Remedies for Wrongful or Unfair Termination

There are a number of different ways in which an ex-employee may seek to challenge either the legality or fairness of their termination, including common law actions for wrongful dismissal and statutory claims for unfair dismissal. Each of these options is reviewed, following a brief look at the issue of wrongful termination by employees themselves.

Remedies for Employers

17.1 Wrongful termination by employees: the employer’s options

As explained in the previous chapter, an employee is entitled to quit their job without notice in response to a serious breach or repudiation by the employer. But in the absence of such an excuse, it will be a breach of contract to leave in the middle of a fixed term, or without giving a required period of notice.

In practice, there may be little an employer can do about this. The courts will rarely, if ever, grant an order for specific performance that compels the employee to return to work: see Tradition Australia v Gunson (2006). There are a number of reasons for this stance, including a general reluctance (which is not limited to employment contracts) to make orders that would require continuous supervision. But perhaps the main reason is their unwillingness to see contracts of employment become contracts of slavery: see De Francesco v Barnum (1890) at 438.

In theory, an employer remains free to sue for damages for loss occasioned as a result of a wrongful termination. But even if the employer could identify substantial loss, such an action would rarely be cost effective, given the inability of most employees to meet any substantial judgment obtained against them.

One thing an employer may do is to withhold wages due for work done before the departure. Any action by the employee to recover these
wages can then be met by a counter-claim for damages. But an employer has to be careful in this situation. If the wages were due under an industrial instrument or legislation, the employer may be fined for failing to comply with its obligations, even if it succeeds in a damages claim. On the other hand, many awards now expressly permit an employer to take this step.

Some employment contracts fix a ‘bond’, to be given up in the event of a premature departure by the employee. At common law, however, such provisions are generally regarded as unenforceable. This is because they will be treated as a ‘penalty’, in accordance with the principles discussed at 12.17: see eg Arlesheim v Werner (1958); Amos v Commissioner for Main Roads (1983). To be valid, the amount of the bond must constitute a genuine pre-estimate of the loss likely to be suffered by the employer as a result of any wrongful termination, as opposed to being an arbitrary sum: see eg Pigram v Attorney-General (1975).

**Injunctive relief**

If there is one remedy that an employer may have a greater chance of obtaining from a court, it is an injunction. In Chapter 13, it was explained that an employer can sometimes take action to prevent an employee from using or disclosing confidential information, or contacting the employer’s customers in breach of their obligations. Similarly, where a contract contains a promise by the employee not to work for other employers during the currency of the employment, an injunction may sometimes be granted to restrain a breach of this promise, at least until such time as the contract has lawfully ended.

Even then, the courts are careful to avoid making orders which would have the practical effect of compelling the employee to work for the original employer: see eg Heath Lambert v Keenan (2000); Bearingpoint v Hillard (2008). An employer may have more likelihood of success where the contract only restrains the performance of similar work for other employers, and the court is satisfied that the employee has the capacity to find suitable work in another field: see eg Curro v Beyond Productions (1993); Tullett Prebon v Purcell (2008).

**Remedies for Employees**

**An overview of the options**

There are a range of ways in which employees may be able to challenge the legality or fairness of their dismissal. Some remedies are provided by federal legislation, some by State legislation and some by the common law. Some must be brought in courts, others in tribunals.

The quickest and most cost-effective option will generally be a statutory unfair dismissal claim, for those who are eligible. The main drawbacks
have traditionally been that applicants rarely get their old jobs back, and compensation awards tend to be fairly low.

Workers dismissed in the middle of lengthy fixed-term contracts, and higher paid workers who are ‘capped out’ of bringing an unfair dismissal claim, are more likely to sue for wrongful dismissal at common law. This is a more expensive option, and carries the risk of having to pay the defendant’s costs if the claim is unsuccessful. But in some instances it may result in much higher sums of compensation.

An employee may believe that they have been victimised or discriminated against on some prohibited ground, such as their gender, race, disability, age or union membership. If so, it will generally be in their interest to bring a claim under the discrimination or victimisation provisions outlined in Chapter 14. Compared to an unfair dismissal claim there are fewer exclusions, there is often no cap on the compensation that may be awarded, and in some instances the legislation puts the burden of proof on the employer to show the true reason for dismissal. As against those advantages, such proceedings can sometimes take a long time to be resolved.

Public sector workers who have access to a procedure for challenging their dismissal before it is confirmed will generally be advised to pursue that process. Even if their dismissal is upheld, they may still be able to bring one of the actions mentioned above, depending on the circumstances.

Common Law Actions for Wrongful Dismissal

17.4 Nature of the action

An action for ‘wrongful dismissal’ is effectively a claim for breach of contract. It involves an allegation that an employer has terminated or purported to terminate an employment contract without having the power to do so. It will generally arise where an employee is dismissed in the middle of a fixed term, or without the notice otherwise required by the contract. The employer may contest the claim by arguing that there were grounds for summary dismissal.

If the employer has no obvious way of justifying a termination, it will generally (on legal advice) offer a payout to avoid or settle any claim. This is commonly done, for instance, where a football coach or the chief executive of a company is sacked before the end of their contract. Assuming there are no allegations of misconduct, the fact that the team/company is underperforming will not usually be a basis for summary dismissal. The payout will usually reflect what the dismissed employee could have expected to obtain by way of damages for wrongful dismissal, under the principles explained below.
The difficulties in obtaining reinstatement

One reason why so many wrongful dismissal claims are settled by the payment of a sum of money is that an award of damages is the usual outcome of any litigation. It is rare that a plaintiff can obtain a court order that effectively reinstates them in their job or continues their employment.

