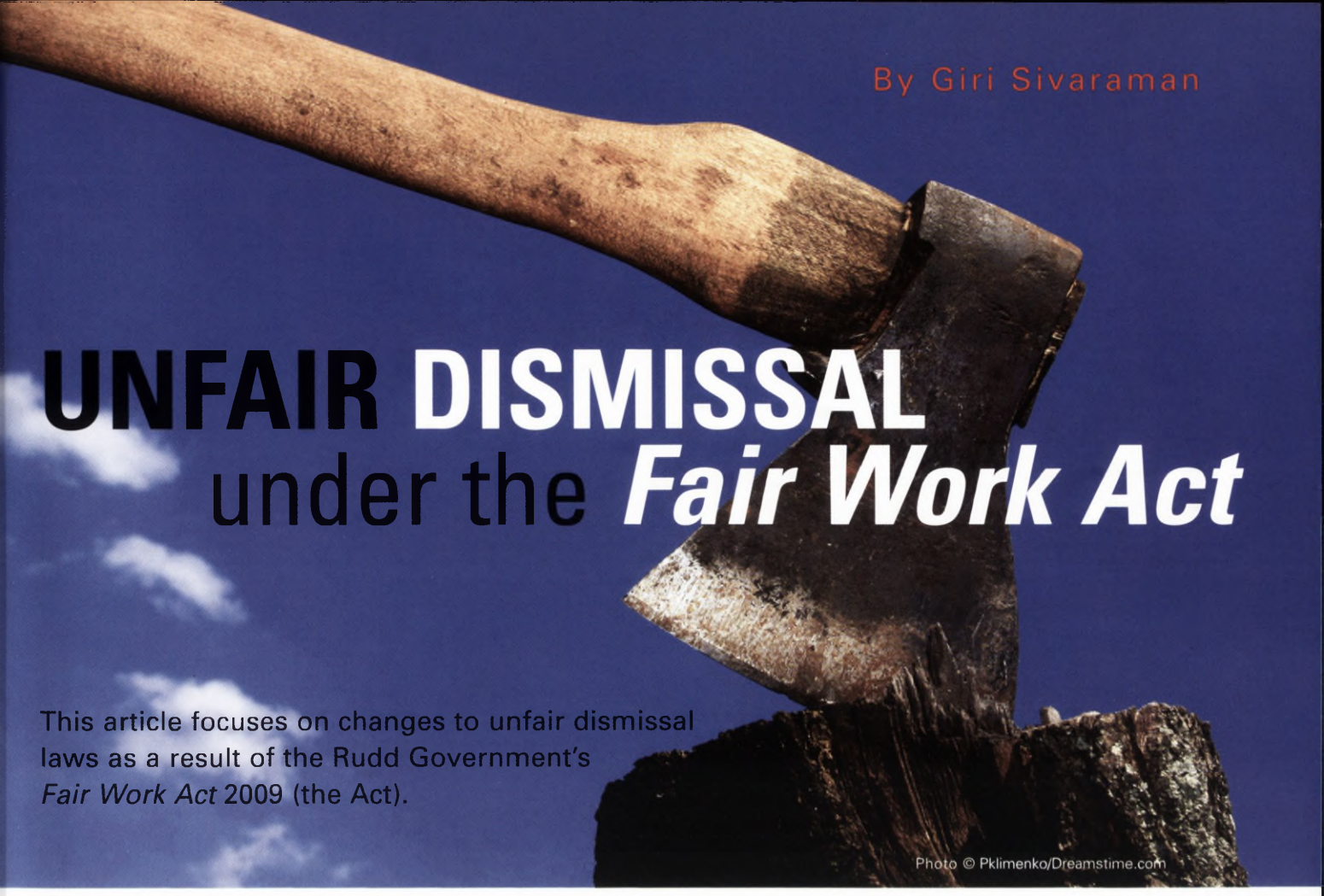

By Giri Sivaraman

UNFAIR DISMISSAL under the *Fair Work Act*

This article focuses on changes to unfair dismissal laws as a result of the Rudd Government's *Fair Work Act* 2009 (the Act).

It is sometimes not realised that unfair dismissal laws were a significant improvement to the security of employment provided in the common law of employment.[1] Common law contracts of employment, subject to express terms to the contrary, can be terminated with notice for no reason at all. Secondly, the common law's refusal to order specific performance of contracts for personal services prevents reinstatement of a dismissed employee.[2] Unfair dismissal laws, long agitated for by trade unions, created statutory rights preventing termination of employment without just cause and allowing workers to seek reinstatement.[3]

However, the Howard government's WorkChoices amendments to the *Workplace Relations Act* 1996 (the WRA) dramatically reduced the number of Australian workers who could access unfair dismissal laws.[4]

Under WorkChoices, employees of constitutional corporations (who comprise about 85 per cent of Australia's workforce) were unable to bring an application alleging they were unfairly dismissed unless:

- their employer had more than 100 employees;
- they were not dismissed within a six-month qualifying period; and
- they were not dismissed for 'genuine operational reasons'.

