

Case studies in 'unfair dismissal' process

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ABSTRACT

This paper briefly traces the history of 'unfair dismissal' legislation in Australia and outlines the basic approach of the 'unfair dismissal' process in the NSW jurisdiction. The paper then provides some real life case studies of the 'unfair dismissal' process in action to illustrate that the process is relatively simple for employers, though a little more problematic for employees. The case studies range from the year 2000 to 2003 and are all set in regional Australia and involve small to medium enterprises. The paper makes some observations based on the experience of the case studies about the outcomes and proceedings of 'unfair dismissal' cases for both employees and employers.

Introduction

Much concern about the current federal 'unfair dismissal' legislation has been expressed by the Federal Government stating that it is "cumbersome" and that 'unfair dismissal' procedures demand small business operators to "become experts on employment law" (Federal Government Media Release CCH 29 October 2003). While federal legislation in this area is relatively recent, the ability for employees to seek relief from 'unfair dismissal' has been a part of the States' jurisdiction since Federation and since the enactment of the *Workplace Relations Act 1996* the process and procedures of both the State and Federal systems have essentially been the same. The concept of 'unfair dismissal' as the subject of Federal legislation has only existed since 1993 and resulted from the *Industrial Relations Reform Act, 1993*, which amended the *Industrial Relations Act 1988*. Most of the principles that governed the "Termination of Employment" Division of the 1993 *Reform Act* originated from the *Termination of Employment at the initiative of the Employer* ILO Convention of 1982. The 1982 Convention introduced a concept of 'unjustifiable dismissal' and urged member countries to provide statutory protection against unfair or unjustifiable dismissal in order to strike a balance between management autonomy and the protection of the workers' security of tenure in employment. (Butterworths, October 2004). The 1993 legislation allowed employees to challenge their termination at the initiative of the employer on the basis that it was 'harsh, unjust and unreasonable'. This paper briefly examines the history of 'unfair dismissal' legislation in Australia and provides some case studies to illustrate the process in practice. The case studies show that the process is not cumbersome or complex for employers and, even if employees are dismissed 'unfairly' or arbitrarily, the price the employer is likely to pay in compensation may be relatively minor. The case studies are drawn from the personal experience of the author as an employee representative and advisor to the applicants.

Literature review

The *Termination of Employment at the initiative of the Employer* ILO convention (1982) has significantly influenced many legislatures throughout the world. It has placed restrictions on the freedom of the parties to regulate the terms of employment thereby placing employees in a better position than had previously existed at common law. (Mahomed, 2002). This Convention has led to legislation in England (*Employment Rights Act 1996*), New Zealand (*Employment Relations Act 2000*) and Canada (*Canadian Labour Code RSC 1985*) to name but a few. In Australia, the Federal Government has had constitutional limitations in regard to legislation in this area until relatively recently, with the argument being that the Australian Industrial Relations Commission (AIRC) did not have the jurisdiction to order remedies for 'unfair dismissal'. High Court decisions (*Ranger Uranium Mines case (1987)*, 163 C.L.R. 656, *Fruehauf Trailers case (1988)*, AILR No. 426 and *Wooldumpers case (1989)*, AILR no. 54) in recent years challenged this perception and this, together with the High Court's decision in the *Tasmanian Dams case 1983*, (158 C.L.R. 1) that made it clear that the Foreign Affairs and Corporations powers of the Constitution could form the basis of domestic legislation, led to the enactment of the *Industrial Relations Reform Act 1993*.

This Act for the first time, in the federal jurisdiction, legislated for relief from 'unfair dismissal' for employees, subject to a certain category of exclusions. Prior to the High Court decisions, particularly *Ranger Uranium Mines*, the AIRC could only deal with 'unfair dismissal' through conciliation and make recommendations about remedies that were not binding on the parties.

The State Industrial Relations Commissions, however had no such constitutional restrictions and were able to deal with 'unfair dismissal' cases under their broad dispute settling powers since Federation (Davidson, 1980). Despite the ability to deal with 'unfair dismissals' in this manner, the States (except Tasmania) also enacted legislation allowing an individual to apply to a State industrial tribunal for relief in respect of an 'unfair dismissal'. In South Australia and Western Australia legislation was enacted in the 1960's, Queensland in 1990, New South Wales in 1991 (amended in 1996) and Victoria in 1993 (Butterworths, October 2004).

