Unfair dismissals under the Workplace Relations Act 1996

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Under the Workplace Relations Act relief available to workers who have been unfairly dismissed has been further restricted.

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The *Workplace Relations Act 1996* introduced major changes to the federal law relating to the protection of workers against unfair dismissal from their employment. Federal unfair dismissal provisions had been in operation only since March 1994, when Parliament under the then Labor Government amended the *Industrial Relations Act 1988* (IR Act) by inserting a new Part VIA relating to termination of employment.[1] The 1994 provisions contained the most comprehensive statutory protections against unfair dismissal ever seen in Australia.

Since March 1994 there has been almost constant pressure from business groups to wind back those protections. The debate has focused on alleged costs to business and the alleged effect of the legislation in discouraging employment. Any restriction on the rights of employers in dealing with their employees is characterised as anti-business and as a discouragement to employment.

What the debate has not acknowledged is that there is arguably an increased need for statutory protection against unfair dismissal in a climate where job security is a thing of the past and where even the largest employers such as BHP and Telstra are shedding thousands of jobs in pursuit of increased competitiveness. In addition the shift towards increasing casual and part-time work in recent times has left large numbers of workers in an extremely vulnerable position in dealing with their employer. This vulnerability is of course heightened by an unemployment rate which persistently hovers around the 8–10% mark, with the unofficial rate significantly higher.

Pressure from business groups led to the modification of the 1994 provisions to narrow both the range of workers protected and the scope of relief available.[2] Those reforms did not of course silence critics of the legislation within the business sector and within the Liberal–National Party coalition in opposition.

The reforms brought about by the Coalition Government through the *Workplace Relations Act 1996* (WR Act) are supposedly designed to ensure that a *'fair go all round is accorded to both employer and employee concerned'*. This much is expressly stated in s.170CA(2) of the WR Act. However, almost without exception the changes brought about by the Coalition Government shift the balance against the employee in both the substantive and procedural law which applies.

In essence, Part VIA Division 3 of the WR Act now provides that an employee may apply for relief in respect of the termination of their employment *either* on the ground that the termination was harsh, unjust or unreasonable (sub-division B) *or* on grounds that the termination was for a prohibited reason or reasons (Sub-Division C). The separation of these two 'causes of action' — unfair from unlawful dismissal — is based in part on the changed constitutional basis for the provisions. It is reflected in both the procedure to be followed and the relief which may be obtained.

Constitutional basis

In order to appreciate the complexity of the current provisions it is necessary to understand something of the constitutional basis for the legislation.

The unfair dismissal provisions introduced in 1994 relied on the external affairs power for their constitutional validity. The relevant international instruments were the Termination of Employment Convention (ILO Convention 158) and the Termination of Employment Recommendation (ILO Recommendation 166). Both Instruments were reproduced as schedules to the Act. Article 4 of the Convention, which states that the employment of a worker should not be terminated unless there is a valid reason for such termination, was the foundation for the legislation. Article 5 provides that certain matters (including union membership, race, sex, marital status, family responsibilities, pregnancy and others) do not constitute valid reasons for termination of employment. The general prohibition on termination without a valid reason was reproduced in s.170DE(1) of the IR Act 1988. The specific prohibitions were reflected in s.170DF.

This reliance on the external affairs power gave rise to difficulties when the High Court found (on the basis of dubious reasoning) that the external affairs power did not support s.170DE(2) *(Victoria v The Commonwealth* (1996) 138 ALR 129). Section 170DE(2) had incorporated terminology commonly used in State unfair dismissal legislation and some industrial awards. It stated in substance that a dismissal was not for valid reason if in all the circumstances it was harsh, unjust or unreasonable. In practice, the loss of s.170DE(2) did not severely affect the availability of remedies because the Industrial Relations Court interpreted the term 'valid reason' extremely broadly to the effect that a dismissal could not be for valid reason if it was, in the circumstances, harsh, unjust or unreasonable.[3] (This line of reasoning has, however, been sharply curtailed by a more conservative full bench of the Federal Court — see below.)

The WR Act relies on both the corporations power and the external affairs power. The external affairs power is relied on in relation to the 'prohibited grounds' powers. Terminations on prohibited grounds are described in Subdivision C as 'unlawful' terminations. These grounds are now specified in s.170CK(2) of the Act and are said to assist in giving effect to the Convention Concerning Discrimination in Respect of Employment and Occupation and the Family Responsibilities Convention. The Termination of Employment Convention and Recommendation have been removed as schedules to the legislation. The effect of international instruments in relation to the termination of employment has been significantly reduced.

In terminations where it is alleged that the dismissal is harsh, unjust or unreasonable, the corporations power is relied on. It remains to be seen whether this reliance will be found to be constitutionally valid.

