



# Pigott Stinson

## Unfair dismissal under the Fair Work Act

May 2009

### 1. INTRODUCTION

One of the major changes introduced by the Fair Work Act (**FW Act**) is in relation to unfair dismissal laws. This area of the FW Act has also received a lot of coverage in the media.

The stated objects of the part of the FW Act which contains the unfair dismissal laws (Part 3-2 of the FW Act) are to:

- (a) establish a framework for dealing with unfair dismissal that balances the needs of business and the needs of employees;
- (b) establish quick procedures for dealing with unfair dismissal claims that are quick, flexible and informal; and
- (c) provide remedies for a dismissal which is found to be unfair, with an emphasis on reinstatement.

Importantly, section 318(2) provides that:

*“the procedures and remedies referred to ... 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 the employee concerned”.*

This section of the paper looks at the new unfair dismissal laws.

It will also provide a brief outline of how unfair dismissal claims will be dealt with under the FW Act by the new body called Fair Work Australia (**FWA**)

### 2. COMMENCEMENT

The new unfair dismissal laws will commence on 1 July 2009.

### 3. WHO WILL BE COVERED?

Currently, an employee can bring an unfair dismissal claim if he or she was:

- (a) employed by a company which employs less than 100 employees; and
- (b) not dismissed for genuine operational reasons.

Under the new laws, an employee will be protected by the unfair dismissal provisions if he or she has completed *“the minimum employment period”* and:

- (a) a modern award covers the employee; or

- (b) an enterprise agreement applies to the employee; or
- (c) the employee's annual earnings is less than the high income threshold<sup>1</sup> which will be set out in the Regulations.

If the employer is not a small business, the *minimum employment period* is 6 months.

If the employer is a small business, the *minimum employment period* is 1 year.

For the purposes of determining the minimum employment period, the period of employment is taken to be the period of continuous service the employee has completed with the employer. However, there are two important qualifications to this general rule.

Firstly, the period of service will not include any time spent as a casual employee unless:

- (a) the employment was on a regular and systematic basis; and
- (b) the employee had the reasonable expectation of continuing employment on that basis.

The second important qualification relates to the transfer of a business. The period of an employee's service with an old employer will not count towards the period of service with the new employer if:

- (a) the employee is a transferring employee;
- (b) the old employer and new employer are not associated entities; and
- (c) the new employer informed the employee in writing before the new employment started that the period of service with the old employer would not be recognised<sup>1</sup>.

#### **4. DEFINITION OF "SMALL BUSINESS"**

**From 1 July 2009 until 1 January 2011**, a small business will be one which employees fewer than 15 full time equivalent employees.

**After 1 January 2011**, a small business will be one which employs fewer than 15 employees.

Accordingly, an organisation which may be a "small business" prior to 1 January 2010 may find that it ceases to be a small business after this date.

It is also important to remember that an employer may change from being a small business if it increases or decreases the number of people it employs.

#### **5. WHAT IS UNFAIR DISMISSAL?**

A person will be unfairly dismissed if FWA is satisfied that:

<sup>1</sup> For more detail on transmissions of business, see our separate paper entitled "Changes to the Transmission of Business Rules Under the Fair Work Act".

- (a) the person has been dismissed;
- (b) the dismissal was harsh, unjust or unreasonable;
- (c) if the employer was a small business: the dismissal was not consistent with the '*Small Business Fair Dismissal Code*' (discussed below); and
- (d) the dismissal was not a case of genuine redundancy.

Of course, an employee is dismissed when an employer terminates the employee's employment.

However, an employee will also be dismissed if he or she has resigned but was forced to do so because of the conduct, or a course of conduct, engaged in by his or her employer.

The FW Act sets out criteria that FWA must take into account to determine whether a dismissal has been harsh, unjust or unreasonable. These matters are as follows:

- (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 reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; 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 size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialist or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.

## **6. SMALL BUSINESS FAIR DISMISSAL CODE**

The Minister can declare a "Small Business Fair Dismissal Code".