The 1993 Federal provisions made it unlawful to dismiss an employee unless there was a valid reason connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service; and a reason was not valid if the termination was harsh, unjust or unreasonable (Sect. 170DE). The employer bore the onus of establishing a valid reason for termination; the onus then shifted to the employee to show that the dismissal was harsh, unjust or unreasonable (Sect. 170EDA). Further, an employee could not be dismissed without first being given the opportunity of defending the allegations unless the employer could not reasonably be expected to give the employee that opportunity (Sect 170DC). All applications for unlawful terminations went to the AIRC for conciliation and for arbitration by consent of the parties. Applications not settled in conciliation and not arbitrated by consent by the AIRC were sent to the newly established Industrial Relations Court of Australia, which had jurisdiction to make orders reinstating a dismissed employee and providing compensation either in addition to reinstatement or alternatively to it (Sect. 170EE). An application to the Court was limited to persons employed under a federal award or if award free earning not more than \$60,000 (adjusted annually for inflation) (Sects 170CD and 170 EA). The cap on compensation was a maximum of 6 months salary for those employed under a federal award or \$30,000 (adjusted for inflation) for non-award employees (Sect. 170EE). The constitutional validity of the 1993 termination of employment provisions was challenged in the High Court and their validity was substantially upheld (*Victoria v Commonwealth [Industrial Relations Act case] (1996) 187 CLR 416*). The High Court held that it was a valid exercise of the Commonwealth's external affairs power.

When the *Workplace Relations Act 1996* was enacted, the termination of employment provisions were based more significantly on the constitutional Corporations power (as well as other constitutional powers) rather than the External Affairs power as the 1993 amendments had been. The termination provision of the 1996 Act used the Public Service power (for public servants), the Territories power (for territories), the Corporations power (using the definition of constitutional corporation), the Conciliation and Arbitration power (for federal award employees), the Trade and Commerce power (for waterside workers, maritime employees and flight crew officers) and the External Affairs power (to support the constitutional validity of unfair dismissal applications). The use of these powers in the 1996 Act resulted in the following types of employees becoming eligible under the termination of employment provisions (Sect. 170CB);

- Commonwealth public sector employees
- Territory employees
- Federal award employees employed by a constitutional corporation
- Federal award employees who are waterside workers, maritime employees or flight crew officers
- Victorian employees (as Victoria had ceded its industrial powers to the Commonwealth)

The general exclusions from the termination of employment provisions remained essentially the same as those in the 1993 legislation and these are (Sect. 170 CBA);

- Employees engaged for a fixed term
- Employees engaged for a specific task

- Employees on probation for a period, determined in advance, of 3 months or less, or, if more than 3 months the period is deemed reasonable
- Casual employees engaged for a short period
- Employees engaged under a traineeship
- Employees with earnings of more than \$60,000 (adjusted annually for inflation)

The NSW 'unfair dismissal' provisions have the same exclusions as are listed above, have the same application fee (\$50) to make a claim and the same time provisions for making a claim as the federal system.

The essential difference between the provisions of the 1993 Act and the 1996 Act was that the 1993 Act provided for two criteria that could lead to the finding that the dismissal was 'unfair' and the employee could succeed by establishing either of the criteria, while the 1996 Act used the 'a fair go all round' principle. The two criteria were, firstly, that there had to be a valid reason for the dismissal and that the reason was not valid if the dismissal was harsh, unjust or unreasonable and, secondly, the process of dismissal had to be procedurally fair. The 'a fair go all round' principle of the 1996 Act attempted to ensure that in all aspects of the dismissal both the employee and the employer were accorded a 'fair go'. The 'a fair go all round' principle came from the case *Re Loty v Australian Workers' Union 1971 AR (NSW) 95* and was a principle that had essentially been adopted in the State jurisdictions, particularly in NSW. The effect of the changes brought about by the 1996 Act clearly made it easier for employers to defend Federal 'unfair dismissal' claims.

