



Employment & Industrial Law Update

Fair Work Australia Special Edition

Significant portions of the new federal Fair Work Australia system commence on 1 July 2009, so we devote the majority of this issue of the Update to the changes that are imminent; including unfair dismissal, changes to redundancies, and the new rules surrounding collective agreements.

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Changes to unfair dismissal rules

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Special points of interest:

- New unfair dismissal rules
- Caution with probationary periods
- NSW state wage case 2009
- The AIRC addresses a "fake" redundancy

As outlined in the December 2008 issue of the Update, new unfair dismissal rules come into place on 1 July 2009.

Perhaps most striking for small businesses is the removal of the exemption that prevented employees from pursuing unfair dismissal claims against employers with less than 100 employees.

The new system gives all employees the right to claim unfair dismissal provided they have served a qualifying period with the employer. That period is 12 months for employees whose employer has less than 15 employees, or 6 months otherwise.

The new system will also

alter the existing "genuine operational reason" defence.

While it will still be a defence to an unfair dismissal claim that the employee was subject to a 'genuine redundancy', that term has a new meaning (see the article on page 2).

One change that is perhaps of some relief to employers is the reduction of the time limit for commencing unfair dismissal claims. Under the existing system, an employee has 21 days after termination to bring their claim. Under the new system, they will have only 14 days.

While it is possible to seek an extension of time, it has historically been difficult to convince the AIRC to grant

an extension except in special circumstances.

Employers in small business (those with less than 15 employees) should make themselves familiar with the Small Business Fair Dismissal Code (detailed in our September 2008 issue), as the new system states that compliance with the Code will defeat an employee's claim for unfair dismissal.

Reinstatement as a remedy seems to have a more prominent role in the new system, but it remains to be seen whether Fair Work Australia will alter the existing practice of only ordering reinstatement in special cases.

Probationary period must be notified before employment begins

In the decision of *Mann v Allstar Electrical Services*, the AIRC has confirmed that in order for a probationary period to be valid, it must be notified to an employee before the employee commences employment.

Mann was offered employment by Allstar on a Friday night and first worked for them the following day.

He was given the relevant paperwork to fill out on the Monday. The paperwork referred to a probationary

period that had not previously been mentioned.

The Commission held that the probationary period did not apply, as the employer could not unilaterally change the conditions of employment that has already commenced.

New rules for redundancies

Redundancy entitlements

Under new Fair Work Act provisions which are expected to commence in January 2010, all national system employers that are not "small business employers" will have redundancy obligations to employees with more than 1 years' service if their employment is terminated "at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour".

Redundancy payments will also arise where a worker's employment is terminated because of the insolvency or bankruptcy of their employer.

As with unfair dismissal, a small business employer is any national system employer with less than 15 employees.

Redundancy payments will vary depending on length of service, but range from 4 weeks to 16 weeks.

An employer may, however, apply to Fair Work Australia to vary or reduce redundancy entitlements where the employer has arranged

'acceptable employment' for the employee or where the employer cannot pay the amount owing.

Redundancy and Unfair Dismissal

Of perhaps more imminent interest to national system employers is the role of redundancy in unfair dismissal claims. Those changes commence on 1 July 2009.

Under the new system, a dismissal for reasons of redundancy is only protected where it is a "genuine redundancy".

A redundancy will only be "genuine" if the employer:

- no longer wishes the person's job to be done by anyone because of changes in the operational requirements of the employer's enterprise;
- has complied with any obligation in an applicable modern award or enterprise agreement; and
- could not reasonably have re-deployed the worker within the employer's enterprise or

the enterprise of an associated entity.

The second and third requirements are significant changes to the existing system.

Under the existing system, an employer can rely on a redundancy to defeat an unfair dismissal claim, even where that redundancy was not carried out in accordance with the provisions of an award. Under the new system, employers must be sure to comply with the procedural requirements or the redundancy will offer no protection.

The new system also imposes greater obligations on the employer to try to re-deploy the employee. Notably, the employer must consider other areas in their enterprise that the employee might be redeployed to, and must also consider whether there is an opportunity for redeployment to "associated entities".

"Associated entities" is a wider term than has previously been used in this context and essentially means any entity controlling or controlled by the employer, or which is controlled by the same entity that controls the employer.

