Asian Academy of Management Journal, Vol. 20, No. 1, 147–164, 2015

UNFAIR DISMISSAL FOR AUSTRALIAN WORKERS: THE HUNDRED-YEAR JOURNEY

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ABSTRACT

This paper examines the journey Australia traversed in the development at of the unfair dismissal protections it provides the majority of its workers, since the nation's Federation in 1901. Historically, the country's Constitutional "heads of power" were intended to prohibit the federal government from regulating individual aspects of the employment relationship. Over time, such interpretations of the constitutional powers were challenged by governing parties, resulting in the modern-day, "national" unfair dismissal protections afforded to the majority of workers. The journey Australians traversed during the architecture of their current unfair dismissal legislation provides a lesson on a government's ability to conjure significant influence on individual arrangements between management and workers. Despite Australia's participation in the worldwide, neoliberal push to deregulate labour markets, the protection of workers from unfair dismissal is an explicit matter in the employment relationship attracting increased regulation through industrial legislation. This paper culminates in reporting the consequences facing employers who improperly administer dismissals and how employers can take steps to mitigate such risks.

Keywords: unfair dismissal, neoliberal termination of employment, industrial legislation, labour market

INTRODUCTION

Legal protection against the unjust termination of employees from their jobs has held significant prominence in Australia's industrial landscape, particularly during the past thirty years. In Australia, "unfair dismissal" refers to the termination of an employee's service without the employer exercising due care for the worker's right to procedural justice. Such termination also occurs when a dismissal reflects a disproportionate application of the employer's prerogative to terminate the employment relationship. This paper examines the crafting of unfair dismissal protections covering Australian workers by successive federal

governments. The past 30 years of these developments reflect a time that, curiously, coincides with a period of neoliberal reforms that characteristically *deregulated* the employment relationship. The coverage of the current protections is broad-ranging, with most Australian employers held to legislative requirements when they terminate a worker's employment contract due to misconduct or underperformance, or during times of redundancy. As a result, managers and business owners must approach the dismissal of an employee with a rigid application of distributive and procedural justice if they wish to avoid an unfair dismissal claim that has the potential to escalate to binding arbitration.

The issue of whether a person can lose his or her job due to arbitrary or unfair dismissal is a matter of societal interest as it cuts to the core of justice and the rights of people to be "*free from arbitrary and oppressive treatment, whether at the hand of government or private persons*" (Wheeler & Rojot, 1992, p. 3). The arbitration of termination of employment processes, as it now exists under Australian legislation, "*introduces a measure of public interest to a private right which would otherwise be regulated only by the common law"* (Donaghey, 2006, p. 6). This government regulation makes employment security the terrain of political interests in Australia, rather than the subject of free market forces associated with a prevailing, and socially tolerated, neoliberal philosophy. Employers have the right under contract law to dismiss a worker, yet the just execution of such rights is now being primarily judged by a federal tribunal with its authority provided by federal legislation. The current obligations that exist for employers have been strongly influenced by the results of the 2007 federal elections during which the Australian people gave majority support to a government that promised to play an active role in safe-guarding their employment security.

Yet how has Australia managed to evolve such extensive national protections given its historical preference for individual regulation by the states, and furthermore, in the face of other active neoliberal reforms? To address this question, the exposition in this paper traces Australia's journey in providing unfair dismissal protections in three sections. The first section proposes that the increased unfair dismissal regulation is surprisingly inconsistent with the typically neoliberal philosophies of the government regulations, perhaps due to Australia's uniquely expressed expectations of a "fair go all round". Given that there is limited literature collating the historical development of this slice of Australia's industrial history, the second section considers how the notion of "unfair dismissal" was treated by legislators post-Federation. After this, the development of the unfair dismissal protections that started infiltrating the industrial relations system in the early 1980s is closely examined. From this point forward, Australians experienced the conservative neoliberal reforms of the Hawke and Keating Labor government era; followed by the radical neoliberal

reforms of the Howard Liberal-National Coalition government; concluding with the current state of affairs resulting from more temperate neoliberal revisions by the Rudd Labor government. The final section provides insights about the features of the current, national system available to workers for claiming unfair dismissal and evidence of their impact on employers.

