Legal Aid Civil Law Conference 2010

Remedies for Termination of Employment – Some General Observations

This paper raises some general issues about remedies which may be available in respect of termination of employment. It is far from exhaustive.

As a general rule, unless a person was employed by the NSW Government or in local government, the Industrial Relations Commission of NSW now has no jurisdiction in respect of termination of employment. There are minor exceptions to this, for example where an employee is alleged to have been dismissed for making a complaint about an occupational health and safety issue: see sections 23 and 23A of the *Occupational Health and Safety Act* 2000 (NSW).

If there is a question whether the dismissal was legal, or fair, there are a number of possible avenues. There are two main avenues under the Fair Work Act ("FW Act"). The first is a claim under the 'General Protection' provisions. The second is a claim under the Unfair Dismissal Provisions. This paper discusses some of the considerations which arise in respect of these avenues. There may also be potential claims under the *Trade Practices Act*, anti-discrimination legislation or the common law, to name a few, but these possibilities arise much less frequently.

General Protections

General Protection provisions are found in Part 3-1 of the FW Act. These provisions prohibit the taking of adverse action, including the dismissal of employees, for certain reasons. (These provisions are not limited to employees, and are not limited to dismissals, but that is the focus of the present discussion).

In broad terms the protections apply where an employee is dismissed because he or she has, exercises, or proposes to exercise a *workplace right*, or because he or she has engaged in or proposes to engage in *industrial activity*.

Provisions of this type have existed in Commonwealth industrial legislation for many years but they have been gradually broadened over the years, and the FW Act has broadened them even further.

Protection in Relation to Workplace Rights

Division 2 deals with having and exercising workplace rights. Workplace rights are defined in s341. These include:

- having benefit of workplace law, instrument or order: s341(1),

- Being able to participate in a process or proceeding under workplace law: s341(2)(broadly defined in s341(2),

- having ability to make complaint or inquiry in relation to employment (if the person is an employee) : s341(1)(c)(ii).

The most important change introduced under the FW Act is 341(1)(c) – adverse action because an employee has or exercises the ability to make complaint or inquiry – this has been very significantly broadened so that there only has to be a complaint or inquiry in relation to employment. It can be a complaint to the union, or a complaint to the employer. Previously only complaints to certain specific bodies (generally with powers of enforcement) fell within the protection.

Industrial Activities Protection

Industrial Activities are protected under Division 4. Industrial activities are broadly defined in s347 and the Courts have interpreted these provisions extremely broadly. They include joining a union, and various activities associated with union membership and office. For example, an employer which disciplined an honorary official of the union for speaking to the media in breach of an employer's media policy was found to have breached the predecessor provisions.

Importantly, the protection now extends to taking action as part of an informal grouping of employees as well as playing a role in respect of registered organisations.

Other Protections

Section 351 provides that an employer must not take adverse action because of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Section 352 provides that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury.

It can be seen that this provision is significantly broader than some of the anti discrimination legislation which could be considered as an alternative. One consideration in weighing up the alternatives is that the usual provisions as to costs generally apply claims under discrimination legislation, whereas under the FW Act costs orders are not usually made.

Other Important Provisions

Reference should also be made to s360, which provides that *a person takes action for a particular reason if the reasons for the action include that reason*. Accordingly the prohibited reason need not be the main reason, but must be an operative reason.

Finally reference should be made to Section 361(1). It is in effect a 'reverse onus' provision, which provides that where it is alleged that adverse conduct is for a particular reason or with particular intent, it is presumed that the conduct was for that reason or with that intent unless the person proves otherwise. Clause 361(2) provides that this 'reverse onus' does not apply to an application for an interim injunction. However section 361(1) has been given weight in a number of cases for the purpose of assessing whether there is an arguable case in interlocutory proceedings.

Procedural Issues

An unlawful termination application, must generally be made in the first instance to FWA: s365. This application must be made within 60 days, with extensions granted only in "exceptional circumstances": s366. If the matter is unable to be resolved through conciliation in FWA a certificate will be issued by FWA and the matter can then proceed to the Court.

One significant exception is if the person is seeking interlocutory relief, in which case they should proceed direct to Court – either the Federal Court of Australia or the Federal Magistrates Court. This should obviously be done as quickly as possible.

Relief in respect of Breach of General Protections

Relief in respect of unlawful termination in breach of the General Protections is dealt with in Part 4 – 1, Compliance and Enforcement. Section 545 gives the Court broad powers, to make "*any order that considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision*". Examples of remedies given in s545 include orders for compensation and orders for reinstatement. The Court may award a component for hurt, humiliation and distress etc, although this is not common. Penalties may also be imposed under s546 for breaches of a civil remedy provision.

