicial Review) Act* 1977 confers on the Federal Court and the Federal Circuit Court jurisdiction to review a decision of Fair Work Commission on the basis of a wider range of issues including breaches of natural justice, want of jurisdiction, errors of law (s 5 ADJR Act).

Being strictly "review" proceedings, unfair dismissal claims must first pass through the Fair Work Commission arbitral process before being brought before the Federal Circuit Court or the Federal Court. As stated above, a certificate must first be issued by the Fair Work Commission together with a merits assessment before a matter can proceed to one of these courts.

(It should also be noted that, quite apart from the judicial review jurisdiction of the Federal and the Federal Circuit Courts in connection with decisions of the Fair Work Commission, each of these courts has an original jurisdiction in relation to matters arising under the Fair Work Act. Section 562 of the Act confers jurisdiction on the Federal Court in relation to any civil or criminal matter arising under the Act, whereas s 566 confers jurisdiction on the Federal Magistrates Court in relation to any civil matter arising under the Act).

**Structure of the Fair Work Commission**

The Fair Work Commission is headed by a President and two Vice Presidents (presidential members). The current appointees are:

- President: Justice Ian Ross AO

- Vice Presidents: Adam Hatcher SC and Joe Catanzariti AM

There are 16 Deputy Presidents and 21 Commissioners. Additional members include 3 further Deputy Presidents, an additional Commissioner and a number of Expert Panel Members.

**Unfair dismissal claims: eligibility**

In order to bring an unfair dismissal claim in the Fair Work Commission, an employee must be able to show that:

- they are a national system employee; **and**
- they have served the minimum period of employment (at least 6 months of continuous service or 12 months of continuous service if the employer is a Small Business [comprised of less than 15 employees]); **and**
- they earn less than the high income threshold (as at 1 July 2017, $142,000 per annum); **or**
- they are covered by a modern award; **or**
- they are covered by an enterprise agreement.

When determining an employee's earnings for the purpose of the high income threshold, base salary plus any entitlements, fixed commissions and private use benefits (for example, private vehicle) will be included. Superannuation and floating (non-fixed) commissions are not included in an employee's earnings for this purpose.

In addition to these eligibility requirements, the employee must be able to show that they have been "dismissed" according to s 386 of the Fair Work Act.

**"Dismissal" under the FW Act**

Section 386 of the Act provides that an employee will be considered to have been "dismissed" if they can show that the termination of their employment was communicated to them and that their employment was either terminated upon the initiative of the employer, or that the employee was forced to resign due to the conduct of the employer (ie. a constructive dismissal).

Communication of the dismissal is key (*Burns v Aboriginal Legal Service of WA* (AIRCFB, 21 Nov 2000).

Whether or not a person has been "dismissed" is a matter of fact to be determined as a jurisdictional issue.

**Practitioner's tip:** Where payment in lieu of notice was given to the employee, the date upon which termination is taken to have effect is the day the payment was made and not the date upon which the notice expires (*Siagian v Sanel Pty Ltd* [1994] IRCA

2). This is important when calculating the time limits from bringing an unfair dismissal application.

**What makes a dismissal "unfair"?**

Section 387 of the Fair Work Act provides the litmus test for determining whether or not a dismissal was 'unfair'. Essentially, the dismissal must have occurred in circumstances which render it "**harsh, unjust or unreasonable**".

The Fair Work Commission will take into account a range of factors operating on the dismissal, such as:

- whether there was a valid reason for the employee's dismissal;
- whether the employee was given notice of their dismissal;
- whether the employee was given an opportunity to respond;
- whether the employer unreasonably refused to allow the employee to be accompanied by a support person in any discussions relating to the dismissal;
- whether the employee had received any prior warnings relating to their job performance;
- the size of the employer's business and whether or not the absence of dedicated Human Resources specialist would impact the dismissal procedure followed.

The Commission may also take into account any other matters it considers relevant (s 387(h)).

When it comes to Small Businesses (businesses that employee less than 15 people), the factors to be considered in determining whether a dismissal was harsh, unjust or unreasonable are more generously applied. In such cases, the test will be whether or not the business complied with the **Small Business Fair Dismissal Code** (s 388).

In cases where the employer can make out a **genuine redundancy**, the dismissal will not be considered to be "unfair" under the Act. In these cases, the Commission will consider changes to the employer's operational requirements and whether it would have been reasonable to redeploy the employee within the employer's business or to an associated entity, if any (s 389).

**Practitioner's tip**: Ignore the Small Business Fair Dismissal Code at your peril – if you are acting for an applicant who is alleging unfair dismissal, many of the usual requirements for a valid dismissal under the Act will not apply to small businesses. If your application seeks to hold small businesses to the same standard as other businesses, you run the risk of your claim being subject to an objection and dismissed at the first hurdle.

**Commencing claims in the FWC**

Time limits are crucial and are strictly applied in the Fair Work Commission.

An applicant in an unfair dismissal claim has 21 calendar days from the date of dismissal to bring their claim (s 394(2)). If a claim is brought outside this time period, an extension of time will only be granted if exceptional circumstances can be shown (s 394(3)).

