



EMPLOYMENT & INDUSTRIAL RELATIONS

MACGILLIVRAYS

S O L I C I T O R S



ARE UNFAIR DISMISSALS BECOMING MORE TRENDY?

When the new *Fair Work Act* and National Employment Standards were announced to commence on the 1 January 2010, employers were concerned that this would result in an increase of unfair dismissal cases.

In March 2010, the Australian Bureau of Statistics released a report titled '*Wages Growth, Industrial Action and Unfair Dismissals: Recent Trends*'ⁱ providing interesting statistics on the new scheme.

SHOULD EMPLOYERS BE CONCERNED?

The ABS Report states that there was an increase of 30% in applications lodged in the first six months of the *Fair Work Act* (FWA) commencing, compared to the 2008-2009 period. Up to the date of report compiled, there were 5,208 applications lodged with Fair Work Australia. **Why the increase?**

Reasons given by ABS for the upward trend were:

1. All Australian employees who serve a qualifying period under the new scheme ie 12 months for small businesses and 6 months for others *potentially* have access to the unfair dismissal protections. A further 4.3 million Australians now have access to commence proceedings under FWA.
2. The difficult economic climate has resulted in a 31% increase in disputes lodged from 2007-08 to 2008-09. Employees are more concerned about job security and more likely to challenge a dismissal.

WHAT MEASURES HAVE FAIR WORK AUSTRALIA INTRODUCED TO DEAL WITH THE UPWARD TREND?

Fair Work Australia released a number of fact sheets to assist employees and employers in dealing with the unfair dismissal regime.ⁱⁱ

The fact sheets include:

- Types of dismissal
- What is unfair dismissal?
- Who can make an unfair dismissal application?
- General protections dismissal and other types of dismissal
- Meaning of small business employer
- Coverage & eligibility
- What is harsh, unjust or unreasonable?
- What is a genuine redundancy?
- Small Business Fair Dismissal Code.

Further Guides are published including the 'Unfair Dismissal Guide'ⁱⁱⁱ which details the process, costs, eligibility and protections for employers against an application.

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ARE UNFAIR DISMISSALS BECOMING MORE TRENDY?

E X P E R T I S E



Fair Work Australia strongly recommends any employee enquiring about unfair dismissal to read the fact sheets and Guides before lodging their application. This attempts to reduce the amount of applications where the employee does not have rights to commence ie out of time, not an award or enterprise agreement employee.

Once the application is accepted by Fair Work Australia, a compulsory conciliation is set down, which is a more informal measure to resolve the issues in dispute within a short timeframe.

The ABS Report states that by Fair Work Australia adopting this approach, 78% of matters in the first six months of FWA commencing were resolved. The success of conciliation has resulted in 3% more matters resolving than in the 2008-09 period. The number of days in resolving the disputes in the new scheme is 37 days compared to 106 days in the 2008-09 period for 85% of disputes.

IS THIS GOOD NEWS FOR EMPLOYERS?

What the statistics do not show is what happened at the conciliation conference to settle the dispute. Did the employer offer the employee money in an attempt to reduce the overheads of any continuing dispute, where the employer did not take any actions which were *unlawful, harsh or unjust* in terminating the employment? It is extremely rare for an Application to not include some form of damages requested by the employee for *compensation*.

If you are confronted with a conciliation and wish to offer something non monetary to settle, conciliation agreements commonly include:

- A Work Statement to be provided which is fair and does not state any reasons for the dismissal;
- Confidentiality of the employee records be maintained;
- Employer and employee to act respectfully and avoid any defamatory conduct against each other.

The ABS Report does not assist with what was offered to settle.

HOW CAN YOU AVOID BECOMING PART OF THE STATISTICS?

- Keep accurate records of each employee's performance;
- If you are a small business employer, record the termination reasons in the Small Business Code Checklist ready to present to Fair Work Australia;
- If the employee is an Award employee, check that their pay and conditions are in line with the applicable Modern Award.

For further assistance, please contact Gary Woodman or Lisa Sylvester on 1300 369 581

ⁱ Available from the website at: www.deewr.gov.au/WorkplaceRelations/Documents/PDF/TrendsReport090310.pdf

ⁱⁱ See www.fwa.gov.au under the heading of Dismissals.

ⁱⁱⁱ http://www.fwa.gov.au/documents/dismissals/guide_dismissal.pdf

BY LISA SYLVESTER
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MULTINATIONAL EMPLOYERS BEWARE?

In a recent Fair Work Australia (FWA) decision of *Gardner v Milka-Ware International Ltd*ⁱ (MW) an application for unfair dismissal was filed by an employee under s 394 of *Fair Work Act 2009 (Act)* alleging the termination of employment was harsh, unjust or unreasonable. The employer was a multinational entity, who entered into a verbal agreement of employment with Mr Gardner to work three weeks in New Zealand and one week in Australia. The place of work varied through the period of employment. When the dismissal took place, Mr Gardner had worked for two months continuously in Australia.

JURISDICTION

MW raised issue with FWA having jurisdiction to deal with the matter, as it was incorporated in New Zealand. MW submitted they were not captured by the 'national system employer' definition as it was not a constitutional corporation, incorporated in Australia.

In response, Mr Gardner's representative relied upon section 51(xx) of the Australian Constitution, where 'foreign corporations' are captured as a constitutional corporation. Discussion of the *Incorporation Case*ⁱⁱ lead the Commissioner to conclude that a NZ company employing someone to work 'in' Australia, falls within the ambit of the Act.

TESTS FOR WORKING 'IN' AUSTRALIA

For FWA, an employee can be regarded as working 'in' Australia by:

- Working part of the employment in Australia, but not necessarily solely in Australia when the termination took place; or
- The primary place of work is Australia.

Mr Gardner's primary place of work was deemed to be 'in' Australia as he had solely worked for the past two months in Australia. FWA found that it did not matter in which country the employment contract was formed as the termination of employment occurred in Australia. Mr Gardner was therefore given rights to pursue an application for unfair dismissal in Australia.

WHAT TO DO NEXT?

It is important following this decision, that Multinational Employers include in any contract of employment what jurisdiction governs the employees 'place of work'. If the employee is found to work 'in' Australia, not only will the Act apply, but also the National Employment Standards, any applicable award and Anti-Discrimination legislation.

BY GARY WOODMAN
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ⁱ Glenn Gardner v Milka-Ware International Ltd (U2009/13800) Commissioner Gooley, Melbourne, 25 February 2010

ⁱⁱ New South Wales v The Commonwealth (1990) 169 CLR 482