Australia's Political Parties

The design of the unfair dismissal legislation in the latter half of the 20th century has depended heavily on the policy packages of the political party in power. Before progressing further, readers unfamiliar with Australia's political parties may benefit from a brief explanation of the major parties that shaped the dismissal protections. While there are many minor political parties in Australia, the country has two major political parties: the centre-left Labor Party, the "traditional friend of workers" that rivals the centre right Liberal Party (Costar, 2011; Eccleston, Williams, & Hollander, 2006, p. 62). The Liberal Party—the champion of private enterprise—maintains a quasi-permanent alliance to form a *coalition* with the National Party, whose traditional concerns are for primary producers (Costar, 2011; Eccleston, Williams, & Hollander, 2006).

THE ARADOX: REGULATING THE TERMINATION OF EMPLOYMENT IN A NEOLIBERAL FRAMEWORK

Since Federation, Australia's industrial relations system has gravitated towards a system that has aimed to afford workers a sense of dignity combined with some sense of power that can counter the employers' power. For instance, industrial tribunals were conceived and implemented as compulsory industrial mediators and umpires under Australia's pioneering industrial legislation: the Commonwealth Conciliation and Arbitration Act in 1904. During the 20th century, legislators implemented policies to ensure minimum wages and work conditions were enshrined in awards and to fortify the representative role of unions in labour regulation. More recently, the "fair go all round" principle came to feature in the industrial legislation, matching its presence in Australia's cultural psyche. It is said that to some degree, the Australian industrial system was "infused with a moral economy that emphasised the 'frugal comfort' of workers and their families alongside firms' efficiency and profitability" (Bailey, Macdonald, & Whitehouse, 2011, p. 444). The concept of the "moral economy" recognises that the behaviour of economic institutions reflects the moral decisions of their actors, which has ethical implications on society (Sayer, 2007). This concept offers a lens for us to acknowledge the impact of laws and choices made by institutions on the functioning and well-being (or ill-being) of the people.

Australia, like a number of other advanced economies, has adopted neoliberal policies promoting free market ideals with limited government intervention, including labour market deregulation (Bray & Underhill, 2009; Collins & Cottle, 2010; Peetz & Bailey, 2010). Neoliberal trends have been evidenced in Australia's industrial relations system through the discontinuation of centralised wage fixation, together with the de-collectivisation of worker entitlements from unionised awards to locally negotiated, enterprise agreements. Beyond labour market deregulation, the government's commitment to neoliberalism is also exemplified by the lifting of exchange rate controls and deregulation of aspects of the financial markets (Peetz & Bailey, 2010).

The gradual adoption of unfair dismissal protections as they appear today occurred over a time when a post-industrial society became increasingly knowledgeable. With that knowledge grew worker expectations that they should receive moral treatment from their employers. In Australia, incoming governing parties have the benefit of hindsight in relation to public reaction to the "Work Choices" legislation in 2005. Work Choices accommodated employer prerogatives with features that limited unionism, dissolved awards, individualised bargaining and had the potential to lead to a "rash of dismissals from SMEs" (Sheldon & Junor, 2006, p. 168). However, this overtly neoliberal attempt by a Coalition government to deregulate job security was overthrown by public opinion at the subsequent federal electoral. The Labor party was returned to office touting election promises of rewinding many of the industrial reforms.

