

Topic 7: Unfair Dismissal (Under FWA)

OBJECT OF UNFAIR DISMISSAL PROVISIONS

Object of Part 3-2 “Unfair dismissal” (UD) of the *Fair Work Act 2009* (Cth) (FW Act) is:

FW Act s 381

Object of this Part

- (1) The object of this Part is:
 - (a) to establish a framework for dealing with unfair dismissal that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
 - (b) to establish procedures for dealing with unfair dismissal that:
 - (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
 - (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
- (2) The procedures and remedies referred to in [paragraphs](#) (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

TOPICS

1. Time limits for applications
2. Jurisdictional requirements for s.394 applications
 - Protected from unfair dismissal
 - Unfairly dismissed
3. Remedies
4. Processes

1. TIME LIMITS

s.394(1) FW Act: A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

s.394(2) FW Act: The application must be made:

- a) 21 days of dismissal, or
 - b) Within such period as FWC allows, if exceptional circumstances exist
 - o **Exceptional circumstances provision: s.394(3) FW Act**
The FWC may allow a further period for the unfair dismissal remedy application to be made by a person if the FWC is satisfied that there are exceptional circumstances, taking into account:
 - (a) the reason for the delay; and
 - (b) whether the person first became aware of the dismissal after it had taken effect; and
 - (c) any action taken by the person to dispute the dismissal; and
 - (d) prejudice to the employer (including prejudice caused by the delay); and
 - (e) the merits of the application; and
 - (f) fairness as between the person and other persons in a similar position
- The longer the period harder to establish exceptional circumstances as of fact

Exceptional circumstances:

- means out of the ordinary course, unusual, special or uncommon
- need not be unique, unprecedented or very rare
- not those regularly, or routinely, or normally encountered (*Ho v Professional Services Review Committee No 295* (2007) and *Nulty v Blue Star Group Pty Ltd* (2011))

2. JURISDICTIONAL REQUIREMENTS FOR s.394 APPLICATION

1. *Is the employee a national system employee?*

- Unfair dismissal provisions apply to national system employees and national system employers (ss.13, 14 and 380, FW Act)
- Workers who are not employees at common law cannot bring a claim for unfair dismissal.

FW Act s 380

Meanings of employee and employer

In this Part, *employee* means a national system employee, and *employer* means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

FW Act s 13

Meaning of national system employee

A *national system employee* is an individual so far as he or she is employed, or usually employed, as described in the definition of *national system employer* in section 14, by a national system employer, except on a vocational placement.

Note: Sections 30C and 30M extend the meaning of *national system employee* in relation to a referring State.

FW Act s 30C

Extended meaning of national system employee

- (1) A *national system employee* includes:
 - (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in [paragraph 30D\(1\)\(a\)](#), except on a vocational placement; and
 - (b) a law enforcement officer of the State to whom [subsection 30E\(1\)](#) applies.
- (2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30H may limit the extent to which this section extends the meaning of *national system employee*.

FW Act s 30M

Extended meaning of national system employee

- (1) A *national system employee* includes:
 - (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in [paragraph 30N\(1\)\(a\)](#), except on a vocational placement; and
 - (b) a law enforcement officer of the State to whom [subsection 30P\(1\)](#) applies.
- (2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30S may limit the extent to which this section extends the meaning of *national system employee*.

FW Act s 14

Meaning of national system employer

- (1) A *national system employer* is:
 - (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
 - (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
 - (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
 - (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
 - (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
 - (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, *Australia* includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of *Australia* in section 12).

Note 2: Sections 30D and 30N extend the meaning of *national system employer* in relation to a referring State. Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

- (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
- (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
- (iii) is a wholly-owned subsidiary (within the meaning of the [Corporations Act 2001](#)) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under [paragraph](#) (4)(a) is in force in relation to the employer.

(3) [Paragraph](#) (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in [paragraph](#) (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under [subsection](#) (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of [paragraph](#) 54(2)(b) of that Act).

Employers that cannot be declared

(6) [Subsection](#) (2) does not apply to an employer that:

- (a) generates, supplies or distributes electricity; or
- (b) supplies or distributes gas; or
- (c) provides services for the supply, distribution or release of water; or
- (d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the [Corporations Act 2001](#)) of, or is wholly controlled by, such a body.

(7) [Subsection](#) (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

• Employee applicant must be:

- i) **Protected from unfair dismissal** at the time of being dismissed
- ii) **Unfairly dismissed** (s.390(1), FW Act)

i) **Protected from unfair dismissal**

FW Act s 382:

(a) Minimum employment period completed with the employer, and

▫ **FW Act s 383: Meaning of minimum employment period**

(a) if the employer is **not a small business employer**- 6 months ending at the earlier of the following times:

- Non-small business employer – 6 months continuous service at the **particular time**
 - (i) the time when the person is given notice of the dismissal;
 - (ii) immediately before the dismissal; or

(b) if the employer is **a small business employer**--one year ending at that time.

- Small business employer – 1 year's continuous service at the particular time (refer above (i) or (ii)).

▫ **FW Act s 23: Meaning of small business employer**

- (1) A national system employer is a **small business employer** at a particular time if the employer employs **fewer than 15 employees at that time**.
- (2) For the purpose of calculating the number of employees employed by the employer at a particular time:
 - (a) subject to [paragraph](#) (b), all employees employed by the employer at that time are to be counted; and
 - (b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.
- (3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.
- (4) To avoid doubt, in determining whether a national system employer is a **small business employer** at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to [paragraph](#) (2)(b)):
 - (a) the employee who is being dismissed or whose employment is being terminated; and
 - (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

- **S 22 FW Act: Continuous service and service?**

- **Service** is the period during which the employee is employed by the employer, but does not include certain excluded periods
- **Continuous service** is the period of unbroken service the employee has with the employer
- **Excluded periods** include periods of unauthorised absence, certain types of unpaid leave and certain types of unpaid authorised absence
- An excluded period does **not break** the employee's continuous service with the employer. However, it **does not count towards the length** of the employee's continuous service with the employer

- The **notice of the dismissal** must either specify a time when the termination is to take effect, or that time must be ascertainable (*MFB v Duggan* [2017])

(b) One of the following apply:

2. Is the employee covered by a MA or EA?

- (i) Modern award covered, or
- (ii) Enterprise agreement applies, or

3. If not, is the employee earning less than the high income threshold?

- (iii) Annual earnings less than high income threshold (1/7/18 - \$145,400)
 - What is included in earnings? (see s.332, FW Act and Reg. 3.05, FW Regulations)

4. Is the employee a casual employee?

- If so, the employee must meet the 'period of employment' criteria under FW Act, s 384(2)
- Stand down not included in the period

FW Act s 384(2): Period of employment

- (1) An employee's **period of employment** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.
- (2) However:
 - a. a period of service as a casual employee does not count towards the employee's period of employment unless:
 - (i) the employment as a casual employee was on a regular and systematic basis; and