There are two reasons for this. The first is the practical difficulty in keeping the employment contract alive pending any court proceedings. In principle, an employee can refuse to accept a wrongful termination as bringing the contract to an end: see eg Re Associated Dominions Assurance (1962). But if the employer will not let them work, the general rule at common law is that they cannot earn any wages: see Automatic Fire Sprinklers v Watson (1946); Sterling Commerce v Iliff (2008). As soon as they accept another job, on anything other than a temporary basis, that will generally be treated as an ‘election’ to treat the contract as terminated: see Wheeler v Philip Morris (1989) at 310–11. Furthermore, any failure to seek other work may count against them if they are ultimately forced to seek damages, as explained later on.

Secondly, and even where the employment contract remains ‘on foot’ (ie, still in operation), a court will not as a general rule make orders by way of specific performance: see Gregory v Philip Morris (1988); Byrne v Australian Airlines (1995) at 428. This is partly out of a desire to be even-handed. If an employer cannot get such an order against an employee, so the reverse should be true. But the most common explanation is that once the relationship of ‘trust and confidence’ between an employer and employee has broken down, the courts will not compel the parties to mend it. The reluctance to reinstate wrongfully dismissed workers has been criticised by some judges: see eg Bostik v Gorgevski (1992) at 36–8. But the ‘general rule’ against making such orders remains.

In effect, the courts have taken the view that while a wrongful dismissal (or indeed any other kind of repudiation by an employer) may not automatically terminate the employment contract, it has the practical effect of bringing the employment relationship to an end: see Byrne at 427–8; Visscher v AIRC (2007).

Exceptional cases

Despite the ‘rule’ against reinstatement, there are exceptional cases in which an injunction may be granted to restrain a dismissal, or a declaration may be made to recognise the subsistence of an employment contract. This is especially true in interlocutory proceedings, where a plaintiff is seeking interim orders pending a full trial as to the legality of their termination.

In many of the cases where a plaintiff has succeeded in obtaining a declaration or injunction, they have been seeking to keep the contract alive for a specific and temporary reason. This may be to ensure that
certain rights accrue through length of service: see eg Hill v CA Parsons (1972). Or, more commonly, it may be to allow for a contractual or statutory procedure to be completed: see eg Baker v Salisbury (1982); Paras v Public Service Body (2006). The plaintiff may have a stronger case for relief in such a situation if they can show that trust and confidence remains between the parties, and that the employer remains satisfied as to their conduct and competence: see eg Reilly v Victoria (1991).

17.7 Damages: types of loss

The general purpose of a damages award for breach of contract is to place the injured party in the same position as if the contract had been properly performed. In accordance with this principle, and depending on the circumstances, a wrongfully dismissed employee may be able to claim damages for:

- loss of wages or other remuneration which would have been earned but for the dismissal (see below);
- loss of superannuation or other entitlements to which the employee would have had some claim, or a greater claim, but for the unlawful dismissal – see eg Ryan v Commonwealth (1936);
- expenses (such as removal costs) incurred in order to take up a new job, where the employer unlawfully reneges on a job offer – see eg Goldburg v Shell Oil (1990);
- any physical ‘injury’ sustained as a result of the dismissal or conduct preceding it, including a recognised psychiatric illness – see eg Clunne v Nambucca Shire Council (1995); Goldman Sachs v Nikolich (2007).

On the other hand, it appears that no claim can be made for any distress or humiliation suffered as a consequence of the dismissal or the way it was handled: Tucker v Pipeline Authority (1981); Burazin v Blacktown City Guardian (1996) at 147–51; although compare Quinn v Gray (2009). This rule has been frequently criticised. The way in which an employee has been treated during the employment relationship may lead to an award of damages for distress or humiliation that falls short of a recognised psychiatric illness: see eg Naidu v Group 4 (2006). If so, it is hard to see why the same should not be true where the treatment occurs in the course of dismissal. But this may depend on the issue raised at 16.18, of whether the employer’s implied duty of fair and reasonable treatment extends to decisions to dismiss.

17.8 Claims for loss of remuneration

The most obvious loss suffered by a wrongfully dismissed employee is that they are deprived of the opportunity to earn their agreed remuneration. ‘Remuneration’ for this purpose may include not just
wages or salary as such, but also the pecuniary value of other benefits which the employer is obliged to provide. That may, for instance, include superannuation contributions, whether the minimum required by statute or any greater amount determined by agreement: see eg Macauslane v Fisher & Paykel (2003). Other employer-funded benefits, such as the provision of a motor vehicle, may also be brought into account: see eg Burton v Litton Business Systems (1977).

As for bonuses or incentives, the employee may be compensated for the loss of any payments or share allocations that would necessarily have been made had the employment continued: see eg Reilly v Praxa (2004). But no claim may be made in respect of any benefits that are entirely a matter for the employer’s discretion: NSW Cancer Council v Sarfaty (1992); Reynolds v Southcorp Wines (2002).

The maximum period in respect of which an employee may claim loss of remuneration normally extends from the date of dismissal to the earliest date at which the employer could lawfully have terminated the contract. Where the employment cannot be terminated without the employer having a valid reason, the employee may potentially claim wages lost up to their projected or likely date of retirement: Bostik v Gorgevski (1992). But as emphasised at 16.17, such a contract is the exception rather than the rule. Where an employment contract is terminable on notice, which is far more common, damages may in general only be claimed for wages and other benefits lost over the relevant period of notice: see eg Walker v Zurich Insurance (2001). That will either be an agreed period of notice, or reasonable notice where that is required by an implied term.

In the case of a fixed-term agreement which cannot be terminated on notice, the employee may claim for wages and benefits lost up to the date on which the contract was due to expire: see eg Scharmann v APIA (1983); Patterson v Middle Harbour Yacht Club (1996). A similar principle applies to a contract for the duration of a particular task: see eg Bryant v Defence Housing Authority (2002).

