Unfair Dismissal in Depth

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Overview

- Legislative framework – who can make unfair dismissal claims?
- Available remedies
- The process: from conciliation to litigation
- Appealing decisions of the Commission
- Areas of interest – trends and uncertainties
- Important Cases

Legislative framework – who can make unfair dismissal claims?

- Part 3-2, *Fair Work Act 2009*
- Objects (s.381) – "a fair go all round": *Toms v Harbour City Ferries Pty Ltd & Anor* (2015) 229 FCR 537 at [31]-[42]
- Protected persons (s.382):
  - Is the applicant an employee?
  - Has the applicant completed the minimum period of employment (6 months or 12 months for small business employers)?
  - Is the applicant covered by a Fair Work Act industrial instrument or earning below the high income threshold ($138,900 from 1 July 2016)?
- Is the employer a national system employer? (s.14)

Legislative framework – who can make unfair dismissal claims?

- Has the employee been dismissed? (s.386(1)): Terminated at the initiative of the employer; forced to resign (constructive dismissal);
- If the employee was a casual, was the employment regular and systematic and did the employee have a reasonable expectation of continuing employment? (s.384(2);
- Has the application been filed within 21 days of the dismissal or such further period as the Commission allows? (s.394).

Legislative framework – who can make unfair dismissal claims?

- Certain exceptions:
  - There is no dismissal if the employee has been dismissed as a consequence of completing a contract for a specified period of time or task or completing a training arrangement (s.386(2));
  - Dismissal is not unfair if the termination is a genuine redundancy (ss.386, 389);
  - Dismissal is not unfair if the termination is consistent with the Small Business Fair Dismissal Code (ss.386, 388).
- Note also the effect of ss.725 to 732 that an unfair dismissal application cannot be made if another claim has also been made under Part 3-1 or a complaint under State or Commonwealth law in relation to the dismissal

Genuine Redundancy Exclusion

- A genuine redundancy occurs where (s.389(1)):
  - Employer no longer requires an employee's job to be done by anyone because of changes in the operational requirements;
  - The employer has complied with a relevant obligation to consult about the redundancy
- Note (s.389(2)), a dismissal is not a genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
  - The employer's enterprise; or
  - The enterprise of an associated entity of the employer

Harsh, unjust or unreasonable

- A person has been unfairly dismissed if the dismissal was harsh, unjust or unreasonable (s.385): *Byrne v Australian Airlines* Ltd (1995) 185 CLR 410 at 410 (per Brennan CJ, Dawson and Toohey JJ) and 465 (per McHugh and Gummow JJ)
- Criteria for considering harshness (s.387):
  - Was there a valid reason (s.387(a))?
  - Was the person notified of that reason (s.387(b))?
  - Was the person given an opportunity to respond to any reason related to conduct or capacity (s.387(c))?
  - Was there any unreasonable refusal by the employer to allow the person to have a support person (s.387(d))?
  - Was the person warned about any unsatisfactory performance before the dismissal (s.387(e))?

Harsh, unjust or unreasonable

- Criteria for considering harshness (s.387):
  - Consider the degree to which the size of the employer's enterprise would likely impact on the procedures followed (s.387(f))
  - Consider the degree to which the absence of dedicated human resources management or expertise would likely impact on the procedures followed (s.387(g))
  - Consider any other relevant matters (s.387(h))
    - Information discovered after the dismissal
    - Differential treatment
    - Personal circumstances and effect of dismissal
    - Context in which acts occurred
  - See generally: *Blue Scope Steel Ltd v Sirijovski* [2014] FWCFB 2593

Harsh, unjust or unreasonable – A valid reason

- A valid reason for dismissal is one which is "sound, defensible or well founded" and not "capricious, fanciful, spiteful or prejudiced": *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373-4
- The question of whether there was valid reason for a dismissal, is answered by reference to the facts that existed at the time of the dismissal based on the evidence which is before the Commission: *King v Freshmore (Vic) Pty Ltd* Print S4213, 17 March 2000; *Lane & Ors v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427 at 456

Remedies Available

- The primary remedy is reinstatement (ss. 390 – 391)
- Where reinstatement is ordered, the Commission can order that continuity of employment be maintained and lost pay be restored (ss.391(2),(3))
- Reinstatement requires consideration of a broad range of factors, including whether or not there has been a loss of trust and confidence: *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191-2