If the employer is a small business and complies with that code in relation to a dismissal, that dismissal will not be unfair.

## **7. GENUINE REDUNDANCY**

As is currently the case, a termination will not be unfair if it is a genuine redundancy.

The FW Act states that a redundancy will be genuine where a person's employment has been terminated in the following circumstances:

- (a) the employer no longer requires the job to be performed by anyone else because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employee regarding consultation about the redundancy.

Importantly, the FW Act goes on to provide that there will be no genuine redundancy if it would have been reasonable for the employee to have been redeployed within the employer's enterprise or an associated entity.

This may make it more difficult for an employer to argue that a termination was a case of genuine redundancy

## **8. REMEDIES FOR UNFAIR DISMISSAL**

An unfair dismissal claim will be brought by the employee through FWA.

There will be two remedies available to an employee who has been unfairly dismissed: reinstatement and compensation.

As is currently the case, reinstatement will be the primary remedy.

FWA cannot order the payment of compensation unless reinstatement is inappropriate and it considers that compensation is appropriate in the circumstances.

Importantly, FWA also has power, if it considers it appropriate, to order that continuity of service has been maintained despite the dismissal and that the employer must pay the employee for remuneration lost because of the dismissal.

In determining whether compensation should be paid, FWA must take into account all the circumstances of the case including at least the following factors:

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person

because of the dismissal; and

- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of an order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that FWA considers relevant.

Importantly:

- (a) if an employee's misconduct contributes to that employee's dismissal, the amount of compensation is to be reduced; and
- (b) FWA cannot include in any compensation a component for shock, distress, humiliation or any other similar hurt caused by the dismissal.

#### **Time within which an unfair dismissal claim can be made**

An unfair dismissal claim must be made within 14 days after the dismissal took effect and be accompanied by the appropriate fee. There is scope for FWA to allow an employee to make an application after the 14 day period in exceptional circumstances.

Prior to considering the merits of an application, FWA must determine whether:

- (a) the application was made within the 14 day period;
- (b) the person was protected from unfair dismissal;
- (c) the dismissal was consistent with the small business fair dismissal code; and
- (d) the dismissal was a case of genuine redundancy.

FWA will have the ability to conduct conferences and hearings to help determine a matter.

A conference is held in private whereas a hearing is held in public.

It will be possible to appeal a decision of FWA to the Full Bench of FWA if there has been a significant error of fact by the original member of FWA in determining the claim.

### **9. IMPORTANT POINTS FOR EMPLOYERS**

Employers will need to be mindful of the change in the definition of small business which will occur from 1 January 2011.

Employer must also be aware of whether they have become, or have ceased to be, a small business because of the number of people they employ.

It is also important to remember that these comments relate to “unfair dismissal” and not “unlawful dismissal” or “unlawful termination”.

For example, termination on a prohibited ground of discrimination (such as gender or race) is still prohibited by both the FW Act and other Federal and State legislation and give rise to additional remedies for employees and former employees.

**Prepared by Ray Travers  
& Caroline Vu**

**11 May 2009**

If you would like to talk to Pigott Stinson’s employment law team about any of the matters covered in this paper, please contact any of the following people:

<b>John Ralston</b>	Partner	<a href="mailto:j.ralston@pigott.com.au">j.ralston@pigott.com.au</a>
<b>Leonie Kyriacou</b>	Senior Associate	<a href="mailto:l.kyriacou@pigott.com.au">l.kyriacou@pigott.com.au</a>
<b>Ray Travers</b>	Associate	<a href="mailto:r.travers@pigott.com.au">r.travers@pigott.com.au</a>

John, Leonie and Ray can also be contacted by calling (02) 8251 7777.

This paper and accompanying seminar provide a summary only of the subject matter covered, without the assumption of a duty of care by Pigott Stinson Lawyers. The summary is not intended to be nor should it be relied upon as a substitute for legal or other professional advice.

Copyright in this paper and any related seminar is owned by Pigott Stinson Lawyers.