In some cases it has been accepted that damages can also be awarded for the loss of the chance that the employment contract would have been renewed at the expiry of a fixed term, or that the employer would not have given notice at the earliest opportunity: see eg Tasmania Development and Resources v Martin (2000); Walker v Citigroup (2006). But other courts have disagreed: see eg Murray Irrigation v Balsdon (2006). At present, therefore, the law remains unsettled on this point.

**Mitigation of loss**

Under the doctrine of mitigation, a plaintiff seeking damages for breach of contract cannot claim for any loss they have in fact avoided, or that the defendant proves they could reasonably have avoided.
For a dismissed employee, the most obvious form of mitigation is to seek income from another job. If such income has in fact been obtained during the period for which there is a claim of lost remuneration, it will be taken into account and deducted from the plaintiff’s claim: see eg Patterson v Middle Harbour Yacht Club (1996). So if a dismissed worker quickly finds another job, there may be little point in maintaining a wrongful dismissal claim, unless the new job pays far less than the old one.

Even if the employee has not found other work, the employer may contest their claim by arguing that they could reasonably have secured a comparable position elsewhere: see eg Lucy v Commonwealth (1923). Importantly, however, the courts have taken the view that the employee is not necessarily expected to accept different or inferior work: see eg Scharmann v APIA (1983); Quinn v Jack Chia (1992).

### 17.10 Other reductions and offsets

Where there is a claim for lost remuneration over a lengthy period, the court will impose a discount to allow for the possibility that the employment may have come to an end for other reasons during that period: see eg Lucy v Commonwealth (1923); Bostik v Gorgerski (1992). For example, it is always possible that the employee might have died or become incapacitated, or decided to leave of their own accord.

The court will also generally allow the employer to offset any severance payment it has made to the employee, whether on an *ex gratia* basis or pursuant to a pre-existing obligation: see eg Furey v Civil Service Association (1999). Likewise, the court will deduct any social security payments (such as unemployment benefits) to which the employee is automatically entitled as a result of the dismissal: McCasker v Darling Downs Co-op (1988).

### Evolution of Unfair Dismissal Laws

#### 17.11 From dispute resolution to individual complaints

For much of the 20th century there were no laws specifically dealing with unfair dismissal in Australia. Public sector workers, as noted in previous chapters, often had the benefit of laws that provided for some form of review or appeal where a decision was taken to dismiss them. Each of the industrial arbitration statutes also had provisions protecting workers from being victimised for reasons such as union membership. But for most private sector workers, there was no general right to challenge a dismissal.

What trade unions could and did do, however, was to take up the cause of members who had been dismissed, where their treatment was considered harsh or unfair. If the matter could not be resolved by
negotiation, a dispute might be notified to an industrial tribunal. In New South Wales, in particular, such claims were common. The Industrial Commission there recognised the right of employers to decide how to run their business and whom to employ. But at the same time it emphasised the entitlement of workers to be treated fairly. The governing principle was the need for a ‘fair go all round’, as it was memorably put in Re Loty (1971) at 99. Where a dismissal was considered unjust, the Commission had no compunction in ordering the worker to be reinstated, assuming their job was still available.

In 1972 South Australia took this process one step further by introducing a statutory right for individual workers to seek reinstatement in the case of any ‘harsh, unjust or unreasonable’ dismissal. In 1984, the jurisdiction was extended to permit orders for compensation to be made in lieu of reinstatement, where a return to work was not considered practicable. Legislation along similar lines was subsequently adopted in all the other States. In New South Wales this was actively resisted by the union movement. It took a Liberal Government in 1991 to give workers the right to lodge their own complaint of unfair dismissal, rather than needing the support of a union.

Federal laws

At this stage, unfair dismissal laws were not especially controversial. But that changed when the first federal legislation was introduced by the Keating Government in 1993. It was based on the ILO Termination of Employment Convention 1982 (No 158) and applied to all employers. Rather than being modelled on existing State legislation, it put the burden on employers to show that there was a ‘valid reason’ for termination. It also made a dismissal unlawful when the employer did not adopt a fair procedure for making the decision, even if the decision itself was soundly based. Following employer complaints, the legislation was amended in various ways, notably to exclude certain types of employee from lodging a claim and to cap compensation awards. Similar restrictions were subsequently adopted in some States.

When the Howard Government came to power in 1996, it reworked the unfair dismissal provisions so as to more closely resemble the State laws, to the point of making express reference to the ‘fair go all round’ principle. It also narrowed the coverage of the legislation in certain respects. For the next decade, it tried to introduce an exemption that would prevent claims being lodged against small businesses. Its argument, often made but never substantiated, was that protection against unfair dismissal reduces the number of jobs in the economy. With control of the Senate in 2005, it was finally able to act. The Work Choices amendments barred claims against any employer with 100 or fewer employees. Larger employers were also protected when dismissing for ‘operational’ reasons.
Under Part 3-2 of the FW Act 2009, which took effect on 1 July 2009, most of the previous exclusions have been removed. With the exception of certain higher paid workers, all national system employees are now eligible to bring an unfair dismissal claim once they have completed a minimum period of employment. But there are still restrictions on challenging a redundancy dismissal, while the legislation also acknowledges the special position of smaller employers.

Unfair Dismissal Claims under the Fair Work Act

17.13 Who can bring a claim

Section 382 of the FW Act provides that a national system employee is ‘protected from unfair dismissal’ if, at the time of their dismissal, they can satisfy two requirements.

In the first place, the employee must have completed the required minimum employment period with their employer. That period is six months, or 12 months in the case of a ‘small business employer’ (s 383). More is said about this requirement below.