In relation to the prohibited grounds found in s.170CK(2) an unlawful termination application must be made and determined in the Federal Court. Whether a dismissal is harsh unjust or unreasonable is determined by way of an arbitration in the Australian Industrial Relations Commission (AIRC). For reasons discussed below, the majority of applications tend to be determined on issues of unfairness (and consequently in the AIRC) rather than issues relating to termination on prohibited grounds.

Exclusions from operation of Act

There are a number of workers excluded from the provisions of the Act by Regulation 30B. These exclusions existed prior to the WR Act but have been expanded. They apply to applicants in relation to both unlawful termination and unfair dismissal applications. Employees employed under a fixed-term contract, probationary employees, most casual employees and trainees are excluded. These exclusions are in themselves extremely significant particularly because of the increasing use by employers of workers on a fixed-term or casual basis.

The unfair dismissal provisions are further restricted in that they only apply to workers who, prior to dismissal, were Commonwealth public sector employees, employees in the State of Victoria or in a Territory, or employees covered by a federal award who are also employed by a constitutional corporation. Significant groups of workers, particularly those who are not covered by a federal award or not employed by a constitutional corporation, are excluded completely. Many other employees face the prospect of complex jurisdictional arguments about whether or not they are covered by a federal award.

The only area where the scope of the federal provisions has been increased is in Victoria. The Victorian Government has referred its powers in relation to industrial relations, including unlawful terminations, to the Federal Government so that the WR Act has much greater application in relation to private sector employees in Victoria than in other States.

Section 170CC(1) permits the making of regulations excluding still more workers including where 'the operation of the provisions causes or would cause substantial problems because of (i) their particular conditions of employment; or (ii) the size or nature of the undertaking'. The Coalition Government has tried to utilise this power to exclude large numbers of workers who are employed by small businesses but has so far been unsuccessful in getting the amendments through the Senate.

Procedural complexity

The unfair dismissal jurisdiction is one where employees are frequently unrepresented, or are represented by representatives such as trade union officers who may not have legal training.[4] The reasons for this are obvious — the amounts of money involved are relatively small — even under the former legislation the maximum amount of compensation awarded was equivalent to six months remuneration, and frequently significantly smaller amounts were awarded to successful applicants. It was not unheard of for applicants to win their cases and be awarded compensation, only to be out of pocket because their legal fees exceeded the amount awarded.

Instead of simplifying the legislation to make it more user friendly to unrepresented employees (and employers) the Coalition Government has done the opposite. The procedural provisions, particularly s.170CFA, challenge the comprehension powers of the most experienced legal practitioner. This is in part a reflection of the fact that the Liberals have introduced the novel concept of having two legally and procedurally separate streams of unfair dismissal.

When the application is lodged by the applicant with the AIRC then unless the employer wishes to raise a jurisdictional objection the matter is referred to a Commissioner for a conciliation conference. Where the matter is unable to be resolved, the Commissioner issues a certificate to this effect,

also indicating her/his assessment of the merits of the application. The mind boggles as to how this can be done with any accuracy on the basis of a normally short conference with (frequently) unrepresented parties.[5] This assessment may form the basis for a costs application against the applicant at a later stage (see below).

Once the certificate is issued, the Applicant has seven days to make an election either to proceed in the AIRC, to proceed in the Federal Court, or not to proceed. Most unfairly, the applicant cannot pursue simultaneously an argument that they were dismissed for a prohibited reason and that the dismissal was harsh, unjust or unreasonable. Most dismissals for a prohibited reason would be harsh, unjust or unreasonable by definition. Many are also harsh, unjust or unreasonable for reasons other than prohibited reasons. Less commonly, dismissals which are unlawful because they are for reasons including a prohibited reason may not be harsh, unjust or unreasonable in all the circumstances.

A Court proceeding has advantages in terms of remedy because many of the restrictions placed by the WR Act (s.170CH) on the awarding by the AIRC of compensation (see below) do not apply in the court. In electing for a court proceeding, however, the applicant must gamble on succeeding on a much narrower range of grounds than is available in relation to an unfair termination and risk being left, at the end of the day, with no remedy in relation to a dismissal which is not for a prohibited reason but which is nevertheless harsh, unjust or unreasonable. In addition a court proceeding inevitably involves a higher level of formality than an arbitration in the Commission which may be intimidating to an unrepresented employee.

If applicants fail to make a decision (with or without legal advice) on these complex issues and to submit the appropriate form within seven days, the application is taken to be discontinued (s.170CFA(7)) although an extension of time may be granted in certain circumstances.

If applicants wish to allege that the termination was for a prohibited reason, they must make a new application to the Federal Court within 14 days of the lodgement of the election.