Remedies Available

- If reinstatement is inappropriate and compensation is appropriate in all of the circumstances of the case, the Commission can order compensation to a maximum of 26 weeks (s.392): *Blue Scope Steel Ltd v Sirijovski* [2014] FWCFB 2593
- As to the matters to be taken into account and the method for calculating compensation under s.392 of the FW Act – see Full Bench decision in *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge* (2013) 229 IR 6
- Also, see *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 and *Ellawala v Australian Postal Corporation*, Print S5109

Remedies Available

- The Commission must reduce the amount of any compensation if it is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person (s.392(3)): see *Bowden* at [59]; *Smith v Buick Holdings Pty Ltd* [2016] FWCFB 3683
- Range of other factors as outlined in s.392(2) also need to be taken into account i.e. evaluated and given due weight - in deciding on the amount of the compensation if any: see generally *Bowden*

The process: from conciliation to litigation

- Application has to be filed within 21 days of the dismissal or such further period as the Commission allows (s.394)
- Further time for filing may be granted if there are exceptional circumstances (see for instance *Cheval Properties Pty Ltd v Smithers* (2010)197 IR 403); *Wolfgang v Boeing Defense Australia* [2016] FWC 3807
- Conciliation conference by telephone as an administrative step
- The Commission may facilitate or conduct separate conciliations, including during the hearing process
- If not settled, parties are issued with directions, including relating to any jurisdictional objections

The process: from conciliation to litigation

- Private conference or public hearing (s.398)
- Commission has wide array of powers as outlined in ss.590 to 594
- Representation by legal representatives and paid agents by permission (s.596)
- Emphasis on the Commission exercising its powers in a manner that is fair and just; quick, informal and avoids unnecessary technicalities etc (s.577)
- Although rules of evidence do not apply (s.591), the Commission tends to follow the rules of evidence to achieve good and consistent procedure: *Thompson v John Holland Group Pty Ltd* [2012] FWA 10363
- Note requirements of procedural fairness/natural justice

The process: from conciliation to litigation

- Note costs consequences (ss.440A – 402)
- No costs jurisdiction, but costs can be awarded against parties or representatives in certain circumstances, including indemnity costs
- See for instance: *Rainshield Roofing Pty Ltd v Paerau and Dircks* [2014] FWC 3777; *Post v NTI Ltd* [2016] FWC 1059
- If the matter is settled, execute a deed containing the appropriate provisions and releases
- NB - a verbal settlement is binding: *Csontos v QT Hotels & Resorts Pty Ltd* [2016] FWC 3632

Appealing decisions of the Commission

- Appeal rights are addressed under s.400
- In summary, permission of the Commission is required for an appeal to be pursued
- The Commission must not grant permission unless it considers the appeal to be in the public interest
- The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment: *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266; see also *Toms* at [70]-[73]

Appealing decisions of the Commission

- As a further restriction, an appeal on a question of fact as a ground can only be pursued if the decision involved a significant error of fact (s.400(3))
- In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts. If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision: *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338

Appealing decisions of the Commission

- A decision under appeal is a discretionary one and can only be challenged if it is shown, for instance, that the discretion was not exercised correctly
- It is not open for the Full Bench to substitute its view on the matters that fell for determination before the Commissioner in the absence of error of an appealable nature in the first instance decision
- See generally: *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [32]; *Toms* at [83]ff

Areas of interest – trends and uncertainties

- Dismissal for safety related incidents
  - Golden rule breaches eg *Mr Mark Hanley v Stramit Corporation Pty Limited T/A Stramit Building Products - Rockhampton* [2016] FWC 1150
  - Note also observation of Full Bench in *BHP Coal Pty Ltd v Schmidt* [2016] FWCFB 1540 :

    > [8] The criteria for assessing fairness, although not exhaustive, are clearly intended by the legislature to guide the decision as to the overall finding of fairness of the dismissal and are essential to the notion of ensuring that there is "a fair go all round". This is particularly important in relation to safety issues because the employer has obligations to ensure the safety of its employees, and commitment and adherence to safety standards is an essential obligation of employees – especially in inherently dangerous workplaces. The notion of a fair go all round in relation to breaches of safety procedures needs to consider the employer's obligations and the need to enforce safety standards to ensure safe work practices are applied generally at the workplace.