Interlocutory Relief

It is important to note that the Federal Court has jurisdiction and power under s23 of the *Federal Court of Australia Act* 1976 to grant interlocutory relief in respect of unlawful terminations in breach of the general protections. Available relief includes orders for reinstatement pending final hearing and determination of the matter. The conventional test for interlocutory relief, being serious issue to be tried and balance of convenience, will apply.

Unfair Dismissal provisions of the FW Act

Unfair dismissal is dealt with under Part 3 -2 of the FW Act.

Division 2 sets out when a person can make an application in respect of unfair dismissal. The person's employment must either be covered by a modern award or enterprise agreement OR the earnings must be less than the "high income threshold" in the regulations. The current threshold is $113,800 a year.

Importantly, a person cannot make an application under these provisions unless they have been employed for a *minimum employment* period of at least six months: s383 (one year for small business). Casual employees who have at least six months continuous service may make a claim, subject to the criteria set out in s384.

A further requirement applies in respect of small business in that a dismissal is only unfair if it is not consistent with the *Small Business Fair Dismissal Code*. A **small business** is a business that employs **less than 15** full-time equivalent employees.

Section 385 defines an unfair dismissal to be a dismissal which was harsh unjust or unreasonable; AND was not a case of genuine redundancy.

Genuine redundancy is defined in s389. A person's dismissal was a case of genuine redundancy if:

- the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise, and
- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- the employer's enterprise
- the enterprise of an associated entity of the employer.

It seems that the concept of *geniuine redundancy* will be interpreted broadly so that even if the functions performed by the employee continue to be required, a reorganisation which changes the configuration so that the specific "job" no longer exists may give rise to a *genuine redundancy*: see *Ulan Coal Mines v Henry John Howarth and Others* [2010] FWAFB 3488.

Section 387 sets out criteria which must be taken into account in considering whether a dismissal was harsh, unjust or unreasonable. These include (most importantly) whether there was a valid reason for dismissal, and a range of other rather specific procedural matters, such

as whether the person dismissed was given proper opportunity to respond to any allegations against them. The list is not exhaustive.

Remedies are provided for in Division 4, and include reinstatement and compensation. Under s390(1) reinstatement may be awarded if a person has been unfairly dismissed. Under s390(2) compensation can only be awarded if reinstatement is inappropriate and payment of compensation is appropriate in all the circumstances of the case. In the case of reinstatement, ancillary orders, such as for lost remuneration and continuity of service, may also be made.

Compensation is provided for in s392 and is extremely limited. The maximum amount is the lesser of the following:

- half the *high income threshold* immediately before dismissal ; and
- the total amount of remuneration to which the person was entitled for any period of employment with the employer during the 26 weeks before the dismissal.

In determining the amount to be awarded FWA must take into account various factors under s392(2), all of which have the potential to reduce compensation. These include remuneration earned, efforts to mitigate loss. Section 392(3) provides that compensation MUST be discounted if FWA finds that misconduct of a person contributed to a person's dismissal. This unusual provision was introduced under the FWA. Under s392(4) compensation MAY NOT include compensation for shock, distress, humiliation, etc. These provisions are further significant limitations on the scope of relief available, in circumstances where reinstatement is infrequently granted.

Procedural Matters

Under s394(2) an application in respect of unfair dismissal must be made within 14 days after the dismissal took effect. The time limit will be extended only in exceptional circumstances: s394(3). This provision has been strictly interpreted: see appeal decision in *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Janette Smithers* [2010] FWAFB 7251 where a decision of McKenna C granting an extension of time was overturned.

The procedure for unfair dismissal applications is somewhat fluid and informal. FWA has discretion as to what parts of the claim should be subject to a formal hearing: see generally Part 3 – 2 Division 5 and section 399. Where there are disputes of fact a formal hearing will generally occur.

Compulsory conciliation is part of the unfair dismissal regime in FWA. About 80% of unfair dismissal applications settle at conciliation without reaching a final hearing. This figure has increased somewhat over recent years. Experience and intuition suggests that these matters will generally settle for monetary amounts, often relatively small (having regard to the maximum available compensation discussed above).

Legal representatives must have permission to appear at all stages in the process: s596.

Costs orders are generally not made in respect of unfair dismissal claims, save for the circumstances set out in s611, where the application or the response is made *vexatiously or without reasonable cause*, OR the application or response had *no reasonable prospect of success*.