The use of the 'a fair go all round' principle aligned the federal legislation with the State legislation so that the process in both systems is now essentially the same. The only difference between the federal and the NSW system (and other State systems) is that in the federal system the AIRC provides a certificate to the parties after the conciliation process is exhausted that indicates whether either party has a case and therefore gives a strong indication of the feasibility of continuing with the case to arbitration. So, for all practical purposes the process and procedures of 'unfair dismissal' legislation as applied in the federal and NSW systems are the same. This point justifies observations and conclusions drawn from the case studies being applicable to either the federal or State systems even though the case studies are all from the NSW jurisdiction.

The AIRC produces an annual report concerning the number of claims for relief in respect to 'unfair dismissals' that are made, but this report is essentially statistical. For example, the 2001-2002 report finds that around 7500 claims were filed and most cases were settled by conciliation or were abandoned. Only 550 cases went to the Commission for formal arbitration. (AIRC Annual Report 2001 – 2002). The NSW Industrial Relations Commission's annual report for 2002 states that 4052 claims were lodged for that calendar year and that 4010 were completed by 31 December 2002. This report does not give a break up of claims that were settled during conciliation or those that were arbitrated. (NSWIRC Annual Report, 2002).

The practice – some case study examples

The preceding section sets out the historical and theoretical aspects of the provisions in relation to dismissal at the instigation of the employer, but how do these provisions operate in practice? The following case studies come from actual cases all of which are set in regional Australia and illustrate the sort of unfair dismissal claims that are commonly made, the jurisdictional problems that may arise and the outcomes that result. All of the cases dealt with below that resulted in an 'unfair dismissal' claim were conducted in the NSW jurisdiction under the provisions of the *NSW Industrial Relations Act 1996*. The process followed once a claim is submitted (Sect. 84) is that a Commissioner lists the case for a conciliation conference (Sect. 86), which is a relatively informal procedure designed to settle the matter, if possible, by discussion. This is done whether the claim is lodged out of time (a claim should be made within 21 days of the date of dismissal (Sect. 85)), the employees' eligibility to lodge a claim (Sect. 83) may be challenged or other jurisdictional issues need to be sorted. If the matter is not settled at this hearing the matter will then be listed for a formal hearing (provided the applicant is willing to pursue the matter further) to determine jurisdictional issues and/or the merits of the claim (Sect. 87).

It is only at the formal hearing that formal evidence is provided in the form of witnesses and/or exhibits. It is also at the formal hearings that employers are more likely to be represented by employer associations or solicitors, even where they were not represented at conciliation hearings. The conciliation hearings and any formal arbitration hearings are normally conducted in the regional centre where the applicant lives, though formal appeals on arbitrated decisions are heard in Sydney (in the NSW jurisdiction). This means that employers who are seeking representation from an employer association often require the representative to travel from Sydney to the regional centre. Hearings dates vary from about two weeks after the date of lodgement of the claim to about three months after the date of lodgement. So, where the employee and the employer are represented, there are often discussions held between the representatives prior to any hearing aimed at trying to settle the matter. Hearings can be delayed by either representative being unavailable on the suggested hearing date.

CASE 1 (MATTER NO. IRC 2000/1504): An assistant catering manager from a local services club was dismissed for allegedly stealing from the till at the end of a shift. The assistant catering manager was a young man who vehemently denied the allegation and lodged an unfair dismissal claim mainly to clear his name, especially for future career prospects in the hospitality industry. At the conciliation hearing, the employer, who represented himself because the employer association representative failed to appear, admitted that the employee was an extremely good worker, that the employees were under constant video surveillance in the work area and this produced no evidence of theft. The only basis for the accusation of theft was that the till takings did not balance. The employee explained that the till imbalance was caused by a discount to a member for meals not being correctly recorded on the till. The employer refused reinstatement, but offered a few weeks pay. The employee accepted this deal on the condition that he receive a reference from the employer, which the employer was happy to provide. It emerged later that the employer had one too many catering managers and needed to shed one and took this approach to do so. The good news for the employee is that he has gone on to a much more senior management position at another services club. The hearing and settlement of this matter took about one hour.

