Understanding Unfair Dismissal

Not all business can be sued for unfair dismissal, writes David Lalic in Owner Driver -

THE FAIR Work Act has decreased the Small Employee Exempt Threshold from 100 employees to 15 employees. It is important to know who is to be included in the 15 employees. Casual employees are to be counted where they have been employed on a regular and systematic basis.

An employee cannot sue for unfair dismissal in the first six months of employment and in the case of small employers in the first 12 months.

Large employers have added protection in that they cannot be sued for unfair dismissal where the annual income of the employee is more than the High Income Threshold (as if July 1, 2009, $108,000, to be indexed on July 1 of each year).

High income employees who have a guarantee of annual earnings are also excluded from award coverage provided that the employer gave notice in writing that they will not be covered by a modern award during the time of the high income guarantee. To get the benefit of the exemption, the employer must give an undertaking in writing to the employee that they will be paid the guaranteed earnings for a minimum guaranteed period that must be accepted by the employee.

If there is change of ownership of a business, the new owner is not associated with the old owner, and the new employer informed the employee in writing before the new employment started that the period of work wit the old employer would not count towards the right to sue under the Fair Work Act, then no claim for unfair dismissal can be made until the qualifying period with the new employer has past. This is one of the matters that an employer should take serious regard to when purchasing a new business.

If a dismissal occurs because of genuine redundancy, no unfair dismissal claim can be made. The expression 'genuine operational reasons' is not used in the Fair Work Act. Genuine redundancy is defined to be the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and … the employer has complied with any obligations in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

The Fair Work Act sets out in detail what Fair Work Australia must take into account when deciding whether a dismissal was harsh, unjust or unreasonable. The one change is that the employer must allow the person to have a support person present to assist at any discussion relating to dismissal.

The last matter of importance is the time within which an application must be made. Any application for either an unfair dismissal or an unlawful dismissal claim must be made within seven days of the termination taking effect. However, an application under section 371 of the new Act for unlawful dismissal can be made within 60 days of the employment's termination; or within such further period as Fair Work Australia allows.

With respect to both unfair and unlawful dismissal, Fair Work Australia may allow a further period in which to bring the application if it is satisfied that there are exceptional circumstances, taking into account:

a) the reason for the delay
b) any action taken by the employee to dispute the termination; and
c) prejudice to the employer (including prejudice caused by the delay)
d) the merits of the application
e) fairness as between the person and the other persons in a like position.

If there is a dispute as to the facts, Fair Work Australia will conduct a conference to hold a hearing to appraise itself of the contested facts. At any conference, Fair Work Australia must take into account 'any difference in circumstances of the parties'.

It would be prudent for employers to carefully document all dismissals so that at these hearings they can rely on documented evidence rather than representations.

Lawyers are permitted to assist at hearings only with the permission of Fair Work Australia. Section 596(2)(a) states that Fair Work Australia may grant permission for a person to be represented if:

a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
b) it would be unfair not to allow the representation because the person is unable to represent himself, herself or itself effectively; or
c) it would be unfair not to allow the person be represented taking into account fairness between the person and other persons in the same matter.

Both employers and employees should consider the new regime carefully and proceed with care to ensure rights are protected.

If you wish to discuss the differences between an employee and a contractor further, contact David Lalic from Jackson Lalic Lawyers on 02 9262 1770 or dlalic@jacksonlalic.com.au