Australia's adoption of nationally regulated unfair dismissal protections is quite atypical under a neoliberal agenda, with Australia's current system of unfair dismissal provisions now offering the broadest ranging and most accessible protections covering workers to date. These protections are administrated centrally by a federally legislated industrial tribunal, making the federal government the custodian of worker security. This situation occurs in spite of a global trend to limit government regulatory intervention in the operations of business. It is argued that Australia's ideological desire for a "fair go" underpins this conflict. The right to a "fair go" cannot be neatly packaged under a single political philosophy. The extent of government intervention clearly emerges on dual planes: deregulating business and industry so that these stakeholders have a 'fair go' to grow and build, whilst simultaneously centralising the regulation for the stakeholder of least power in the economic equation: the individual employee. The current regime of unfair dismissal protections provide employees with a 'fair go' if they believe an injustice was committed against their right to work.

UNFAIR DISMISSAL PROTECTIONS FOR AUSTRALIAN WORKERS: THE JOURNEY

The federal government's current role in providing a national system of unfair dismissal protections is at opposite poles with the original interests of the federal government. Yet there is a gap in the literature that assembles the full journey Australia travelled from Federation to the present unfair dismissal arrangements. It is important to record this journey that demonstrates the morphing of the structure and roles of both federal and state governments over the past century: sometimes resulting from people power, at other times either due to union persistence or industry campaigning; but perhaps the most significant changes were due to political manoeuvrings.

Prior to the 1900s, the states in Australia were operating autonomously, each under a "responsible government" (Bennett, 1999). The passing of the Commonwealth of Australia Constitution Act 1900 (the Constitution) established the jurisdiction for an additional, overarching federal government in 1901. The dual governments—state and federal—were each separately empowered to regulate industrial issues, with the federal legislation overriding state legislation where discrepancies occurred (Dabscheck, 1998; Walker, 1970). Above both layers of government was the High Court of Australia, which had the power to determine disputes that arose in relation to the Constitution and conflicts between the state and federal systems (Dabscheck, 1980).

The Constitution prescribes 'heads of power' defining—or limiting—the matters on which the federal government can make legislation. In regard to industrial relations matters, the "*labour power*" of the Constitution intended to limit the federal government's ambit to make laws regarding conciliation and arbitration for preventing and settling industrial disputes. On this understanding, the first major industrial initiative of the federal government was to enact the Commonwealth Conciliation and Arbitration Act in 1904 and establish the Commonwealth Court of Conciliation and Arbitration. This court's power was limited to preventing and settling industrial disputes that either *crossed* state boundaries or industrial matters relating to *international* relations or corporations (Cooper & Ellem, 2008; Dabscheck, 1980; Walker, 1970).

At this time, the High Court of Australia judged that the federal level tribunal did not have the ambit to provide arbitration services in relation to unfair dismissal practices (Stewart, 1989). Thus for most of the 20th century, unfair dismissal was a matter for the states and their respective industrial tribunals. Unlike the federal government that was bound by the parameters of the Constitution, the state governments were free to legislate on any industrial matter, such as those pertaining to wages, hours and conditions directly impacting the work

environment (Dabscheck, 1980; 1998). For the majority of the 20th century, most of Australia's workforce came under state awards (Bray, Waring, & Cooper, 2011; McCallum, 1982; 2005; Sappey, Burgess, Lyons, & Buultjens, 2009).

Each of the states installed legislation that provided their industrial tribunals with jurisdiction to reinstate and/or compensate employees who were determined to have been unfairly and/or wrongfully dismissed with a state award (Pittard & Naughton, 2010; Sherman, 1989). Originally, unfair dismissal in the state was a collectively initiated system (Bray & Underhill, 2009; McCallum, 2002; Sherman, 1989; Stewart, 1992). An individual could not lodge an unfair dismissal claim with a tribunal on their own standing. A person needed to have union support, and if obtained, it was the union that notified the tribunal of an industrial dispute (Bourke, 1990). This collectivist approach to unfair dismissal bolstered both union membership and their legitimacy as representatives for workers. Whilst people employed under state awards were afforded varying degrees of unfair dismissal protections, federal award employees had limited protection from unfair dismissal.