Unfair dismissal rights have been expanded in the Act. Far fewer employees are excluded from making applications. The new industrial umpire, Fair Work Australia (FWA), will have responsibility for dealing with unfair dismissal claims.

WHO CAN BRING A CLAIM?

Employees whose employment is:

- covered by a modern award; or
- subject to an enterprise agreement; or
- employees who have a rate of pay less than an amount set out in the regulations

are able to bring an unfair dismissal claim (s382).

EXCLUSIONS

Even though the number of employees who can make an application has been greatly increased, some employees are still excluded from bringing an unfair dismissal claim.

Those excluded fall mainly into the following categories.

Minimum Employment Period Exclusion

An employee who has been employed for under six months has not passed the minimum employment period and is excluded from making an application. If the employer is a small business employer, the minimum period is one year (s383).[5]

Casual employees' service does not count towards the six-month period, unless they were employed on a regular and systematic basis and had a reasonable expectation of continuing employment on a regular and systematic basis.

In circumstances where an employee transfers from an old employer to a new employer, if the new employer writes to the employee stating that the period of service with the old employer will not be recognised, then the period of service >>

with the old employer does not count towards this six-month period. This rule will not apply where the employers are associated entities.

Small Business Fair Dismissal Code

Employees whose dismissals are consistent with the Small Business Fair Dismissal Code (the Code) cannot bring an unfair dismissal claim (s385(c)).[6] The dismissal is consistent with the Code if the following occurs. Firstly, immediately before the dismissal or at the time of notice of dismissal, whichever happens first, the person's employer was a small business employer. Secondly, the employer complied with the Code in relation to the dismissal. The Code is a checklist. It is to be kept in case of a dismissal claim but it is not a requirement of the Act that the checklist be physically completed. The checklist initially requires the employer to identify:

a) the number of employees;
b) whether the employee being dismissed has been employed as a permanent or regular casual for more than 12 months; and
c) whether the employee was being dismissed for redundancy or serious misconduct.

If the employee has been employed for 12 months or more, is not being made redundant or being dismissed for serious misconduct, then the employer is required to do the following:

a) warn the employee;
b) provide the employee with a reasonable amount of time to improve their performance or conduct;
c) give the employee a reasonable chance to rectify the problem; and
d) advise the employee of the reason for dismissal and give the employee an opportunity to respond.

It is worth noting that the principles that generally determine whether a dismissal is unfair are reflected in this Code.

Redundancy

An employee who is genuinely made redundant cannot bring an unfair dismissal claim. The provisions defining genuine redundancy are more restrictive than the *'operational requirements'* exclusion that existed within the WRA. Genuine redundancy is one where the employee's job is no longer required to be performed by anyone because of changes to the operational requirements of the employer's enterprise. It is not a genuine redundancy if it would have been reasonable in all the circumstances for the person to be re-deployed within the employer's enterprise or the enterprise of an associated entity of the employer (s389(2)). Importantly, it is also not a genuine redundancy if the employer has not followed relevant consultation requirements within a modern award or enterprise agreement (s389(1)). This is an improvement on the *'operational requirements'* definition in the WRA.

Definition of dismissal

The definition of dismissal has been expanded to include the instance where a person has resigned but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer (s386(1)(b)). Though this was not explicitly defined in the WRA, it reflects principles set down by the Australian Industrial Relations Commission (AIRC) in a number of decisions.[7]

Similar to the WRA, a person is not considered to be dismissed if they were employed under a contract for a specified period of time, specified task or for the duration of a specified season, and the employment was terminated at the end of the period, task or season (s386(2)(a)).

However, the Act provides that if a person was on a contract for a specified time, task or season and the substantial purpose of the contract was to avoid obligations to not unfairly dismiss the employee, then the employee is not precluded from making an unfair dismissal application (s386(3)).

An employee is not considered to be dismissed if they were on a training arrangement and the employment terminated at the end of the training arrangement (s386(2)(b)).

Similar to the WRA, a person is not dismissed if they have been demoted, unless the demotion involves a significant reduction in remuneration or duties (s386(2)(c)).

What makes a dismissal unfair?