The second requirement is that either the employee must be covered by an award or agreement (including a transitional instrument), or their annual earnings must be less than the high income threshold prescribed under s 333. A high-earning employee will remain covered by an award for this purpose and hence eligible to bring an unfair dismissal claim, even if they have accepted a formal guarantee of their earnings under Division 3 of Part 2-9. It is only high-earning award/agreement free employees who are excluded. As for the income threshold, as explained at 7.22 this is a figure which is initially set at $108,300 for full-time employees, or a pro rata amount for part-time employees. It will be indexed to rise each financial year.

Beyond that, there are far fewer exclusions under the new system than under the WR Act. Not only has the exemption for employers with 100 or fewer workers been removed, but there are no longer special exclusions for employees on fixed term, fixed task or seasonal contracts. If such employees are not re-hired at the end of their engagement, they will not have been ‘dismissed’ and hence will not be eligible to seek relief, as explained below. But if they are let go in the middle of their contracts, they can now potentially make a claim unless excluded on some other basis.

A further exclusion that has disappeared is that relating to probationary employees. While employers may still want to nominate a probationary period, for the purpose of assessing a new employee, that employee will generally become eligible to make an unfair dismissal claim as soon as they have served the applicable minimum employment period. There is no scope for varying that period by agreement.
Finally, many ‘regular’ casuals need no longer wait 12 months to become eligible to challenge their dismissal. Unless they are working for a small business employer, they need only serve the standard six-month minimum employment period. But in each case their employment must have been regular and systematic, and they must have had a reasonable expectation of ongoing employment (s 384(2)(a)).

The minimum employment period

Under s 384, an employee’s period of employment is determined by the ‘continuous service’ they have completed with their employer, as defined in s 22. As a general rule, an employee maintains their continuity of service when they move to a job with a related employer, or if they are employed following a transfer of business (see 16.35). Hence there is no need to re-start the minimum employment period. The only exception is where the new employer informs the employee that their previous service will not be counted for this purpose. But this must be done in writing before the new employment commences, and does not apply where the new employer is an associated entity of the old employer.

As mentioned above, the minimum employment period under s 383 is ordinarily six months, but extends to 12 months in the case of a small business employer. This term is generally defined in s 23 to mean an employer that has fewer than 15 employees. All workers (whether full-time or part-time) are counted, with the sole exception of casuals who are not employed on a regular and systematic basis.

However, for the first 18 months of the new system, Schedule 12A to the TPCA Act alters this definition for unfair dismissal purposes to fewer than 15 full-time equivalent positions. The calculation is determined by a complex formula, which essentially involves totalling the number of ordinary weekly hours worked in the business (averaged over the four weeks preceding the dismissal), then dividing that total by 38. Hence a business might have considerably more than 15 workers on its books, yet still fall below the threshold if many of them work on a part-time basis. After 1 January 2011, however, the definition will revert to the simple headcount as provided by s 23.

In all cases, both before and after that date, the count includes the employee who is claiming unfair dismissal, any other employee dismissed at the same time, and any employees who work for an associated entity of the employer. In relation to this last point, it would appear that related corporations overseas count for this purpose: see eg Wilkinson v Hospitality Marketing Concepts (2006).

The need for a ‘dismissal’

No claim can succeed unless FWA is satisfied that the employee concerned has been dismissed. Section 386(1) provides that a person has been
dismissed if their employment has been terminated on the employer’s initiative; or if they have resigned, but were ‘forced’ to do so because of the employer’s conduct.

A forced resignation is often known as a *constructive dismissal*. It clearly covers a situation where an employee is pressured into resigning under threat of being fired: see eg *Mohazab v Dick Smith Electronics* (1995). But it may also cover circumstances where an employee leaves in response to unacceptable conduct by the employer, even if the employer did not intend the relationship to end: see eg *Woolworths v Russian* (1996); *Stevenson v Guardian Hall* (2005). The only question is whether the term ‘forced’, first added to the legislation by the Work Choices amendments, requires the employee to show that they were effectively *compelled* to resign, that they had no real option to remain; or whether it is enough that the employer had seriously breached its obligations. At all events, there is no dismissal where the employee resigns of their own accord and cannot establish any repudiation on the part of the employer: see eg *Gunnedah Shire Council v Grout* (1995); *Pacific National v Bell* (2008).

Section 386(2) also makes it clear that there is no dismissal where an employee is engaged for a specified period, task or season, and the contract simply expires. This may potentially make it hard for a casual to claim unfair dismissal, if all that the employer has done has been to refuse to offer any further work: see *Thompson v Big Bert* (2007). Likewise, no dismissal occurs if an employee is demoted, but accepts the demotion and remains in the employer’s service. But this is so only where there is no ‘significant reduction’ in their remuneration or duties. Otherwise, the better view is that an unauthorised demotion can be regarded as a dismissal: see eg *Advertiser Newspapers v IRC of SA* (1999); although compare *Visscher v AIRC* (2007).

Although it is not specified in the legislation, it would also appear that there is no dismissal where an employment contract is frustrated: see eg *University of WA v NTEU* (2003). The same may be true where an employee ‘abandons’ their job: see 16.22.

### 17.16 Avoiding multiple claims

Sections 725–732 of the FW Act prevent multiple applications in relation to a dismissal. If an application is made to FWA or a court under any other provision in the Act, no application for unfair dismissal can be made unless and until those proceedings are discontinued or fail for want of jurisdiction. This includes an application under the ‘general protections’ provisions outlined in Chapter 14. The same applies if an application or complaint is made in relation to a dismissal under any other federal, State or Territory law, including for instance an anti-discrimination statute. But there is no bar where the other proceeding relates solely to a failure to provide a benefit (such as notice, or severance pay) to which an employee was entitled on dismissal (s 733).
CONVERSALLY, THE MAKING OF AN APPLICATION UNDER PART 3-2 OF THE FW ACT MUST BE TREATED AS AN ELECTION TO PURSUE AN UNFAIR DISMISSAL COMPLAINT TO THE EXCLUSION OF ANY OTHER PROCEEDINGS OF THE KIND MENTIONED ABOVE, AGAIN UNLESS THE FEDERAL APPLICATION IS DISCONTINUED OR FOUND TO BE BEYOND JURISDICTION.