Enter the Neoliberalism Agenda

In 1984, the federal industrial tribunal—now called the *Australian Conciliation and Arbitration Commission*—heard a log of claims from the Australian Council of Trade Unions (ACTU) to improve employment security for workers under federal awards. One argument presented by the ACTU was that federal employees in the United Kingdom, under its Employment Protection Act 1980, had the right to complain about unfair dismissal to an industrial tribunal and that the tribunal had the power to order reinstatement, re-employment or compensation. A second arm of the ACTU's submission relied upon Recommendation 166 of Convention 158 of the International Labor Organisation instigating termination of employment standards.

Despite its lack of endorsement from the High Court, the Australian Conciliation and Arbitration Commission incorporated fair dismissal standards in federal awards (Pittard,1994a), and indicated its willingness to arbitrate and provide remedies for successful unfair dismissal claims. This decision (known as the Termination, Change and Redundancy decision, or TCR decision) resulted in a divided system of protections. Federal award provisions offered protection for federal employees, whilst the state provisions covered workers employed under state awards. State employees had "simpler" access to remedies from the state tribunals, whereas federal employees had to access the legal processes of the Commonwealth Industrial Court for absolute judgements. Furthermore, whilst the TCR decision installed fair dismissal standards in federal awards, such standards were yet to be enshrined in federal legislation.

By the late 1980s several decisions by the High Court of Australia indicated that it was softening its interpretation towards placing limits on the federal tribunal arbitrating unfair dismissal claims (Pittard & Naughton, 2010; Stewart, 1989). For conciseness, two landmark cases are noted. The first landmark decision came in 1987 in the High Court's decision over the *Ranger Uranium Mines Case*. In this case, the High Court appeared willing to let the federal Commission reinstate unfairly dismissed workers. The second landmark case was the *Wooldumpers Case* in 1989. Recalling that the Constitution only allowed the federal government to put in place conciliatory and arbitral systems to deal with "interstate disputes", it was still a hurdle preventing the Commission from exercising arbitral power on unfair dismissal claims. The High Court decision in the *Wooldumpers Case* implied that the Australian Conciliation and Arbitration Commission's ability to conciliate and arbitrate an unfair dismissal claim "might be conducive to preventing an interstate dispute" (Smith, 1990, p. 120).

In 1988 the Hawke Labor government introduced new federal industrial legislation, *The Industrial Relations Act,* and renamed the Conciliation and Arbitration Commission as the Australian Industrial Relations Commission (AIRC). The role of the AIRC remained, primarily, to prevent and settle interstate labour disputes and to certify enterprise agreements (Plowman, 1992). This 1988 Act also signalled the commencement of a neo-liberal industrial relations agenda, by providing scope for unions and employers to enter into enterprise agreements (Bray & Underhill, 2009; Pittard & Naughton, 2010; Plowman, 1992). It is paradoxical, given the Labor party's trade unionist tradition, that labour market deregulation was initiated by a Labor government (Eccleston, Williams, & Hollander, 2006). The successive Keating Labor government, in its 1993 revisions to the industrial legislation, would continue the deregulated, decentralised agenda commenced by the 1988 Act. The government reduced the federal awards to a safety net of minimum conditions for those employees without an enterprise bargaining agreement (Pittard & Naughton, 2010).

Another amendment to the legislation was the incorporation of the terms from the International Labour Organization's (ILO) Termination of Employment Convention 158 (Forsyth, Creighton, Gostencnik, & Sharard, 2008). The convention required ILO members to provide employees with an appeal process to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator in the event of a termination (International Labour Organization, ILO, 1982). Titled *The Industrial Relations Reform Act 1993*, it directly adopted the full wording of Recommendation No. 166 to meet this obligation. Notably, Recommendation No. 166 identified three categories of excluded employees: specified period employees; specified task employees; and short term casuals.

