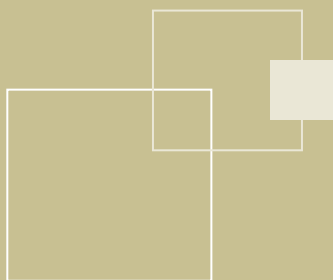


# GETTING IT RIGHT

## The reintroduction of unfair dismissal legislation



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AFFILIATED FIRMS PRACTISING SEPARATELY IN  
SYDNEY • MELBOURNE • BRISBANE • ADELAIDE • PERTH

# Anthony Massaro

## Senior Associate

September 2009

# Return of the Unfair Dismissal

- Do those laws apply to my business?
- Please tell me that an exception applies...
- Ok, so was this a fair dismissal?
- Oh. What am I up for?
- Oh. How do I get it right next time?

# Unfair dismissal under Work Choices

- Unfair dismissal did not apply to
  - Employers with 100 or fewer employees;
  - Employees terminated within 6 months of commencement;
  - Terminations for “genuine operational reasons”
  - Award/Agreement-free employees earning over threshold
- Many employees excluded

# Unfair dismissal under Fair Work Act

- Unfair dismissal does not apply to:
  - Employees terminated within 6 months of commencement, or 12 months for small businesses;
  - Genuine redundancies
  - Award/Agreement-free employees earning over \$108,300
- Applies to all employers

# Unfair Dismissal – small businesses

- Fewer than 15 full-time equivalent employees (until 31 December 2010)
- Extended qualifying period of 12 months
- Fair Dismissal Code – compliance is a complete defence

# Unfair dismissal – genuine redundancy

- Unfair dismissal provisions do not apply in the case of genuine redundancy
- Redundancy is only genuine if the employer has:
  - Complied with consultation obligations in agreement or modern award
  - Considered redeployment, whether with employer or associated entity

## Unfair dismissal – high income cap

- Only excludes employees if they are not covered by an award, or if no agreement applies
- \$108,300 calculated on base earnings, not full salary package
- Excludes:
  - Bonus
  - Commission
  - Statutory superannuation

# Unfair dismissal

- Termination must not be harsh, unjust or unreasonable
  - Valid reason for termination
  - Notification of reason
  - Opportunity to respond
  - Support person
  - Warnings in relation to performance
- Written notice of termination

## Valid reason for termination

- Must be a reason for termination, not just a warning
  - Ongoing performance issues
  - Ongoing disciplinary issues
  - Unsafe practice
  - Sexual harassment

vs

- An instance of tardiness
- Failure to provide a medical certificate

# Procedural fairness – performance problems

- Inform the employee
- Written criteria for improvement
- Initial warning, if appropriate
- Timeframe
- Support and supervision
- Document outcomes
- Ongoing monitoring
- Follow up – warnings if appropriate
- Termination

# Procedural fairness – disciplinary action

- Determine seriousness of conduct
- (Investigation)
- Advise employee of findings
- Opportunity to respond
- Consider length of service and employment record
- Consider prior warnings
- Obtain advice concerning risks
- Identify appropriate response

# Getting it wrong

- Compensation of up to 6 months' pay
  - Capped at \$54,150 this financial year.
- Reinstatement
  - to the same position
  - to a different position which is no less favourable
  - to a different position which is no less favourable *with an associated entity*

# Hypothetical 1

Company has 18 employees: 10 full-time, 8 part-time employees on 0.5 FTE.

Terminates the employment of its General Manager, Susan on 18 September 2009, for poor performance. Susan is advised of the termination by telephone, and told that it will take effect immediately.

Susan is not an Award employee. She has been with the company for 13 months, and is on a salary of \$100,000 plus \$9,000 in superannuation.

What remedies are available to Susan?

# Hypothetical 1 – Key Points

- Unfair dismissal provisions apply
  - Is it a small business?
  - Has Susan satisfied the qualifying period?
  - Does the high income exemption apply?
- Was the termination unfair?
  - Application of unfair dismissal requirements
  - Application of Fair Dismissal Code
- Termination without notice

# Hypothetical 2

Mundell Pty Ltd is a company with several pharmacies in Victoria. It is a wholly-owned subsidiary of Wyndorf Pty Ltd, a national company with community pharmacies across the Eastern States.

Wyndorf has determined that operating cost must be reduced across of its operations by 10 per cent and has directed Mundell to reduce its headcount from 110 to 95 before 31 March 2010.

The majority of employees are covered by the Pharmacy Industry Award 2010 or the Clerks – Private Sector Award 2010.

What impact will the Fair Work Act have on this restructure?

## Hypothetical 2 – Key Points

- Can the employees claim unfair dismissal?
- Does the genuine redundancy exception apply?
  - What are the consultation provisions?
  - Has the employer considered redeployment?
- What is the process?

# Hypothetical 2 – Key Points (cont)

- Process
  - Documentation
  - Redeployment – Mundell/Wyndorf
  - Written selection criteria
  - Consultation process
  - Select employees
  - Notify Centrelink
  - Notice of termination
  - Redundancy/severance pay

## Hypothetical 3

Simon is a pharmacy assistant working for Mundell Pty Ltd. His response to the news about redundancies is to take the rest of the week off on personal leave, complaining of “stress”.

Margaret, his manager, becomes aware that several packets of non-prescription painkillers have gone missing.

Margaret doesn't think that Simon is trustworthy, as he seems to take sick leave at every opportunity.

Security cameras show that Simon was stocking the shelves in question, but the footage is inconclusive.

# Hypothetical 3 – Key points

- Risks
  - Must avoid unfair dismissal
    - Valid reason for termination?
  - Must also avoid adverse action
    - “You suspect me because of my mental illness.”
- Investigation
- Response must flow from investigation findings

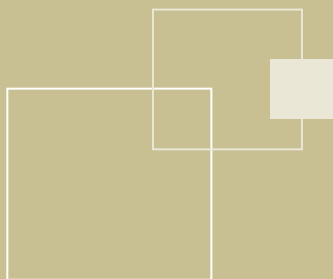
# Conclusions

- Unfair dismissal is back on the menu
- Valid reason is essential
- Procedural fairness
- Consider all angles
- Obtain legal advice before termination, not afterwards

# Questions

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