**Practitioner's tip:** Excuses such as "I wasn't aware I had a right to bring a claim" or "my solicitor has been overseas" will not generally be accepted as "exceptional" circumstances.

**Forms**

Employees (applicants) must lodge a Form F2 application within the statutory time period – this can either be filed at the Registry or else online. Documents may be attached to the application if required (eg: notice of dismissal).

Employers (respondents) have only 7 calendar days to respond to the F2 application. Response is by way of a Form F3 response.

The employer's F3 Response provides an opportunity to raise any **jurisdictional objections** to the application. Some examples of a jurisdictional objection are:

- The application was lodged outside the 21 day time limit;
- The applicant was not an "employee";
- The applicant was not dismissed;
- The applicant's earnings exceed the high income threshold.

If the employer does not raise objections in the F3 Response, Form F4 can be subsequently lodged to raise objections.

It should be noted that raising a jurisdictional objection at this stage does not have the effect of staying a claim.

**Practitioner's tip:** Regardless of whether you are representing an applicant or a respondent, key advocacy and tactical matters should be considered at the earliest stages of an unfair dismissal claim. The "kitchen sink" approach to applications and responses must be avoided at all costs. Information included in an application or a response ought contain sufficient information to describe the substance of the dispute, but not so comprehensive that all your tactical advantages are lost. Many applicants seek "compensation and/or reinstatement" as their primary remedy – this approach will backfire if the employer agrees to offer reinstatement when your client's interests may not be best served by a reinstatement. Avoid all temptation to engage in submission, opinion or other hyperbole. Exercising some foresight and restraint in the early stages can provide important advantages in the later stages of a conciliation or a hearing.

Identifying the correct employer is also a key consideration for applicants. In cases where identifying the proper respondent may not be obvious, some initial investigation will be necessary. If a mistake is made, an opportunity exists to correct such matters, however fundamental errors as to the nature of the application itself cannot be easily cured and will almost certainly result in a dismissal of the claim.

Similarly, a clear understanding of your client's employment relationship and the nature of the dispute will ensure that applications brought in the Fair Work Commission are brought in the proper forum (see "**Distinguishing Causes of Action**" above).

In all cases, it is advisable to seek the assistance of counsel at the early stages of an unfair dismissal claim where there are any uncertainties as to jurisdiction or cause of action. Such advice will ensure that tricky issues are identified early and hopefully resolved prior to the matter being adjudicated in the Commission (or elsewhere, as the case may be).

## Conciliation Process

After an unfair dismissal application is brought in the Fair Work Commission, the matter will be allocated a conciliation date.

If the respondent has raised an objection to the application, a jurisdictional hearing will be set down. If the Commission Member presiding over the jurisdictional hearing decides there is a want of jurisdiction, the matter will be dismissed. If jurisdiction is found to exist, the matter will proceed to conciliation.

Conciliations are run by Commission staff who are trained mediators. The parties attend either by telephone or in person. Lawyers may attend and do not require leave to appear at this early stage. Attendance is voluntary, however most parties agree to attend. The process is relatively informal and – most importantly for your client – confidential and without prejudice.

Conciliations usually last for 1 ½ to 2 hours, depending on the complexity of the matter. The conciliation is an opportunity for each side to put their case, with the conciliator shuffling between the parties.

Conciliation presents a chance to engage in some delicate advocacy, in accordance with an agreed plan of approach with your client. It is not a forum for aggressive advocacy. Your client's end game must be the focus of the conciliation.

**Practitioner's tip**: There is a fine balance between knowing what matters ought be raised in a conciliation and what matters are best kept in reserve. If the winds appear to be blowing against a resolution, the careful practitioner may be able to use evidentiary matters not explicitly raised in the application to "encourage" agreement (this is especially useful where misconduct of some sort has been alleged). Such

strategic decisions ought be planned well in advance to ensure that no tactical disadvantage results where the matter appears to be destined for a formal a hearing.

Given the statutory cap on compensation orders, coupled with the no cost jurisdiction exercised by the Fair Work Commission, it is in many cases advisable that where reasonable offers have been made at conciliation, these be seriously considered and not simply rejected out of hand, even in cases where the merits seem to be on your side.

**Conciliation Outcomes**

The latest statistics indicate that around 85% of unfair dismissal claims resolve at the conciliation stage. Where matters reach a resolution, standard templates of orders are available for the parties to record any resulting agreement between them. A cooling off period exists for self-represented litigants to seek legal advice on any agreed outcome.

If the conciliation does not result in a resolution, the matter is set down for a formal hearing (or, in most cases involving self-represented litigants, a determinative hearing). Available dates and witnesses should be known and communicated at this stage.

**Formal hearings**

Formal hearings take place before a Commission member, usually no more than 1 day where the issues are relatively confined. For more complex matters, more senior Commission members may be required and a longer hearing time allocated.

The aim of a formal hearing is to resolve the claim in its entirety. The hearing will involve cross-examination of witnesses, oral and written submissions and advocacy. As such, solicitors will sometimes opt for the assistance of counsel to advise and appear, particularly where there is some complexity or robust advocacy required.