To overcome the Constitutional "powers" hurdle of legislating on a matter that was traditionally outside its "*labour powers"* ambit, the Keating Labor government invoked the "*external affairs"* power of the Constitution (Pittard, 1994b). The external affairs power provided the federal government with the ambit to make legislation addressing the country's obligations under international treaties and conventions (Department of Foreign Affairs and Trade, DFAT, 2011). Thus, the 1993 legislation prescribed for the first time minimum unfair dismissal standards for employees under federal awards, as well as for those under state awards that did not have a comparable minimum, in the event they were dismissed on "harsh, unjust or unreasonable" grounds (Pittard & Naughton, 2010).

However, the judgement of unfair dismissal claims was not yet the role of the federal tribunal, the Australian Industrial Relations Commission (AIRC). Instead, the Keating Labor government created the Industrial Relations Court of Australia, a superior court of law that was to specialise in industrial relations matters (Shaw, 1994). The 1993 Act gave authority to the Industrial Relations Court of Australia to reinstate and/or compensate an employee who was found to have been terminated on prohibited grounds, for an invalid reason, or in a 'harsh, unjust or unreasonable' manner (Pittard & Naughton, 2010). The downside of this system was that dismissed employees would be subjected to the formality and expense of court processes.

In 1996, Australia elected a Liberal-National Coalition government under Howard's leadership and it introduced *The Workplace Relations Act 1996*. The Howard government relied less on the "*external affairs"* power to qualify its legislative ambit over the 1996 Act. Instead, the "*corporations power"* was used as the foremost Constitutional basis of the legislation ("territories powers" and "trade and commerce powers" also featured) (Dabscheck, 2001; Gray, 1996; McCallum, 2005). The "*corporations power"* provides the federal government the ambit to legislate on the operations of a foreign, trading or financial corporation within Australia. As the "*external affairs power"* provided the government with an ambit that enabled it to advocate "non-compulsory" ILO recommendations (Stewart, 2009), the federal government was fast to harness the wider industrial relations regulation that could be achieved through the "*corporations power*".

The 1996 Act conferred power to the Australian Industrial Relations Commission (AIRC) to fully adjudicate dismissals that were thought to be harsh, unjust or unreasonable in nature (Donaghey, 2006). The power given to the AIRC to arbitrate unfair dismissal claims was a break-through in Australia's arbitration history after repeated attempts by unions and employers to bring unfair dismissal claims before the Commission. The result was that the various state unfair

dismissal legislations became of limited utility with federal unfair dismissal legislation the primary source of appeal for dismissed employees.

The 1996 Act also instigated the "fair go all round" principle in response to employers' concerns that the ILO conventions were weighted in favour of the employees (Pittard & Naughton, 2010; Robbins & Voll, 2005). Thus, it came to be that the federal government's tribunal, the AIRC, conciliated and arbitrated unfair dismissal claims taking into account the harshness, unjustness or unreasonable of the claim.

Radical Neoliberalism: Work Choices and the Limiting of Unfair Dismissal Rights

In 2004 the Howard Coalition government won its fourth term in office, this time with control of both the Senate and the House of Representatives. This dual control allowed the government to pass the overtly neoliberal legislation, the *Workplace Relations Act 1996 (Work Choices) Act of 2005* built on principals of deregulating and individualising the labour market (Bray & Underhill, 2009; Waring & Bray, 2006) and directly limiting union access and representation in the workplace (Alexander, Lewer, & Gahan, 2008). This legislation was based on the premise it would build a competitive, sustainable economy by increasing jobs, providing employers with "flexibility" and improving the balance of work and family life for Australians (Lloyd Walker, 2007).