The criteria for considering whether the termination of employment was harsh, unjust or unreasonable has stayed the same (s387). These include:

- Is there a valid reason related to capacity or conduct?
- Was the person notified of that reason?
- Were they given an opportunity to respond?
- Did the employer unreasonably refuse a support person to be present to assist at discussions?
- Were warnings of unsatisfactory performance given?
- Impact of size of employer's business on procedures to be followed at termination.
- Absence of the specialised human resources staff that would be likely to impact on the procedures followed in termination.
- Any other relevant matters.

The orders available to FWA are the same as the current orders available to the AIRC; that is, reinstatement and compensation capped at 26 weeks' pay.[8] Similar to the WRA, the Act explicitly states that FWA cannot, as part of any compensation, include a component for shock, distress or humiliation, or other analogous damages caused to the person by the manner of the dismissal (s395(4).

PROCEDURAL MATTERS

It is important to note that the time for an application has been truncated to 14 days (s394(2)). However, applications can now be made by telephone.[9] The 14-day time limit may be extended by FWA if it's satisfied that there are exceptional circumstances, taking into account (s394(3)):

a) The reason for delay;
b) Whether the person first became aware of the dismissal after it had taken effect;
c) Any action taken by the person to dispute the dismissal;
d) Prejudice to the employer, including prejudice caused by the delay;

e) The merits of the application; and
f) Fairness as between the person and other persons in a similar position.

Prior to dealing with the merits of the application, FWA is required to decide whether the application was made in time (s396(a)), whether the person has jurisdiction to make the application (s396(b)), whether the dismissal is consistent with the Code (s396(d)) and whether it was a case of genuine redundancy (s396(d)).

FWA must conduct a conference or hold a hearing in relation to the application if the matter involves disputed facts (s397).

FWA must not hold a hearing in a matter unless it considers it appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter. If a hearing is considered appropriate it may be held at any time, including prior to conducting a conference in relation to the matter (s399).

FWA will not grant permission to appeal unless it considers it in the public interest to do so (s400). It will not grant a right to appeal on a question of fact, unless the decision involved a significant error of fact.

Costs provisions in the unfair dismissal part of the Act relate only to costs being ordered against lawyers and paid agents who have encouraged a person to start a matter without merit, or caused a party to incur costs due to an unreasonable act or omission. Other than that, the costs provisions appear to be the general costs provisions that are set out in s611 of the Act. These are not as extensive as the costs provisions that were in s658 of the WRA. Costs in the Act can only be awarded against an applicant or a respondent who has commenced an application or responded to the application vexatiously or without reasonable cause, or where it should have been apparent to the applicant or the respondent that the application or response had no reasonable prospects of success.

SUMMARY OF DIFFERENCES AND SIMILARITIES BETWEEN THE ACT AND THE WRA

What is the same?

The criteria for determining extension of time applications, and whether a termination of employment is unfair have remained the same. The remedies available to FWA are the same as those that were available to the AIRC, where it finds that the termination of employment was unfair.[10]

What is different?

There is no longer the 100 employee cap that excluded many employees from making an unfair dismissal application. Casuals can bring claims now, as long as their employment has been on a regular and systematic basis for more than six months as opposed to the 12-month requirement in the WRA (as long as they weren't employed by a small business). Persons made redundant are excluded only if there was no other position available to which they could have been re-deployed, and their employer followed consultation requirements.

However, there is a new exclusion to note. Small businesses that follow the Code when terminating someone's employment will be exempt from the Act.

One important difference between the procedure of the FWA and that of the AIRC is that, under the Act, the time limit to make an application has been reduced to 14 days. Also, the FWA can conduct a hearing at any point, as opposed to conducting it after conciliation. It is yet to be seen whether FWA conducts matters in a similar fashion to its predecessor, or whether it embarks on a new path. ■

Notes: **1** R Owens & J Riley, *The Law of Work*, Oxford University Press, 2007 at pp414-15. **2** *Ibid.* **3** *Ibid.* **4** *Ibid.* **5** A small business employer is defined as an employer that employs fewer than 15 full-time employees at the relevant time (s23). On 1 January 2011, this becomes 15 employees based on a simple headcount. At the time of an employee's employment being terminated, that employee is to be counted when determining the number of employees of the employer. **6** See note above for definition of 'small business'. **7** *Steven Pollock and Ink-A-Print* (U no 32950 of 1997) and *BJ Meaney and Master Builders Construction and Housing Association of ACT* (U No. 90235 of 1997). **8** Sections 390-3 of the Act. **9** Interim Fair Work Australia Rules, Rule 14. **10** See note 1.

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