CASE 2 (MATTER NO. IRC 2217/2001): The employee began employment as a permanent part-time courier driver and was on probation for the first three months and was paid under the Transport Industry (State) Award. About eight months after starting employment the employee, having confirmed with his employer that he was permanent part-time, pointed out to his employer that he was entitled to public holidays and annual leave on a pro-rata basis. The employer became abusive and said that he would look into it. Two weeks later the employer informed the employee that he was not going to get public holidays or annual leave. The employer added that he was prepared to give a pay rise if the employee dropped all the issue with public holidays and annual leave. The employee wanted time to think about this. A few days later on a Friday the employer asked the employee whether he was still insisting on his claims and when told that he was, the employer said that he would not be needed next week. At the end of the following week the employer rang the employee to say that he should start back at work next week as a casual employee on casual rates and shorter hours. The employee refused this offer and lodged an unfair dismissal claim on the basis that he was constructively dismissed on the previous Friday. At the conciliation conference it was established that the employee was 'unfairly' terminated by the employer and a settlement was reached that resulted in the employee being paid ten weeks pay, which included one weeks notice and public holiday pay owed. The employer, who represented himself, was a little surprised by the result, despite the fact that he suggested the final settlement amount and asked for time to pay the compensation amount (eight weeks pay). The applicant and the employer came to an arrangement on the matter. The employee was satisfied that he had been vindicated in asserting his industrial rights to annual leave and public holidays, but as a result had no job to go to.

CASE 3 (MATTER NO. IRC 4355/2001): The applicant employee commenced employment with a local sheet metal manufacturer in early September 1999 as their accounts manager. The applicant proved an excellent employee who performed his job to the total satisfaction of the employer. However, just before Christmas in 1999, the employer met a person whom he preferred to the

applicant as the company's accounts manager and promptly sacked the applicant with one weeks pay in lieu of notice. Though this shocked the applicant, he did nothing about this except to look for other employment, which he found within some weeks. It wasn't until May 2001, when the applicant discovered by way of studying employment law at university that he had been unfairly dismissed, that he lodged a claim for unfair dismissal, which turned out to be about eighteen months out of time. At the conciliation hearing, though there was strong evidence that indicated that the applicant may well have been unfairly dismissed, the fact that the claim was made so late was clearly the major issue. The respondent employer, who was represented by an employer association advocate refused to concede that the claim should be heard so long out of time. The applicant, however, was willing to pursue the matter in a formal hearing to establish whether the claim should be accepted out of time and a formal hearing date was set. The matter was subsequently settled immediately after the initial conciliation hearing by the employer (on advice from the employer association advocate) offering the applicant four weeks pay to settle the matter and this was accepted by the applicant.

CASE 4 (MATTER NO. IRC 4295/2001 AND MATTER NO. IRC 6037/2001): The applicant employee commenced work with a private care provider who cared for people with intellectual disabilities in January 2000. Her job was a part-time carer working between 20 to 30 hours per week. Towards the middle of the year 2000, the company decided to set up an 'Acquired Brain Injury (ABI) Unit' and began with one client. The company advertised for a Coordinator for this Unit and the applicant applied and got the job in July 2000. Over the next nine to ten months the number of clients of the ABI Unit expanded due largely to the efforts of the Coordinator while the staff managed by the applicant grew to 27 from an original 5. The title of the Coordinator was changed to Manager (ABI Unit) and an Assistant Manager was appointed in January 2001. A fringe benefit package was also arranged for the Manager, which included a fully serviced car. In early June 2001, the applicant was called to a meeting with the CEO and the Chairperson of the Board and was told in a very brief meeting that the ABI Unit was to be 'restructured' and a new Manager would take over and the applicant would revert to her original position as a part-time carer. No explanation for this was given. The applicant lodged a claim for 'unfair dismissal' from her job as Manager, ABI Unit. The employer was represented by a Sydney based employer association but the conciliation hearing was set for a regional centre. The employer association advocate was keen to settle the matter by negotiations over the phone and the matter was settled at the end of July 2001, the day prior to the conciliation hearing, with the company agreeing to pay the applicant an amount of compensation for her demotion and effective termination from the job as Manager. The applicant continued to work as a part-time carer with the company and continued to have the use of a company car, though a smaller one than before. At the end of August 2001, only one month later, the CEO again called the applicant into his office and handed the applicant a Termination Notice, a cheque for two weeks pay in lieu of notice and holiday pay owed and some cash to take a taxi home. The applicant again lodged a claim for 'unfair dismissal'. The conciliation hearing for this claim was held in mid November 2001. The hearing failed to reach any settlement and the matter was listed for a formal arbitration hearing in mid February 2002. The employer, through the employer association advocate, made some attempts to settle the matter prior to the formal hearing but the offers were unacceptable to the applicant and the hearing went ahead. After a full day's hearing an agreement was reached to pay the applicant four months pay (including the fringe benefits for the use of a company car) without the Commissioner making a formal order, except to indicate that he thought that the applicant was unfairly dismissed but in the circumstances he would not order reinstatement. This was because the company refused to have the employee back and thus the relationship had broken down to such an extent that reinstatement would not be fair to either party. This suited the employer, but once again the employee though vindicated in her 'unfair dismissal' claim was left with no job.