Active campaigning from employer and industry bodies resulted in this legislation excluding additional categories of workers from making unfair dismissal claims. The 2005 Act prohibited claims from, among others, workers employed in businesses with 100 or less employees, seasonal workers and those terminated for "genuine operational reasons" (Southey, 2008). The 100 employee Work Choices exemption was legislated on the premise that small and medium sized businesses were not hiring for fear of potential unfair dismissal claims; although the strength of the job growth-unfair dismissal link used to underpin these exemptions was debated (Department of the Senate Australia, 2005; Freyens & Oslington, 2007; Robbins & Voll, 2005). As the great majority of Australian business had fewer than 100 employees, the impact of these unfair dismissal restrictions was that the majority of Australian workers were without unfair dismissal protection (Abbott, Devey, Hearn Mackinnon, Morris, Saville, & Waddell, 2007).

The 2005 reforms relied upon the same constitutional premise of the "*corporations power"* as the previous (1996) Act. The net effect of the "*corporations power"* usage was that the federal legislation legitimately covered the majority of Australian workers under its 1996 Act. The state legislation

coverage was left to employees in unincorporated businesses, not for profit corporations and state government employees (Peetz, 2007).

Reforming the National System of Unfair Dismissal Protection: An Exception to Neoliberalism

In late 2007, the Labour government was returned to power under Rudd's leadership. One of its major election platforms was its 'Forward with Fairness' policy that largely aimed to unwind the Work Choices legislation and vowed to improve employee access to unfair dismissal claims.

The newly elected Labour government set new industrial legislation, the *Fair Work Act 2009 (Cth).* Unfair dismissal protections were restored to employees if a dismissal was: "harsh, unjust and unreasonable" and if it was not a genuine redundancy. Unfair dismissal protections were restored to workers dismissed for operational reasons, with the resolution of claims through informal mediation being one of the principal aims of the Act (Gollan, 2009). The responsibility for settling unfair dismissal claims was transferred to Fair Work Australia (FWA), a new federal tribunal replacing the AIRC in January 2010. In 2012, The Fair Work Amendment Act was passed by parliament, part of which meant renaming the federal tribunal, Fair Work Australia, to the Fair Work Commission (FWC).

The Fair Work Act 2009 (Cth) has introduced a fair dismissal code for use by businesses with fewer than 15 employees. The *Small Business Fair Dismissal Code* permits an employee to be dismissed without warning in instances of serious misconduct with examples of theft, fraud, violence or serious breaches of safety rules listed in the Code. Otherwise, dismissal with prior warnings and final notice must occur if it is based on the employee's conduct or capacity to do the job (Chapman, 2009; Gollan, 2009; Department of Education Employment and Workplace Relations, 2008; Southey, 2008).

Currently, unfair dismissal protections apply to any employee hired under the terms of a modern award or enterprise agreement. Employees not covered by The Fair Work Act are generally protected by relevant state unfair dismissal provisions, or in the case of "independent contractors", common law claims as they do not fit the definition of an "employee". Despite the number of employees covered by the 2009 Act, specified period employees, specified task employees and short term casuals remain unprotected. However, The Fair Work Act has improved security of employment for casuals working in businesses of more than 15 employees, with casual employees gaining unfair dismissal rights after six months regular service.

In the federal elections of September 2013, the Liberal-National Coalition was returned to power under Abbott leadership. The labour policies of this new government, in the words of the Assistant Minister for Employment, will "return the industrial relations pendulum to the sensible centre and reduce impediments to employment growth so that we can build a more prosperous Australia … we must protect individuals and workers" (Hartsuyker, 2013). Alluding to the "misadventures" of the Work Choices reforms, industrial reforms under Abbott "will be approached with the lessons of history that the last thirty years has to teach us", suggested the Minister for Employment (Abetz, 2014, 28 January). To date, the Coalition has not earmarked the unfair dismissal protections of the Fair Work Act for further change; clear grounds to speculate that the "unfair dismissal" battle has been fought, with the ground rules established.