Costs orders against lawyers or paid agents are expressly provided for under s376 in certain defined circumstances. This power is significantly wider than the common law.

Comments on Choosing Remedy

Unfortunately a person cannot generally pursue both unlawful termination and unfair dismissal: see generally Part 6-1, Division 3.

The 'prohibited reason' grounds under Part 3 -1 might be relevant to determining whether a dismissal is unfair, but general unfairness cannot be taken into account by the Court in determining an unlawful termination application.

The FWA 2009 – 2010 Annual Report provides the following table of outcomes in finalised unfair dismissal claims in 2009 – 2010:

Table 7: *Result of termination of employment matters disposed of by decision 2009–10*

	s.643 WR Act	**s.394 Fair Work Act**
Order for payment in lieu of reinstatement	16	35
Reinstatement	7	15
Other (e.g. breach found but no order) -	-	2
Dismissed—on merits	32	35
Dismissed—out of time	74	37
Dismissed—no jurisdiction	160	68
Dismissed—frivolous, vexatious or lacking in substance	7	4
Total	**296**	**196**

Jurisdictional barriers have been somewhat reduced with the introduction of the FW Act. The reduction in dismissal of claims on jurisdictional grounds is primarily due to the removal of the restriction to claims against employers employing 100 or more employees.

It appears that even under the FW Act the prospects of success at final hearing in this jurisdiction remain generally poor. Prospects of reinstatement are even poorer. However the conciliation process is relatively inexpensive and may give rise to a worthwhile outcome.

The main disadvantage of proceedings in the Federal Court or FMC for unlawful termination is that a prohibited reason must be shown. Even if the dismissal is shown to be extremely unfair, a remedy will not be granted unless it is for a prohibited reason.

The relative advantages of such proceedings include:

- The relative lack of jurisdictional obstacles (such as the six month qualifying period);
- the fact that the prohibited reason has to be only an operative reason, not the main reason;
- the 'reverse onus' which effectively means that the employer must prove that the dismissal was not for reasons including a prohibited reason;
- the availability of interlocutory relief,
- the unlimited compensation and the greater discretion with remedies generally.

A further advantage which may be relevant is that an unlawful termination claim may be accompanied by other common law claims in the Court's accrued or incidental jurisdiction where they arise from the same substratum of facts as the dismissal – for example breach of contract claims may arise. Of course, if there are claims under other Commonwealth legislation, these can be also run in the same proceedings. Thus for example a claim for breach of an industrial award/agreement, or a Trade Practices claim, could be run in the same proceedings.

Proceedings under anti – Discrimination Legislation

I have not discussed remedies for termination of employment under various state and Federal anti discrimination legislation, particularly the *Sex Discrimination Act* (Cth) 1984, the *Race Discrimination Act* (Cth) and the *Disability Discrimination Act* (Cth) and the *Anti-Discrimination Act* (NSW).

There are some significant limits to the availability of remedies under the discrimination legislation. There are also some difficult technical issues in establishing discrimination. These have become more significant since the High Court's decision in *Purvis v New South Wales (Department of Education and Training) [2003] HCA 62; (2003) 202 ALR 133.* The scope and operation of anti-discrimination legislation could be the subject of a detailed paper. One relevant consideration is that generally speaking, in discrimination claims the applicant does not have the benefit of the 'reverse onus' provision found in the FW Act. The particular costs regime will also be a relevant consideration – the stronger the case, the more appealing a conventional costs regime will be!

Common Law – Implied Duty of Good Faith

Brief reference should be made to the possibility of claiming that an employer has breached the implied duty of good faith in the employment contract. This area of law is developing –

some Judges don't consider that such a term exists and many would interpret it rather narrowly. However it has been successfully utilised in a number of proceedings relating to termination of employment. It may be worth considering if Court proceedings alleging unlawful termination or relying upon other statutory causes of action are under consideration. In an appropriate case it allows for the introduction of some general fairness type considerations. A recent discussion of this implied term is found in *Rogan-Gardiner -v-Woolworths Ltd* [No 2] [2010] WASC 290.

Proceedings Under the Trade Practices Act 1974

Finally, brief reference should also be made to the possibility of proceedings under the *Trade Practices Act* 1974. Proceedings under s52 and/or s53B of the *Trade Practices Act* have been successfully utilised on a number of occasions as a result of termination of employment. Most commonly these cases allege pre-contractual representations as to the duration of employment. A very recent example of this type of claim is found *in Moss v Lowe Hunt and Partners Pty Ltd* [2010] FCA 1181 (1 November 2010). In that decision Katzmann J awarded $306,740 in damages.

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