Costs

The costs provisions further discourage an applicant at every stage of the process. An initial filing fee of $50.00 is now payable (not a small amount when one is unemployed). The grounds on which costs may be awarded against an applicant in the AIRC under the WR Act have been substantially expanded by virtue of s.170CJ so as to include unreasonable failure to agree to terms of settlement or unreasonable failure to discontinue the matter. Already an applicant has had costs awarded against him in circumstances where he discontinued an application shortly before the hearing because he could not afford legal representation *(Four Trade Only Business Forms v Danman,* AIRC Print P4296).

Remedy

The most recent Labor Government amendments to the unfair dismissal provisions had introduced an element of uncertainty for applicants in that they enabled the Industrial Relations Court or the Commission to award compensation (if reinstatement was impracticable) *'if the Court considers it appropriate in all the circumstances of the case'* (ss.170EE(2); 170EC(4)). It was open to the Court/Commission to find the dismissal to be unlawful but to decline to grant any remedy.

The WR Act continues this trend of increasing uncertainty in relation to remedy. The WR Act contains separate provisions in relation to remedies for unfair dismissals and unlawful (prohibited ground) dismissals.

In relation to unfair dismissals, s.170CH provides that the Commission *must not* grant a remedy unless, having regard to the circumstances of the case, including a number of prescribed factors, it considers that the remedy ordered is appropriate. Such unusual wording is illustrative of the shift in the balance of the legislation in favour of the employer. Even more illustrative of the shift is s.170CH(2)(a), which requires the Commission to take account of *'the effect of the order on the viability of the employer's undertaking, establishment or service'*. This subsection opens up a potentially huge field for inquiry at hearing. That inquiry may have no connection to the facts giving rise to the dismissal itself. It puts employees in a quite unique position of disadvantage in attempting to obtain a remedy. They may have to meet arguments about the employer's viability when they lack the information and the skills which are necessary to do so. It remains to be seen how this provision will be applied in practice. It is clear, however, that applicants now enter into an arbitration in the Commission knowing that even if they prove that the dismissal was unfair no remedy may be awarded.

The uncertainty extends to the type of remedy which may be expected by a successful claimant. The former legislation provided for reinstatement as its primary remedy, normally with ancillary orders for back pay. Reinstatement is in many circumstances very important to workers, particularly because of the arbitrary limits on quantum of compensation available both under the IR Act and the WR Act. The common question asked by prospective employers is *'why did you leave your last job?'* Workers, forced to disclose that they were in fact dismissed, do not improve their prospects greatly by adding *'but I successfully sued my boss for unfair dismissal and won compensation'*.

Under the IR Act, only where reinstatement was impracticable would compensation be payable (s.170EE(1) and (2)). The test of 'impracticability' in relation to reinstatement was applied reasonably strictly *(Perkins v Grace Worldwide* 72 IR 186). It ensured that in a majority of cases where applicants succeeded they would get their jobs back together with back pay. Section 170CH(3) of the WR Act, in contrast, requires reinstatement only where the Commission considers it to be *'appropriate'*. It remains to be seen just how the word *'appropriate'* will be interpreted in the AIRC but clearly there is now much greater scope for employers to avoid giving unfairly dismissed workers their jobs back.

Similar problems arise in relation to the quantum of any compensation awarded if reinstatement is held to be inappropriate. The maximum amount of compensation available under the IR Act was the amount of remuneration which would have been received by the employee in the six months following the termination had the employment not been terminated. This of course would not come even close to meeting the actual loss of the employee in many cases, as was acknowledged on occasion by the Court *(May v Lilyvale Hotel* (1995) 68 IR 112). In general, the approach adopted to the compensation provisions under the *IR Act* was to assess the total loss suffered by the applicant and then to apply the six month 'cap' *(Davis v Portseal* 72 IR 414). However, even under the IR Act more than half the orders for compensation made by the Court were for amounts less than $6000.[6]

The maximum amount of compensation payable has been further reduced under the WR Act. It is now by virtue of s.170CH(8) limited to the total amount of remuneration received by the employee from that employer during the six months immediately preceding the application. Therefore, if the employee is employed for less than six months the amount of compensation is reduced irrespective of the quantum of loss or the magnitude of unfairness surrounding the dismissal.

In addition, the Commission when determining the amount of compensation to be paid must by virtue of s.170CH(7) take into account a range of factors including the effect of the order of the employer's undertaking, establishment or service. Once again the employee may be required to embark on factual and legal argument about what is effectively the employer's capacity to pay.

The matters referred to in s.170CH(7) do not apply in relation to unlawful termination applications under subdivision C.