THE CURRENT SYSTEM OF MAKING AN UNFAIR DISMISSAL CLAIM

With the ground rules for protecting individuals against unfair dismissals relatively stabilised, it is worth reviewing how these rules actually 'work' in real terms. The first step to enact the protections requires the dismissed worker to lodge a dismissal remedy application claim form—either in person, by mail or electronically—with the FWC. A fee in the vicinity of 65 dollars is paid to the FWC by the worker when lodging the application (Fair Work Commission, FWC, 2013a). The first news an employer may hear that it has a claim against it is when it is contacted by FWC staff to set a date for a private, non-binding, conciliation conference with the worker and a conciliator from the FWC. It is the intention of the legislation that the unfair dismissal claim process remains accessible to workers, without the need for them to engage legal expertise at any stage in the process. Although as limiting representation may have negative repercussions for workers who are left to represent themselves in what is potentially an intimidating setting (Mourell & Cameron, 2009), a provision exists within the legislation to seek the FWC's approval to allow legal representation.

A dismissed worker who is dissatisfied with the outcome of the conciliation conference may seek to have his or her dismissal examined at an arbitration hearing before a government-appointed member of the FWC, generally titled "commissioners". The commissioner will determine if a dismissal was harsh, unjust or unreasonable by considering several criteria: whether there was a valid reason for the dismissal; whether the person was notified of that reason and given an opportunity to respond; whether the person was permitted a support person if requested by the worker; and whether performance warnings had occurred in the event the dismissal was due to performance issues. The "fair go all round" principle, retained from the 1996 legislation, requires the commissioner to also

include in his or her deliberations whether the employer faced challenges in administering a dismissal due to its business size and degree of human resource expertise, together with any other matter the commissioner considers to be relevant.

In the event the FWC commissioner arbitrates that the worker was unfairly dismissed, the commissioner will order a remedy: either reinstatement or "compensation" in lieu of reinstatement. According to the 'fair go all round' principal, the commissioner is required to take into account the effect of the order on the viability of the employer's business. At the same time, the commissioner must take into account the employee's length of service and the remuneration he or she would have received had no dismissal occurred, less the amount of any remuneration earned by the employee from other work since dismissal. Commissioners are not permitted to order monies compensating for shock, distress, humiliation or any other "hurt" caused by the dismissal – although they may impose a penalty on the compensation if misconduct was the reason for a dismissal. Compensation is capped at the lesser of either half of the high-income threshold (this threshold was $123,300 in 2013), or the total amount the person was entitled to receive if they had not been dismissed (FWC, 2013a).

Either party to an arbitration decision may appeal against the decision. Appeals are heard by a bench of three appointed members of the FWC. For the FWC full bench to grant an appeal, the appellant must show that it is in the public interest to do so and that the arbitrator's decision involved a significant error of fact.

Indications of Settlement Costs

The FWC (2013b) recently commenced providing indications of remedies on its website. These statistics suggest that approximately 5,000 claims were made over six months. The vast majority of claims (81%) were settled via conciliation. Approximately 19% of these settlements involved purely non-monetary remedies, such as the opportunity for the worker to resign voluntarily, or receiving a statement of service from the employer. Approximately 2% of workers achieved reinstatement. The remaining settlements involved financial payments, with 80% involving payments of less than AUD$8,000.

Far fewer claims progressed to substantive arbitration. For the same six month period, arbitration decisions were more likely to favour the employer (141 decisions). For the 86 arbitration decisions favouring workers, 13 were reinstated and the other decisions awarded them monetary remedies, generally ranging anywhere between AUD$1,000 and AUD$30,000.

However, broader financial, reputational and emotional costs are faced by both the employer and the worker during arbitration (Southey, 2012). From the employer's perspective, managers must contend with time away from regular duties for preparing and attending conferences and hearings, travel if required (although many conciliation conferences are conducted by phone) and advisor fees if management does not possess the expertise or advocacy skills required. Such costs are in addition to possible settlement payments. Furthermore, individual managers are not immune from the reputational and/or emotional toll of the unfair dismissal claim process. Similarly, workers must cope with the personal imposts and the financial expenses endured through a loss of income, attending hearings and advocacy/legal costs if they are not a union member and cannot self-represent their claim.