Areas of interest – trends and uncertainties

- Genuine redundancies and opportunities for retraining
  - See *Vaughn Pettet and Ors v Mt Arthur Coal Pty Ltd* [2015] FWC 2851
  - Determination of whether or not there was a genuine redundancy involved comparing costs of retraining and redundancy

Areas of interest – trends and uncertainties

- Dismissal for breaches of drug and alcohol testing procedures
  - See *Owen Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033
  - [24] … a critical consideration in assessing whether a dismissal in these types of circumstances was unfair is the fact that there is currently no direct scientific test for impairment arising from the use of cannabis … Apart from reliance upon the employee's own explanation about the matter, which will probably not be verifiable, the employer will therefore not be in a position properly to assess whether the employee is impaired as a result of cannabis use and therefore represents a threat to safety. For that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable. Likewise, depending on all the circumstances, it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair.

Areas of interest – trends and uncertainties

- Avoiding disjunction between procedure and substance relating to dismissal
  - As noted by Full Bench in *BHP Coal Pty Ltd T/A BMA v Jason Schmidt* [2016] FWCFB 72:

> [26] It is well established that the obligation to take into account factors, as far as they are relevant, requires findings of fact and the decision maker to have regard to those facts as matters of significance in the overall decision-making process. Importantly, as the wording of the legislation makes clear, the ultimate question is whether the dismissal was harsh, unjust or unreasonable. As was said by McHugh and Gummow JJ in *Byrne and Frew v Australian Airlines Limited*:
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> > 130. That is not to say that the steps taken, or not taken, before termination may not in a given case be relevant to consideration of whether the state of affairs that was produced was harsh. unjust or unreasonable. Thus, it has been said that a decision which is the product of unfair procedures may be arbitrary, irrational or unreasonable. But the question under cl 11 (a) is whether, in all the circumstances, the termination of employment disobeyed the injunction that it not be harsh, unjust or unreasonable. That is not answered by imposing a disjunction between procedure and substance. It is important that matters not be decided simply by looking to the first issue before there is seen to be any need to enter upon the second."
>
> [27] The criteria in s.387 need to be considered in this context and applied in a consistent and common-sense manner …

Areas of interest – trends and uncertainties

- derogatory remarks about race and religion and sexually explicit comments
  - *Mr Jodie Goodall v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2016] FWC 4129
  - Profanities were commonly used in the mine and the mining industry, the Commissioner said that swearing over the radio was at the lower end of seriousness, as were his "crude, lewd and sexist comments".
  - While the driver's dismissal was not unjust or unreasonable, it was a harsh penalty due to mitigating factors

Areas of interest – trends and uncertainties

- The ongoing impact of social media
  - *Vosper v Solibrooke Pty Ltd* [2016] FWC 1168 (1 March 2016)
  - Nothing derogatory in the statements made on Facebook and no confidential business information was shared.
  - "An employee has a right to complain about their employment rights and their treatment at work”
  - "We do not live in a society where employees are prohibited from discussing their employment status or their treatment at work with others"

Areas of interest – trends and uncertainties

- The ongoing impact of social media
  - Compare with *Mary-Jane Anders v The Hutchins School* [2016] FWC 241 (15 January 2016)
  - Commission refused to reinstate a dismissed teacher, because her school lost trust and confidence in her after she posted disparaging comments on Facebook about an unresolved industrial dispute
  - Instead, the employee was awarded compensation

Unfair Dismissal in Depth

- See FWC Unfair Dismissals Benchbook for more information: http://benchbooks.fwc.gov.au/unfair/assets/File/UDBenchbook.pdf
- Questions?

Important Cases (not elsewhere mentioned)

- Dismissal at the initiative of the employer
  - *Mahazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 203-208
  - *Earney v Australian Australian Property Investment Strategic Pty Ltd* [2010] VSC 621 at [76]-[77]
  - *Bruce v Fingal Glen Pty Ltd* [2013] FWCFB 5279 at [13]-[19]
- Genuine redundancy
  - *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308
  - *Dibb v Commissioner of Taxation* (2004) 136 FCR 388
  - *Johnston v Blue Circle Southern Cement Pty Ltd* (2010) 202 IR 121
  - *Ulan Coal Mines v Honeysett* (2010) 199 IR 363 at [29]