Transfer of powers of industrial relations court

The WR Act in effect abolished the Industrial Relations Court. The Industrial Relations Court's powers are returned to the Federal Court. However, in contrast to the situation prior to the 1994, matters under the WR Act, including unlawful terminations, proceed in the General Division of the Federal Court rather than in a specialised industrial division. This change is likely to impede the progressive development of the law protecting workers against unfair dismissal. The Industrial Relations Court as a specialised jurisdiction developed expertise in the industrial environment in which the laws operated. In the three years of the court's life it was possible to discern a broad trend of advancement and expansion (albeit slowly and cautiously) in the protection of the employment rights of workers particularly in relation to job security and termination of employment.[7]

Recent decisions of the Federal Court would suggest that that progressive development may have gone into reverse. Two Full Bench decisions are indicative of this trend. In *Cosco Holdings Pty Ltd v Thui Thi Van* Do (unreported, 1353 FCA, 4 December 1997, Northrop, Lingren and Lehane JJ) a Full Bench of the Federal Court considered the broad meaning which had been attributed to the term 'valid reason' as it appears in the *IR Act* since *Victoria v The Commonwealth*. In *Cosco* an employer manufacturing toilet rolls arbitrarily selected the production line employees it wished to make redundant. Applying established principles the trial judge held that the arbitrary nature of the selection process and the employer's failure to consider alternatives (such as calling for voluntary redundancies) rendered the dismissals unlawful. The *Cosco* Full Bench in overturning this decision took a strict (and in practice highly pro-employer) view of what constitutes a valid reason for the termination of an employee's employment. It reverses the line of authorities referred to above which said effectively that a reason for dismissal could not be valid if it was harsh and unfair.

Cosco deals with the former legislation. However the term 'valid reason' is retained in s.170CG(3)(a) of the WR Act 1996. Whether there is a valid reason for the termination is now one of the factors which the Commission must consider in determining whether a dismissal is harsh, unjust or unreasonable.

Another worrying decision concerned the application of the *Disability Discrimination Act 1992* (Cth). In *Commonwealth v The Human Rights and Equal Opportunity Commission* (unreported, FCA, 13 January 1998, Burchett, Drummond and Mansfield JJ) a Full Bench overturned the decisions of the Human Rights and Equal Opportunity Commission and the judge at first instance to find that the dismissal of an army recruit found to be infected with the HIV virus did not constitute a breach of the *Disability Discrimination Act*. In the course of a remarkably conservative decision the Court cautions against the dangers of too generously applying the rule requiring remedial legislation to be beneficially construed.

It remains to be seen to what extent the loss of the specialist industrial relations court will hinder the development of a progressive body of employment/industrial law. The portents are not good.

Conclusion

Under the WR Act the already limited relief available to workers who are unfairly dismissed has been further restricted. Many workers have been excluded altogether from the operation of the WR Act. But for the Government's inability to force legislation through the senate, workers employed in small businesses would also have been excluded altogether from the limited protections which are still available. For those workers who do still have access to the federal unfair dismissal provisions, the procedural and substantive complexities and the meagre relief ultimately available, together with the threat of costs penalties, mean that taking action under the WR Act is in many cases simply not worth the effort. These factors have been reflected in the very drastic reduction in the number of applications for relief under the federal legislation since the WR Act came into effect. In the period from 31 December 1996 to 3 October 1997, 5222 federal unfair dismissal applications were made, compared with 11,196 applications during the same period in 1996. This represents a 51% decline.[8] No doubt this was a primary objective of the legislation.

References

1. *Industrial Relations Reform Act 1993.*
2. The amending statutes include the *Industrial Relations Amendment Act (No. 2) 1994* (commencing 30 June 1994), the *Industrial Relations and other Legislation Amendment Act 1995* (commencing 15 January 1996).
3. See for example *Nettleford v Kim Smoker Ltd* 69 IR 370; *Kerr v Jaroma Ltd* 70 IR 469; *Thomas v Ralph Lynch t/a Bellingen Grocery* 71 IR 307.
4. In the 1996-97 financial year fewer than 50% of applicants were represented by legal practitioners. About 25% were represented by a union, and about 25% represented themselves. See IRCA Annual Report 1996-97, pp.36-7.
5. A Full Bench of the Commission has found that it is not mandatory for the Commissioner to express a view as to the merits: AIRC Print P1109.
6. IRCA Annual Report 1996-97, p.31.
7. See for example *Burazin v Blacktown City Council,* unreported, IRCA, 13 December 1996, where a full Bench found that compensation could be awarded in relation to non-economic loss.
8. Department of Workplace Relations, *Workplace Relations Act Monitor*; Developments to September 1997. Overall State and Federal applications have declined by about 21% in January–August 1997 compared with the same period in 1996.