CASE 5 (MATTER NO. IRC 1146/2003): The applicant began work as a casual employee with a local branch of a national removalist company in December 1997 and became a regular casual employee in January 1998. She worked regularly, allowing for seasonal fluctuations, for the company until late January 2003. During this period she became a very competent and experienced pre-packer with the company and was considered a good worker. She also became quite friendly with the then branch manager.

The applicant had over some years endured workplace harassment from a fellow casual worker and reported this to the branch manager, who eventually dismissed the offending employee. In early February 2003, the branch manager was terminated from her job and this became the subject of a separate 'unfair dismissal' claim before the AIRC. The applicant expected to be called in to work on 4 February 2003 but was not called. On enquiry a few days later she was told by a fellow employee that the State Manager had instructed that no friends of the previous branch manager were to be employed. The applicant then became aware that a new branch manager would soon be appointed and because she knew this person waited until she took over to verify whether she still had a job or not with the company. The new manager took over on 18 February 2003 and the applicant was told by the new branch manager that she did not want to become involved in the alleged dismissal of the applicant. It was at that point, the applicant finally accepted that she had been dismissed and lodged an 'unfair dismissal' claim. At the initial conciliation hearing, the respondent employer, who was not represented, denied that the employee had been dismissed and maintained that she was a casual employee who was still on the company's books as a casual employee, but had not been called in to work for some time because other casuals had worked. The respondent also denied all allegations about the conversation he allegedly had about the applicant. As there was no resolution at this hearing the Commissioner determined that two jurisdictional threshold issues needed to be determined in a formal hearing. These were firstly, was the employee entitled to lodge a claim for unfair dismissal even though she was a casual employee and secondly, should the claim be heard despite the apparent late lodgement of the claim? After the formal hearing to deal with these threshold issues, the Commissioner handed down a written decision some months later. The outcome was that the Commissioner found that the applicant was a long term casual employee and was entitled to lodge an unfair dismissal claim, but dismissed the out of time claim and therefore the claim could not proceed.

CASE 6: This is a case where there was not any 'unfair dismissal' claim lodged due to early advice and negotiations directly with the employer. The employee was a senior registered nurse who was employed in an aged care facility that came under the umbrella of a regional base hospital. The employee's job was mostly administrative at the aged care facility and she was able to carry out her job very efficiently. However, due to a long simmering clash of personality with the manager of the facility, she was transferred back to a clinical nursing position at the base hospital but still maintaining her salary level. She had not been engaged in clinical nursing for many years and over a period of a few months had been severely reprimanded for making potentially serious errors with medication and the like. She was facing another disciplinary hearing when she sought advice. The likely outcome of the disciplinary hearing was dismissal and without advice she would have lodged an 'unfair dismissal' claim, because even though she accepted that she had made errors in her work, she did not accept that they should have led to her dismissal. The hospital on the other hand had dealt with the employee with due process and given her all the chances to improve her clinical skills and could no longer condone her failures in procedure. An 'unfair dismissal' claim would have been very difficult to defend and would still have cost the hospital a significant amount even if they had won the case. A further detriment to the employee would most likely have been deregistration of her nursing credentials, which meant not being able to work as a nurse in future. The employee was nearing retiring age could reasonably have contemplated retirement within about six months. A settlement was negotiated with the hospital, which was that the employee would go on annual leave and long service leave until the desired retirement date and then resign her position. The hospital contributed to the deal by granting some ex-gratia leave to be able to reach the desired retirement date. The employer was satisfied with the arrangement because it solved a serious problem and saved potential costs and the internal disruption that the 'unfair dismissal' proceedings would have created. The employee was not entirely happy, but once convinced that she would most likely lose the 'unfair dismissal' case as well as being deregistered as a nurse, accepted the deal as being fair in all the circumstances.