**Initiating a complaint**

An unfair dismissal complaint is commenced by the dismissed worker lodging an application with FWA under s 394. This must ordinarily be done within 14 days of the dismissal taking effect. FWA does have the discretion to accept late applications in exceptional circumstances. But if the previous practice of the AIRC is any guide, it will usually do so only where the applicant has a good explanation for missing the deadline, and the respondent would not be unduly prejudiced by the delay: see eg *Nottage v National Australia Bank* (2007).

**Procedures for dealing with a complaint**

Before considering the merits of an application, s 396 dictates that FWA decide whether it was made in time, and whether the applicant was eligible to lodge a claim. FWA must also decide whether the Small Business Fair Dismissal Code was complied with, and whether the dismissal was a case of genuine redundancy, two matters that are considered further below.

In some cases, the respondent may challenge FWA’s jurisdiction to deal with the application. Aside from questioning any extension of time, this may be done on a number of grounds. The respondent may argue that it is not a national system employer, or deny it is the employer of this particular worker, or contend that the worker is an independent contractor rather than an employee. Or it may allege that there has been no ‘dismissal’, that the applicant has not served the minimum employment period, or that they are an award/agreement employee who is over the high income threshold and thus ‘capped out’.

A respondent may also ask FWA to exercise its general power under s 587 to dismiss an application on the basis that it is ‘frivolous or vexatious’, or has ‘no reasonable prospects of success’. FWA is only likely to do this if the application is manifestly untenable: see *Wright v Australian Customs Service* (2003) at 358.

In determining how to respond to any of these arguments, or indeed how to deal with a complaint if it does have jurisdiction, FWA has a general discretion to decide whether to resolve the matter by private conference, or by way of a formal hearing. It need only convene a hearing if that would be the most effective and efficient way to proceed (ss 398–399). It can even proceed without either a conference or a hearing, though only where there are no facts in dispute (s 397).
Unlike the system under the WR Act, there is no formal requirement to endeavour to conciliate a complaint, then resolve the matter by arbitration if the dispute cannot be settled. Nor does the matter have to be handled only by a Member of FWA (ie, a Commissioner or Deputy President), unless a hearing is required. In most cases, it appears that a staff member from FWA will respond to an application by making contact with the parties to ascertain their views, establish whether the application is one that is properly made, and (where appropriate) explore the possibility of a settlement. A number of specialist conciliators have indeed been appointed to the staff of FWA to assist in this regard. It may be, therefore, that a Member will only become involved if a matter cannot quickly be resolved by conciliation, or involves a jurisdictional issue that must be resolved.

The government’s clear expectation is that this new system will resolve complaints more quickly than in the past, and preferably with no more than a single conference/hearing, which might even be conducted at the workplace. It had also suggested that lawyers and other paid advocates would be excluded from this process, though s 596 makes it clear it is generally up to FWA to decide whether it is appropriate to allow a party to be represented. At any event, FWA will no doubt be wary of trying to resolve complaints without giving each side a fair hearing, something that provides an obvious basis for challenging any tribunal decision: see eg Hill v Downer EDI Mining (2008).

In practical terms, it seems likely that most claims will continue to be settled or withdrawn during or just after a conciliation conference. Settlements commonly involve the payment of a few thousand dollars to the dismissed worker, in return for which the employer will generally expect a formal ‘release’ that protects them from further claims. Employers are often prepared to settle claims that they may not consider particularly meritorious, on the pragmatic basis that it is cheaper to make a payout than to incur the costs and trouble associated with defending the application. Equally, workers with strong claims are often advised to accept what may seem a modest settlement. For reasons to be explained, compensation awards do not tend to be substantial, and they too must factor in the costs of proceeding to a formal hearing.

Where FWA does make a formal decision in relation to an application, it can be appealed to a Full Bench. But to the extent any question of fact is involved, an appeal can only succeed if there has been a ‘significant error’ at first instance (s 400).

17.19 ‘Harsh, unjust or unreasonable’

Under s 385 of the FW Act, a person is considered to have been unfairly dismissed if FWA is satisfied that their dismissal was harsh, unjust or unreasonable. It must also be satisfied that the dismissal was not consis-
tent with the Small Business Fair Dismissal Code (if applicable), and that it was not a case of ‘genuine redundancy’.

In considering whether a dismissal was harsh, unjust or unreasonable, s 387 specifically requires FWA to take into account:

- whether there was a ‘valid reason for the dismissal related to the [applicant’s] capacity or conduct (including its effect on the safety and welfare of other employees)’;
- whether the applicant was notified of that reason and given an opportunity to respond;
- whether the applicant had received any warnings about unsatisfactory performance;
- whether the employer unreasonably refused to allow the applicant to have a support person present in any discussions relating to the dismissal;
- the degree to which the size of the employer’s business and/or the absence of a dedicated human resources management specialist would be likely to impact on the procedures for terminating employment; and
- any other matters that FWA considers relevant.

A reason for dismissal will be treated as ‘valid’ when it is ‘sound, defensible or well founded’, rather than ‘capricious, fanciful, spiteful or prejudiced’: Selvachandran v Peteron Plastics (1995) at 373. A reason may be valid in this sense even if it would not be grounds for summary dismissal at common law: see Annetta v Ansett (2000); Shanahan v AIRC (2006).