Although the Commission is not bound by the rules of evidence, such rules are nevertheless used by the Commission as a guide for the Member in determining the issues.

**Practitioner's tip**: Do not assume that you will be granted leave to appear for your client at a Fair Work Commission unfair dismissal hearing. Practitioner's should refer to s 596 of the Act which provides that permission to appear will only be granted if it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter, if it would not be unfair to the opposing party, or if it would be unfair to not grant permission to a party who cannot otherwise represent themselves. If the matter requires submissions in relation to jurisdictional issues, permission under s 596 is usually granted by the Commission.

Adjournments will only be granted if substantial grounds can be shown to justify why the adjournment is **necessary**. In other words, adjournments must not be assumed (*Sanford v Austin Clothing Company Pty Ltd t/as Gaz Man* (AIRC SDP, 19 July

2000). Issues relating to illness or injury will require a medical certificate. In granting an adjournment, the Commission will need to balance the justice between the parties.

**Remedies in the FWC**

All remedies granted in the Fair Work Commission are discretionary in nature (s 390).

The two remedies associated with unfair dismissal claims are reinstatement or compensation.

**Reinstatement** will rarely be granted where the employer objects, and certainly not in cases where the relationship of trust and confidence between the employer and the employee has broken down to an irretrievable degree (s 391).

**Compensation** will be capped to an amount equal to half the high income threshold (as at 1 July 2017, $71,000) (s 392). The amount of compensation is determined after having taken into account all of the circumstances of the case. Those circumstances will include, among other things:

- the effect of the order on the viability of the employer's business;
- the employee's length of service and remuneration they received – or would have received had they not been dismissed;
- the employee's efforts to mitigate their loss (eg: accepting other work); and
- any amounts earned by the employee between dismissal and the order.

The method of calculating compensation used by the Commission is known as the "Sprigg formula", taken from the case of *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21. In essence, the Sprigg formula involves the following steps:

1. estimate the likely amount the employee would have received if they had not been dismissed;
2. deduct any earnings since date of dismissal;
3. deduct an amount to account for any contingencies;
4. calculate the impact of taxation;
5. apply the compensation cap in s 392.

The rationale of the Sprigg formula is that if the application of the formula "yields an amount which appears either clearly excessive or clearly inadequate", the Commission should reassess the assumptions made in reaching the amount.

Under s 392(3), an employee's misconduct – if it contributed to the employer's decision to dismiss them - will be a relevant factor when determining the correct amount of compensation (and the amount will be reduced accordingly).

The Commission does not make orders that include amounts for shock, distress or humiliation "or other analogous hurt" resulting from an unfair dismissal (s 392(4)).

## Costs

The general rule in the Fair Work Commission is that each party pays its own costs. The general rule in relation to costs will, however, be displaced where applications are brought vexatiously, or in circumstances where a legal practitioner has encouraged an application with no prospects of success (s 401).

If a party wishes to apply for costs, this must be done with 14 days of the date of the Commission's decision.

## Appeals

Any person aggrieved by a decision of the Fair Work Commission may apply for leave to appeal the decision to the full bench with 21 days of the date of the decision. Form F7 is used.

Appeals from the Fair Work Commission do not lie as of right – the Commission will consider applications to appeal and determine:

1. whether or not leave ought be granted to appeal the original decision; and
2. whether the decision was attended by some error.

Appeals must be able to point to some error of law, a significant error of fact, or otherwise be in the public interest.

Appeals are decided by the full bench (known as the Appeal Bench) of the Fair Work Commission, comprised of 3 Members of the Commission including at least one Presidential Member.

The Appeal Bench may:

- confirm, quash or vary the original decision;
- make a further decision in relation to the original decision raised in the appeal;
- refer the matter back to the original Commission Member for further action.

Recent figures indicate that permission to appeal to the Appeal Bench is granted in only around 18% of cases. Unfair dismissal cases account for the greatest number of appealed decisions, without around 20% of permitted appeals being granted.

## Judicial review

As mentioned above, judicial review against a decision of the Fair Work Commission Appeal Bench may be available in the Federal Circuit Court and the Federal Court, depending on the nature of review sought (see "**Jurisdiction of the Federal Circuit Court & Federal Court**").

## Conclusion

This paper has been designed to equip you with the basics relating to unfair dismissal claims in the Fair Work Commission.

Given the potential for complexity when it comes to employment relationships, practitioners are encouraged to seek counsel's advice early in tricky employment matters to ensure that cause of action and choice of forum are properly ascertained. Even if costs considerations restrict your client's ability to engage counsel to appear in the early stages of an unfair dismissal claim, advice on areas of uncertainty, including jurisdictional issues or matters of law, should nevertheless be sought prior to an application being made. Counsel can discuss with you the best approach to be taken so that tactical advantages in your client's case are preserved should the matter proceed to a hearing or beyond.

Unfair dismissal is only one area touched on in this paper, however a quick perusal of the Table of Provisions of the Fair Work Act 2009 demonstrates just how vast and potentially complex this area of law can be.

Should you have any questions, or require further advice on employment matters generally, please do not hesitate to contact the author.

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