Observations from the case studies

There are a number of broad conclusions suggested by these case studies.

1. Employees do not automatically lodge 'unfair dismissal' claims when they are dismissed. This is partly because of a lack of knowledge about the system and partly because of a sense of powerlessness in comparison with the employer. Also, some employees accept the reasons for their dismissal. In all of the cases listed above the employee sought advice either before lodgement of a claim or soon after the claim was lodged. There is little doubt that had these applicants not received advice and representation, many would not have proceeded with their claims.
2. Employees find it quite difficult to obtain good advice about how to respond to dismissal, how the system both at State and Federal level operates, their chances of success and the possible remedies available. Generally, the only avenues for this sort of advice are unions (if the employee is a member) or a solicitor. The latter is usually too expensive for the average employee, especially if there is more than one hearing involved. The employees in the case studies above were not union members and the financial outcomes in these cases would not warrant legal representation as that would eat up most, if not all, the compensation paid.
3. The outcomes generally favour employers with compensation paid being relatively small in the case studies even though in all cases the employees had substantial evidence that they were unfairly dismissed. None of the employees were reinstated, despite that being their major objective in most cases. In only one of the cases listed above (Case Study 3) did the employer pay out some compensation where there was no pressure to do so as it appeared very unlikely that the application would be accepted out of time by eighteen months. In this case, the employer did so based on the advice of the employer association representative on a cost benefit analysis. In other words it was cheaper to offer some compensation to avoid a full arbitration hearing in which the employer would have invested significant time (and money) even though the outcome would almost certainly have been in favour of the employer.
4. The outcome for employees was reasonably acceptable, where employees were able to obtain similar or better employment relatively quickly after dismissal. For the others the outcomes were not so positive. Not only were the settlements small, but they had no job and prospects were not good for getting another one.
5. The reasons for dismissing employees are quite varied and included wanting to switch a new person into the job on a personal whim, making a dishonesty allegation without investigation in order to reduce staff in that area, personal work and office politics, dismissing for insisting on industrial rights and as payback for challenging an earlier demotion that was a constructive dismissal. In all of the cases listed above, proper disciplinary and dismissal procedures were not followed, even though some of the employers had written procedures. Clearly, employers are not inhibited from dismissing employees at any time they deem it appropriate.
6. 'Unfair dismissal' claims can be avoided if the employee receives proper advice and is offered alternative solutions (see Case 6) and/or the employer is willing to consider alternatives to dismissal. The employer in Case 6 above was clearly going down the path of dismissal and did not consider other options until those were suggested by a third party, which in this case was an agent for the employee.
7. Most cases do not proceed beyond the conciliation stage and are settled during conciliation hearings or shortly thereafter. This means that employers usually do not require representation as the process is informal and not complex. Only in two of the case studies was the employer represented and even in a formal arbitration hearing the employer in Case 5 was not represented.
8. The experience suggests that employers have little to fear, either financially or otherwise, from 'unfair dismissal' claims even if the employee has been dismissed 'unfairly'. The case studies suggest that even where employers act arbitrarily and 'unfairly' the consequences in terms of time and money spent in defending claims are minimal).

Conclusions

Whilst these case studies might be relatively atypical of 'unfair dismissal' claims made in regional areas, it is not appropriate to draw general conclusions about such claims based on the small sample of case studies outlined above. However, two points can be made in relation to the practice illustrated by the case studies. The first is that the process involved in 'unfair dismissal' proceedings is not cumbersome or complex with most employers able to conclude matters without representation. The second is that reinstatement of the employee is rarely provided as a remedy, where there is any evidence that the employment relationship has been fractured.

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