As for the second and third items on the list, they import considerations of procedural fairness. So too does the fourth, which is the only new factor added to the list that previously appeared in the WR Act. The emphasis on procedural fairness reflects the approach originally developed by the State tribunals in assessing the fairness of dismissals. In particular, it is expected that an employee will not be sacked for poor performance without having had their shortcomings drawn to their attention and being given an opportunity to improve. Nor should an employee be dismissed for misconduct without first having the chance to contest any allegations, and/or provide an explanation for their behaviour.

At the same time, a dismissal will not be regarded as unfair merely because of flaws in the decision-making process. Quite apart from the need to take a realistic view of how decisions are made in smaller businesses, it is always necessary to consider the circumstances as a whole. This was emphasised in Byrne v Australian Airlines (1995). Two airport workers were dismissed for pilfering from the bags they were handling, but without being given a proper opportunity to present their side of the story. The High Court held that the dismissal could not be regarded as harsh, unjust or unreasonable for that reason alone, without at least considering whether their conduct warranted dismissal. It also
confirmed that an employer may justify a dismissal by reference to circumstances that come to light after the fact, even though they were not a reason as such for the termination: see further Metricon Homes v Bradley (2009).

It is notable that, just as with previous legislation, the FW Act does not formally put the burden of establishing unfairness on the applicant. However, since FWA must be ‘satisfied’ that a dismissal is unfair, there is in a practical sense a burden on the applicant to establish a case for relief. On the other hand, where an employer alleges misconduct by the applicant, and that allegation is denied, there is an ‘evidentiary onus’ on the employer to put forward some evidence to suggest that the misconduct occurred: see Hinchey v North Goonyella Coal Mines (2009).

17.20 Examples from the case law

Most unfair dismissal cases turn on their own facts. Conduct that may appear to justify dismissal in one context will be excused in another – for example, because the employer has not properly communicated a policy to its workforce, or has not applied a policy in a consistent manner, or has not properly investigated the matter, or has failed to take proper account of the employee’s length of service and previous good record. For that reason, it is dangerous to generalise from the decided cases. Nevertheless, here is a small sample of recent Full Bench decisions from the AIRC:

- Cunningham v Australian Bureau of Statistics (2005) – upheld dismissal of senior employee for cheating on footy tipping competition he administered, because erosion of trust and honesty between colleagues was a valid reason for termination.
- Rail Corp v El Hawat (2006) – physical assault by rail worker on member of public who had abused and threatened him held to be valid reason for termination, but dismissal nonetheless unfair because of his good record and likely difficulty of finding other work.
- Queensland Rail v Wake (2006) – breach of clear policy against transmission or storage of inappropriate e-mails and images held to justify dismissal of long-serving employee, despite previous good record.
- Simos v Coles Group Supply Chain (2008) – dismissal of two workers upheld for damaging a wall, giving an ‘improbable explanation’ of how it happened, and breaching the company’s safety policy by failing to report it for three days.
- Rail Corp NSW v Vrettos (2008) – unfair on balance to dismiss a long-serving employee who ‘blew up’ and abused co-workers after a promotion was reversed, despite his poor disciplinary record.
The Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code is an instrument declared by the Minister for Workplace Relations. Section 388 specifies that a dismissal is consistent with the Code if a small business employer (see 17.14) has complied with its requirements.

The Code formally declared in June 2009 is extremely short and simple. It provides that:

- A dismissal will be deemed to be fair whenever the employer has reasonable grounds to believe that the employee was guilty of serious misconduct, such as theft, fraud, violence or serious breaches of occupational health and safety requirements. It is ‘sufficient, though not essential’ that the employer reports the allegation to the police or some other relevant authority.

- For other dismissals, an employee must be given a valid reason that is based on their conduct or capacity. This must be preceded by a warning (preferably but not necessarily in writing) that they risk being dismissed if there is no improvement. The employee must also be given an opportunity to respond to the warning and a reasonable chance to rectify the problem.

- Employees can have another person present to assist them in any ‘circumstances where dismissal is possible’. But that person cannot be a lawyer acting in a professional capacity.

- If the employee lodges an unfair dismissal complaint with FWA, the small business employer will be required to ‘provide evidence of compliance with the Code’. That may include ‘a completed checklist, copies of written warning(s), a statement of termination or signed witness statements’.

It will be up to FWA to interpret the Code in relation to some of its key requirements, such as what constitute ‘reasonable grounds’ for suspecting misconduct, or in other cases a ‘valid reason’ for dismissal or a ‘reasonable chance’ to improve after a warning. One clear inference though is that if an employee is reported to a relevant authority on a reasonable suspicion of serious misconduct, their dismissal cannot be challenged – even if the allegation turns out to be unfounded.

Genuine redundancy

One of the more contentious reforms introduced by Work Choices was the exclusion of any challenge to a dismissal that was even partly motivated by an ‘operational reason’. The full breadth of that defence was never clear, though it plainly served to bar claims from employees who had been made redundant. It had never in fact been possible for an employee to complain that a redundancy was unnecessary. The industrial tribunals, both at federal and State level, took the view that the emp-
loyer’s judgment as to the needs of their business should be respected: see eg Quality Bakers v Goulding (1995) at 333. But what a retrenched employee could do, at least before Work Choices, was challenge the procedures used to reach that decision, in relation to matters such as consultation, or selection for termination.

While the operational reasons defence has now been removed, the FW Act still precludes unfair dismissal claims in the case of a genuine redundancy. According to s 389, a dismissal falls into this category if the employer ‘no longer required the [applicant’s] job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise’. Importantly, however, the employer cannot rely on this defence unless it has complied with any obligation in an award or registered agreement (including a transitional instrument) to consult about the redundancy. There must also have been no reasonable opportunity for the person to be redeployed within the employer’s enterprise, or the enterprise of an associated entity.

