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Unfair Dismissal Claims under the *Fair Work Act:* Guiding Principles from Recent Decisions

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Unfair Dismissal Claims under the *Fair Work Act:* Guiding Principles from Recent Decisions

Some of Fair Work Australia's recent decisions provide useful signposts as to how unfair dismissal claims will be handled where the claim is made:

- by a casual employee;
- outside the 14 day time period for those unaware of the law;
- where there are no reasonable prospects of success; and
- by an employee of a foreign company working in Australia.

Casual employees

The *Fair Work Act* provides casual employees with the same ability to make an unfair dismissal claim as full-time or part-time employees, as long as they:

- complete the applicable minimum period of employment (either 6 or 12 months depending on the size of the business); and
- were engaged on a regular and systematic basis and had a reasonable expectation of continuing to work on that basis.

Before the *Fair Work Act*, casual workers employed for less than 12 months were excluded from making an unfair dismissal claim. The focus of many unfair dismissal claims brought by casual employees was whether or not the employee was truly a casual. According to a recent decision of Fair Work Australia, that is no longer the central question.

Instead, the main issue is whether the employee was employed on a regular and systematic basis. Fair Work Australia has stated the following:

- It is the employment that must be regular and systematic, rather than the hours or days of work.
- The fact that an employee works more hours in one week or one month than another, and might have variable start and finish times, is not conclusive evidence of irregular, occasional or non-systematic employment.
- If there is a clear pattern or roster of the hours and days worked, this is strong evidence of regular and systematic employment.
- If the number of hours worked is small and the gaps between days and times worked is long and irregular, other evidence that the employment is regular and systematic will need to be provided.

If an employee does not work a pattern or roster of hours and days, or have a clearly agreed arrangement, evidence of regular and systematic employment and a reasonable expectation of continuing employment can be established where:

- the employer regularly offers work when suitable work is available at times when the employer knows that the employee has generally made themselves available; and
- work is offered and accepted often enough that it could no longer be regarded as simply occasional or irregular.

Ignorance of the law can be considered in late unfair dismissal claims

Unfair dismissal claims made outside of the 14 day time limit can be accepted by Fair Work Australia only where there are "exceptional circumstances".

In a recent decision, an employee made an unfair dismissal claim 36 days out of time. One reason given for the delay was that she was unaware of the existence of Fair Work Australia and the time limits for making an unfair dismissal claim.

Fair Work Australia said that ignorance of the *Fair Work Act* and its time limits **can** be considered in deciding whether to accept a claim out of time. This is particularly the case where the time limit applies under "beneficial legislation" and the previously understood time limit has been reduced from 21 to 14 days.

In this case, however, the claim was rejected. Fair Work Australia found that ignorance was not a valid reason for the employee's delay in making her unfair dismissal claim. It said that the employee was aware generally of unfair dismissal laws, noting that it would be very unusual for any member of the Australian public to be unaware of the extensive public debate about unfair dismissal laws in recent years. Also, the claim was filed well outside the old time limit of 21 days.

Dismissing claims with no reasonable prospect of success

Fair Work Australia has the power to dismiss claims in various circumstances, including where the claim has no reasonable prospects of success.

According to a recent decision, the principles that Fair Work Australia will follow in dismissing a claim for this reason are as follows:

- The party arguing for dismissal of the claim does not have to demonstrate that the former worker's case is hopeless or unarguable.
- Fair Work Australia must consider the matter with a "critical eye" to see whether the worker has evidence with enough weight and quality to succeed at a hearing.
- The worker is not obliged to present their whole case to defeat the employer's dismissal application, but must give a good enough outline for Fair Work Australia to form a preliminary view of whether the unfair dismissal claim has reasonable prospects.
- Some claims and evidence might require greater scrutiny than others. The real question in each case is not so much whether there is any issue that could arguably go to a hearing, but whether there is any issue that should be permitted to go to a hearing.

Employees of foreign companies can make unfair dismissal claims

Fair Work Australia recently allowed a former employee of a New Zealand-based company to proceed with an unfair dismissal claim.

The employee started working in Australia in 2004 for an Australian company. In late 2008, the employee began to work primarily in New Zealand for a (presumably related) New Zealand company. For the first few months, he worked three weeks in New Zealand and one week in Australia each month. During the course of 2009, though, the employee primarily worked in Australia. For the last two months of his employment, he worked entirely in Australia, including for the Australian company by which he was originally employed.

The New Zealand company argued that Fair Work Australia could not hear the employee's unfair dismissal claim because it was not subject to the *Fair Work Act*. This argument was rejected and the claim was allowed to proceed.

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In summary

- The *Fair Work Act* provides casual employees with the same ability to make an unfair dismissal claim as full-time or part-time employees, as long as they are engaged on a regular and systematic basis and have a reasonable expectation of ongoing employment on that basis. If a casual employee does not work a pattern or roster of hours and days, or have a clearly agreed arrangement, they may be able to establish evidence of regular and systematic employment in various ways, depending on the circumstances of their employment.

- Ignorance of the *Fair Work Act* and its time limits can be considered by Fair Work Australia in deciding whether to accept a claim out of time. However, claimants will need to prove that they were genuinely unaware of unfair dismissal laws and time limits.

- Fair Work Australia has the power to dismiss claims in various circumstances, including where the claim has no reasonable prospects of success. There are a number of principles that Fair Work Australia will follow in dismissing a claim for this reason.

- Employees of foreign companies can make unfair dismissal claims in Australia. Fair Work Australia recently allowed a former employee of a New Zealand-based company to proceed with an unfair dismissal claim.