

Federal Unfair Dismissal Laws and Termination of Employment

Under the current provisions of the federal *Workplace Relations Act* and *Industrial Relations Act*, employee dismissals must not be based on prohibited reasons such as an employee's race, sex, age, disability, absence from work due to illness and union membership. If it was a case of misconduct, it must be of a serious nature. The employer in dismissing the employee must not be harsh, unjust or unreasonable.

However, the current unfair dismissal laws apply only in relation to the dismissal of an employee of a constitutional corporation, a Commonwealth public sector employee, an employee in Victoria or a Territory, or a waterside, maritime or flight crew worker employed in interstate or overseas trade or commerce. Employees not falling into these categories can only access **State Unfair Dismissal Laws (treated as a separate article / commentary)**.

The following provisions will apply to all employees nationally:

- requirement for minimum notice or pay in lieu, except in cases of serious misconduct¹;
- prohibition against dismissal on discriminatory grounds; and
- the requirement to notify the Commonwealth Employment Service of the termination of 15 or more employees on redundancy grounds.

Excluded classes of employees include: contracts of employment for a fixed term or specified task, a probationary period, a casual employee engaged for a short period, a trainee or, a non-Award High income earner (exceeding \$64,000 a year).

Recent amendments to the 'unfair dismissal' legislation (under the Howard Government) are based on the principle of a ***fair go all around***, striking a balance between employers and employees. The *Australian Industrial Relations Commission* handles cases by **conciliation** and if the matter is not resolved then it is referred to **arbitration**. In deciding whether a dismissal is harsh, unjust or unreasonable it will be required to take into account all relevant factors, including:

- whether there was a **valid reason** for the dismissal;
- whether the **reason was given** to the applicant;
- whether the applicant was given an **opportunity to respond** to any reason related to their capacity or conduct; and
- whether there was any **warning** as to unsatisfactory performance.

Reinstatement is the preferred remedy for those who succeed in an unfair dismissal claim, although the legislation will provide for **compensation**. However, **compensation** cannot exceed the amount received by the employee in the **six months** immediately preceding the termination, or **\$32,000** - whichever is lower. The recent amendments to the legislation empower the court to consider a range of factors in deciding on a remedy including, the viability of the employer's business, the employee's length of service, likely remuneration and the employee's efforts to mitigate any loss.

¹ Under the regulations, serious misconduct includes:

- wilful or deliberate behaviour inconsistent with the continuation of the contract of employment;
- conduct which causes an imminent and serious risk to the health or safety of any person, or the reputation, viability or profitability of the employer's business; and
- theft, fraud, assault, intoxication and refusal to carry out a lawful and reasonable instruction which was consistent with the employee's contract - unless the employee can show that, in the circumstances, the conduct did not make employment unreasonable.

The recent amendments to the legislation also change the structure of legal costs. Restrictions on **awarding costs** have been relaxed to discourage frivolous and vexatious claims (which often meant substantial costs for the employer).

Comasters can advise employers, and employees, of their respective rights and on the avoidance of legal pitfalls.

© Comasters 2001.

Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace

743-755 George Street

Sydney NSW 2000, Australia

Phone: (612) 9288 0300 Fax: (612) 9288 0399

Email: comasters@comasters.com.au

Website: www.comasters.com.au