This last proviso seems designed to address the situation that arose in Village Cinemas v Carter (2007), a case brought by a long serving employee who was dismissed when the cinema he managed was closed down. The operational reasons defence was used to prevent him arguing that he should have been allowed to take long service leave, while waiting to see whether another position was available elsewhere in the company. Under the FW Act, it would now be incumbent on the employer in such a case to address the possibilities for redeployment. On the other hand, the Act would still seem to bar any application from an employee whose complaint is that they have been unfairly selected for redundancy ahead of other workers, as for instance in Kenefick v Australian Submarine (1996).

17.23 Remedies

If FWA is satisfied that a dismissal is unfair, there are two possible remedies it may grant. The employer may be ordered either to reinstate the employee or, where that would be ‘inappropriate’, to pay compensation (s 390).

Where reinstatement is ordered, it may be to the position the employee previously held, or to another position with terms and conditions which are no less favourable. In most instances such an order will preserve the employee’s continuity of service and also require the employer to compensate the employee for remuneration lost between dismissal and reinstatement (s 391). Once reinstated, the employee is entitled to be given meaningful work to do: see Blackadder v Ramsey Butchering (2005).

In practice, reinstatement orders have tended to be rare. This is partly because most successful applicants are ultimately willing to settle for monetary compensation. But it also reflects the difficulty in envisaging the re-establishment of a working relationship that has broken down.
Only rarely will a dismissed employee be ‘imposed’ on an employer that claims to have lost confidence in them: though see eg *Fletcher v Commonwealth* (2007).

Unless then the new system proves to be more effective in getting dismissed employees back to work, what a successful claimant can generally expect to receive is an award of compensation. In settling on an amount, s 392 requires FWA to consider a number of factors, including the effect of the order on the viability of the employer’s business, the length of the employee’s service, and the remuneration lost or likely to be lost as a result of the dismissal. But no compensation can be awarded for ‘shock, distress or humiliation’.

The general approach previously taken by the AIRC in this regard is set out in *Sprigg v Paul’s* (1998). It primarily involves estimating the remuneration the employee would have received but for the dismissal. From that will be deducted any compensatory payments from the employer, together with any amounts the applicant either has subsequently earned or could reasonably have been expected to earn from other sources. The resulting figure may then be discounted to allow for various contingencies. The approach is broadly similar to that used for calculating damages for wrongful dismissal at common law.

This approach could in theory lead to quite substantial awards for those not able to find another job quickly, were it not for the cap imposed by s 392. An applicant cannot be awarded more than the total amount of remuneration to which they were entitled during the six months before dismissal, or a prescribed amount ($54,150 at the time of writing), whichever is lower. The cap is simply an arbitrary limitation on the amount that might be ordered. It does not operate as a maximum amount to be awarded only in the most grievous or serious cases: *PrintLinx v Hughes* (2001). Nevertheless, most awards have tended to come in well below the cap.

**Costs orders**

The general rule in unfair dismissal cases, as with other FWA proceedings, is that the losing party will not be ordered to pay the winner’s costs. But s 611 does permit a party to apply for costs where the other party has acted vexatiously or without reasonable cause, or has pursued a matter where it should have been apparent that there was no reasonable prospect of success. This can be invoked by a respondent employer against an applicant: see eg *Wodonga Rural City Council v Lewis* (2005). But costs orders can also be made against an employer who has acted unreasonably in defending a claim: see eg *Hi Security Fencing v Forsyth* (2007). In practice, any assessment as to the merits of a case given by FWA during or after a conciliation conference is likely to be crucial. If a party persists with a claim or defence after a clear indication they should withdraw or settle, they increase the prospects of a successful claim against them for costs.
In certain circumstances, a costs order may be made not just against a party, but against their representative (s 401) – for example, where they advise their client to institute or defend proceedings without reasonable prospects of success: see eg Dircks v JimRoy (2009).

Unlawful Termination

17.25 An option for non-national system employees

Under the WR Act, applicants had the option of lodging a complaint of unlawful termination with the AIRC, either as well as or instead of an unfair dismissal claim. If the AIRC was unable to resolve the matter by conciliation, the applicant could elect to pursue the matter in court. Most of the limitations on unfair dismissal claims did not apply to unlawful termination applications. Indeed, they could be brought by any dismissed employee, whether or not they had been working for a federal system employer.

Part 6-4 of the FW Act retains provisions dealing with unlawful termination that also on their face apply to all employees. Crucially, however, s 723 provides that a person may not apply for relief against an unlawful termination if they are entitled to challenge that dismissal under the ‘general protections’ in Part 3-1 that were outlined in Chapter 14. The reasons for termination prohibited under Part 6-4 would also be unlawful under those provisions. In practice, therefore, it is only applicants who fall outside the constitutional coverage of Part 3-1 – principally non-national system employees – who are now able to bring unlawful termination applications.

The central provision in Part 6-4 is s 772, which largely replicates s 659 of the WR Act. It prohibits an employee being terminated for various proscribed reasons, including temporary absence from work, union membership or non-membership, participation in union activities, filing a complaint or participating in proceedings against the employer, absence from work on parental leave, and absence by reason of voluntary emergency management activities. It also prohibits termination on various discriminatory grounds, including race, sex, age, disability and so on, though subject to certain defences. A termination will be unlawful where just one of the reasons for dismissal is on the proscribed list. Furthermore, in any proceedings s 783 places the burden on the employer to prove that an employee was not dismissed for a proscribed reason.