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NSW state wage case

The Unions NSW application for the 2009 State Wage Case will be heard in the NSW Industrial Relations Commission on 13-15 July 2009). Unions NSW has filed a claim for a 3.8% increase.

The results of the wage case will apply to workers employed under NSW awards (but not NAPSAs)

that are amended to reflect the decision.

The Minister and the Director of Public Employment are to file and serve their submission by 8 May 2009.

The NSW Government is supporting a 2.5% increase following the release of the March 2009 quarter CPI

figure of 2.5%. A copy of the Government's submission is available on OIR's website. It is therefore likely that wages will rise between 2.5% and 3.8% as a result of the wage case.

The Commission's decision is usually delivered in October or November.

Paid parental leave on the cards



As part of its May budget, the federal government confirmed that it will introduce a paid parental leave scheme.

The scheme will apply to babies born or adopted on or after 1 January 2011.

Under the scheme, an eligible person will receive taxable PPL payments at the level of the federal minimum wage (currently \$543.78 a week), for a maximum period of 18 weeks. In most cases, the person will receive the payment through their employer.

The scheme will be means-tested (with threshold earnings of \$150,000 per year), and a worker must have been employed continuously during 10 of the 13 months immediately preceding the expected birth or adoption of the child.

If an eligible employee returns to work without exhausting their paid parental leave, they will be able to transfer the unused portion to another eligible caregiver (usually the father of the child).

Participation in the scheme will preclude the family from receiving the Baby Bonus or Family Tax Benefit B during the 18-week period.

The scheme is yet to be completely finalised and the government will be undertaking consultation in the second half of 2009.

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Lodgement of agreements with Fair Work Australia

From 1 July 2009 there are new rules and limits for lodging, varying and terminating workplace agreements. If you don't lodge in time, your workplace agreement, variation agreement or termination cannot start operating.

The key changes to the rules for lodgement of workplace agreements are:

- ITEAs can continue to be

made and lodged up to 31 December 2009.

- Collective agreements need to be made and approved before 1 July 2009 and lodged by 14 July 2009.
- Variations to collective agreements must also be made and approved before 1 July 2009 and lodged by 14 July 2009.

- Terminations of collective agreements must be approved before 1 July 2009 and lodged by 14 July 2009.
- A unilateral termination of a collective agreement can not be lodged after 1 July 2009.

Different rules will apply to documents approved after on or after 1 July 2009.

AIRC can look behind “fake” redundancy

In the decision of *Crafter v Origin Health Care*, the AIRC considered the case of a worker purportedly made redundant.

Despite the fact that all other employees occupying the same role were made

redundant within two months after Crafter's termination, the AIRC determined from letters tendered by the employee that the real reason for her termination was that the employer was dissatisfied with her availability for work.

Although Crafter's co-employees were genuinely made redundant, the AIRC found that her redundancy was not genuine and she was allowed to proceed with her unfair dismissal claim.

“the real reason for her termination was in fact that the employer was dissatisfied with her availability for work.”



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Fishburn Watson O'Brien is an energetic firm of professionals committed to providing a comprehensive range of accredited specialist legal services to Sydney and NSW regional communities.

Jay Clowes has been admitted to practice as a solicitor since 2000. He is a published author on employment law issues and has extensive experience in contract law, insurance and general litigation and advising on legislative compliance. He and partner Michael Fishburn make up the firm's employment and industrial law team.

FWO are commercially oriented with a primary aim of meeting our clients' needs, business goals and objectives on time, efficiently and cost-effectively.

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As a regionally and now Sydney based law firm with accredited specialists heading every department, FWO has grown to a team of 35 professional practitioners and support staff in its 21 years of operation.

We are The Law Specialists and we invite you to contact us on any legal matter of concern to you at any of the contacts shown above.

Dates to remember

1 July 2009	Commencement date for new unfair dismissal regime
7 July 2009	Coffs Harbour Chamber of Commerce breakfast
8 July 2009	Woolgoolga Chamber of Commerce meeting
20 July 2009	Sawtell Chamber of Commerce meeting
3 August 2009	NSW bank holiday
11 August 2009	OIR Kempsey Workshop: Workplace Policies
12 August 2009	OIR Kempsey Workshop: Managing Employees