CONCLUSION

Australia's seminal federal industrial legislation, the Commonwealth Conciliation and Arbitration Act of 1904, installed a collective industrial system with unions on one side, employer and employer associations on the other side, and a third-party industrial tribunal to engage in the conciliation and arbitration of disputes (Cooper & Ellem, 2008). This federal industrial tribunal could not intervene in matters issued by individual employees. For more than eight decades the federal government and its federal tribunal were neither legislators nor arbitrators for unfair dismissal claims.

History shows that throughout the 20th century, the federal government came to dominate the unfair dismissal system by installing a tribunal with authority to resolve individual claims raised by individual workers. The irony is that the current endpoint of this journey is that government-regulated dismissal protection is at odds with the systematic deregulation of the labour market. Cordoned off by legislation, from the otherwise widespread neoliberal reforms of a 'free trade' economy, is the employee's right to appeal an unreasonable dismissal from the workplace. Such regulatory niches of the employer-employee relationship may help sustain capitalist rationalisations that secular businesses are moral operations (Gerde, Goldsby, & Shepard, 2007) and support Australia's national commitment to "a fair go" by catering to parallel notions of what a "fair go" means for "business" and for individuals who work within these businesses.

Despite their existence on opposite sides of the "political fence", these successive governments have managed to expand their industrial regulative ability by achieving successful legal reinterpretations of the heads of powers under the Constitution. Between these two forces was the power of the Australian vote which, in terms of dismissal protections, moderated overindulgence in these

powers. With threats to the ethical treatment of workers the issue at stake, the power of public opinion unseated a government that made legislation that pushed the employers' prerogative too far. Although the "unpalatable" legislation was amended and the current Abbott government is taking a middle of the road approach to industrial reform, the re-interpretation of the constitutional heads of power has remained. This is evidence of the machinations of Australia's political parties to knead the principles of the Constitution to suit the purposes of contemporary labour relations. While it is necessary to evolve in the modern world, this phenomenon is something that commentators, employers and unions need to remain aware of.

For employers, there is no way to ensure an employee will not elect to make an unfair dismissal claim, but the risk of suffering the financial, reputational and emotional costs associated with a claim can be minimised significantly. The FWC tends to look in the first instance at whether the reason for the dismissal was valid. As most employers believe they have a valid reason to dismiss an employee, perhaps it is simpler to think in terms of what makes a dismissal invalid. A dismissal is invalid if the employer failed to gather enough evidence to uphold the dismissal. Validity is concerned with the quality of the evidence collected and how the employer chooses to use the evidence it collects. Ignoring the presence of mitigating factors, such as whether the employee was a good corporate citizen with a satisfactory work record, or whether the employee was experiencing unusual personal situations, may also impact the validity of a dismissal. Employers also need to ensure that management and supervisors have followed company rules and policies in relation to the issue for which the employee is being dismissed, and that these rules are unambiguous, clearly communicated and consistently applied.

Beyond the issue of validity, employers need to be concerned with the process they follow to dismiss a worker and the legislation provides guidance on these aspects. The employee has a right of response to any allegation, which is predicated on the employer either conducting an investigation (in the case of misconduct) or providing training and/or counselling sessions (if it is a performance or redundancy issue). Importantly, employers must make it abundantly clear to the worker the reason they are facing dismissal, so that the employee can respond accordingly. The employer should also provide the worker with enough time to organise the presence of a support person during meetings, if the employee desires. The final hurdle that the employer needs to be aware of is the "harshness" of the dismissal. Proportionality between the reason for the dismissal and the consequences of the dismissal for the employee is paramount. Employers need to carefully consider whether a single or small lapse in an employee's judgement warrants the severity of a dismissal, particularly if the employee's ability to mitigate the loss of his or her job is limited.

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