Section 772 is a civil remedy provision, meaning that court proceedings may be instituted under Part 4-1 to enforce it. The remedies that the Federal Court or Federal Magistrates Court may grant under s 545 include reinstatement or an uncapped amount of compensation. The court may also impose a penalty under s 546. However, no unlawful termination court application can generally be made until FWA has first
sought to resolve the dispute by private conference, and certified that its efforts have been unsuccessful (s 779).

State Unfair Dismissal Laws

The State systems

Each State, with the exception of Victoria, has its own laws regarding unfair dismissal:

- New South Wales – *Industrial Relations Act* 1996 Ch 2 Pt 6
- Queensland – *Industrial Relations Act* 1999 Ch 3
- South Australia – *Fair Work Act* 1994 Ch 3 Pt 6
- Western Australia – *Industrial Relations Act* 1979 ss 23A, 29, 29AA
- Tasmania – *Industrial Relations Act* 1984 ss 29–31

These laws provide for claims of unfair dismissal to be the subject of conciliation and, if necessary, arbitration in the local Commission. There is no separate provision for unlawful termination claims. However, the legislation in both Queensland and Tasmania has lists of prohibited reasons for termination that are broadly similar to those in s 772 of the FW Act. Each State (other than Tasmania) also excludes various classes of worker from lodging a claim. But there is no exclusion based on the size of the employer’s business, and nor is there a ‘genuine redundancy’ defence.

Application of State laws

It is clear from s 26 of the FW Act that State unfair dismissal laws cannot apply to national system employers. Non-national system employers are a different matter, except perhaps where they remain bound by a transitional federal award. Whether the State laws can apply to such employers may depend on whether those laws are inconsistent with any termination provisions in the federal instrument: see eg *R v Industrial Court of South Australia; Ex parte GMH Pty Ltd* (1975); but compare *Unions NSW v Carter Holt Harvey* (2006).

Other Remedies

Laws on discrimination and victimisation

Chapter 14 outlined the various federal, State and Territory laws concerning discrimination or victimisation at work. The protections and remedies conferred by these laws extend to dismissed workers, who can generally seek either reinstatement or (more commonly) compensation for their treatment. In the case of a ‘general protections court application’
under Part 3-1 of the FW Act, this must be preceded by an application to FWA to conciliate the dispute, lodged within 60 days of the dismissal. As noted earlier in this chapter, however, ss 725–732 of the FW Act prevent multiple actions being pursued in relation to a dismissal.

17.29 Public sector

As explained in earlier chapters, some public sector workers – notably those who work directly for the Crown, such as public servants – have the right to insist on certain procedures being followed before they can be dismissed. Those procedures may provide for a right of appeal, either to an internal body or to a specialist tribunal such as the Government and Related Employees Appeal Tribunal in New South Wales.

A further option may be to invoke the principles of administrative law to seek judicial review. This is an action that asks a court to determine whether an administrative body or tribunal has properly exercised its powers. A dismissed public sector worker may bring such an action to challenge either the dismissal itself, or a decision on appeal to uphold that dismissal. Depending on the context, judicial review can be sought on a number of grounds, whether under the common law or under a statute such as the Administrative Decisions (Judicial Review) Act 1977. These grounds may include that the decision in question was not made in accordance with relevant statutory requirements, that the decision-maker was biased or took into account irrelevant considerations, or that there was a failure to observe the requirements of ‘natural justice’. The outcome may be an injunction to restrain any effect being given to the dismissal: see eg Paras v Public Service Body (2006). Or the applicant may ask that the decision be treated as invalid and seek damages for what is in effect a wrongful dismissal: see eg Jarratt v Commissioner of Police (2005).

Finally, public sector workers may be able to pursue remedies for unfair dismissal under the FW Act or State industrial legislation. It is a matter of interpretation in each case as to whether they are eligible to lodge such a claim: see eg Re McIntyre (2004); Re AIRC and Arends (2005). In some cases, however, the existence of detailed legislation regulating the dismissal of certain workers may be considered to override any ‘general’ legislation on unfair dismissal: see eg Ferdinands v Commissioner for Public Employment (2006).

17.30 Disputes and grievance procedures in agreements

Where an enterprise agreement regulates the termination of employment in some way, it may be possible to use the dispute resolution procedure in the agreement to raise issues concerning the treatment of particular workers. Depending on the scope of the dispute resolution provision, it may be possible to seek reinstatement or even compensation for a
dismissed employee: see eg *NTEU v University of Wollongong* (2004). However, in the case of an enterprise agreement under the FW Act, this is subject to the limitations noted at 16.20.

In order to get round the restrictions on unfair dismissal claims imposed at the time by the WR Act, some unregistered agreements made by federal system employers provide for the ‘private arbitration’ of disputes over dismissal. One option may be to refer such a claim to a State Industrial Relations Commission, something that is expressly permitted by legislation in some States: see eg *Industrial Relations Act 1996 (NSW)* s 146A(4)(c).

There may also be situations where the way in which an employer handles a dismissal breaches certain procedural obligations laid down in an agreement: see eg *Van Efferen v CMA* (2009), previously discussed at 9.20.

**Unfair contract laws**

At 16.31, mention was made of the use of the New South Wales unfair contracts jurisdiction to secure benefits for retrenched workers. The same laws (currently found in ss 106–109A of the *Industrial Relations Act 1996*) have been used to challenge the fairness of dismissals on other grounds as well. The Industrial Relations Commission has been prepared to retrospectively vary contracts to provide compensation for workers dismissed without justification or without a fair procedure: see eg *TD Preece v Industrial Court* (2008). But quite apart from limitations imposed by the legislation itself, including a ‘salary cap’ that precludes claims from employees earning more than $200,000 a year, such claims can no longer be made against national system employers.

**Selected further reading**


