



Fair Work Amendment Bill 2012 (Cth)

About us

Kingsford Legal Centre (KLC) is a community legal centre and part of the Faculty of Law at the University of New South Wales. KLC is also a member of Community Legal Centres NSW Inc. (CLCNSW) the peak body for community legal centres in the state.

We provide advice and representation to people who live and work in the Botany and Randwick local government areas as well as to staff and students at the University of New South Wales. KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC provides a specialist employment service within our catchment as well as a state-wide specialist discrimination service.

This submission

Due to the short time frame involved in this Inquiry KLC has not been able to provide a comprehensive submission. We note that the Employment Law Centre of Western Australia has made a more detailed submission to this Inquiry and we endorse that submission. KLC also makes the following comments and recommendations in relation to the Fair Work Amendment Bill.

Limitation period for unfair dismissal claims

KLC is pleased to see that the Bill proposes to extend the time that applicants have to make an Application for unfair dismissal remedy; however KLC submits that 21 days is still not long enough to provide adequate access to a remedy from unfair dismissal – particularly in the case of vulnerable employees.

Limitation period for general protection – dismissal claims

Additionally, KLC is very concerned by the reduction in time given to applicants who have been dismissed to make an General Protection – Dismissal application. KLC submits that 21 days is not long enough for many applicants, particularly those who are vulnerable, to seek legal advice on their claim and make an informed decision about their prospects of success or the appropriate jurisdiction in which to file their claim.

Problems with the proposed limitation periods

- *Waiting times for free legal advice*

KLC is one of the few free legal services that specialises in employment law advice in NSW. Waiting times for an appointment with an employment solicitor at KLC can vary from between 1 and 4 weeks depending upon demand. Waiting times for an appointment to seek advice on a discrimination matter (which may often include advice on unfair dismissal and general protections matters) can at times be up to 8 weeks.

In our experience many clients are not in a position to seek legal assistance immediately after they have been dismissed. Clients from culturally and linguistically diverse (CALD) backgrounds, clients with disability and/or low literacy levels, young clients and Aboriginal and Torres Strait Islander clients are less likely to seek legal assistance straight away, yet these are the clients most likely to struggle with the legal system on their own. Based on current waiting times, even those clients who do seek advice immediately will often have to wait until after their time limit will have expired to receive advice.

- *Increase in applications with limited prospects of success*

Where KLC is not able to provide an appointment for legal advice within the time limit KLC is forced to advise clients to file an Application before receiving advice in an effort to preserve their position. This is particularly so given the limited success of applications for an extension of time at Fair Work Australia.

KLC is concerned that by only extending the unfair dismissal time limit to 21 days, and by shortening the general protections time limit to 21 days, clients are more likely to file claims with no or limited prospects of success because they will not have had any opportunity to receive legal advice. This will result in additional costs to employers and to Fair Work Australia as both will have to deal with an increase in claims that have little merit.

As Fair Work Australia notes in *Future Directions for Australia's National Workplace Relations Tribunal*¹ 'in some instances the provision of timely legal advice may lead a party to discontinue an application because there is another, more appropriate, avenue to redress their grievance.' In KLC's experience, where an employee with limited prospects of success is given this advice early they are likely to decide not to pursue legal action. However, where an employee has filed an Application prior to receiving legal advice (or has received a conciliation or conference date already) they often feel more invested in their Application and are less likely to withdraw despite receiving advice to do so.

- *Increase in the number incorrectly filed General Protections applications*

Under the Bill, applicants will be required to indicate whether they are making an Application for unfair dismissal or general protections – dismissal within 21 days. Under the current system, even if a client is required to file an Application for unfair dismissal remedy prior to receiving legal advice (to preserve their position) they will usually be able to receive legal advice within 60 days of being dismissed. In this case, if the legal advice they receive is that their claim would be more appropriately characterised as a general protections claim they have time to withdraw their unfair dismissal claim and file a general protections application.

Where applicants are required to choose a jurisdiction prior to receiving legal advice it is reasonable to assume that they will choose the jurisdiction that provides a wider range of remedies – for instance uncapped compensation for loss of income and compensation for general damages. KLC is concerned that by providing such a short time limit for both types of application there will be an increase in the number of inappropriately filed general protections claims.

- *Increase in the number of unclear or incorrectly completed applications*

Furthermore, employees who do have meritorious claims but who are forced to file their application without legal advice are more likely to file claims that do not clearly set out their case – this is particularly so in general protections claims where applicants are required to identify particular sections of the *Fair*

¹ Fair Work Australia, 2012, p.3

Work Act that support their claim. It is difficult to see how an employee with low literacy or from a CALD background would complete the current Form F8 (which requires an applicant to list 'Alleged contraventions of Part 3-1') clearly enough without legal assistance for an employer to properly respond.

This is likely to have the greatest impact on more vulnerable employees – for instance employees who may have experienced multiple contraventions of the general protections.

Yi Fei was dismissed after she informed her employer that she was pregnant and intended to take parental leave. On that day she also asked her employer for past payslips (which she had not previously received) because she was told by the Family Assistance Office she would need payslips when applying for the Government's paid parental leave scheme.

Yi Fei did not speak any English and had only discovered KLC after being referred through a series of non-legal services. Her appointment with us was delayed because of difficulties getting an interpreter in her language. Her appointment with us was 54 days after she was dismissed.

We told Yi Fei that she may have been dismissed for asserting workplace rights to parental leave and employee records, or because she was pregnant. We also told her that her rights under her Modern Award to minimum wages, penalty rates and overtime had been breached and she may have been dismissed to prevent her from exercising these rights in the future.

It is difficult to see how Yi Fei would have met the 21 day time limit to make her complaint (or how she would have satisfied the current 'exceptional circumstances' test for an extension) let alone how she would have adequately completed the application form without legal assistance.

- ***Reduced access to justice for meritorious claims***

As can be seen in Yi Fei's case, it is often the clients who are most vulnerable that experience the worst breaches of workplace laws. Yet, the current proposal to reduce the time an employee has to make an application in general protections claims is most likely to exclude the people who need this protection the most.

It is unclear why the time limit for general protections claims needs to be reduced. For instance, where a claim includes an allegation of contravention of s 351 Discrimination it is likely that an employee would also have access to redress under a state, territory or Federal discrimination law. These jurisdictions generally do not have strict time limits and most commonly require an applicant to file a complaint within 12 months of the discrimination occurring.

Recommendations

That the time limit for unfair dismissal applications be extended to 90 days (in line with comparable jurisdictions such as New Zealand, the UK and Canada) or at least to 60 days (in line with the current general protections jurisdiction).

That the time limit for general protections – dismissal applications be increased to 90 days or at the least remain 60 days.

That if the time limit for unfair dismissal and general protections – dismissal applications is changed to 21 days the Federal Government commit to adequately funding community legal centres to provide timely free legal advice to vulnerable employees in employment law matters.

Yours Faithfully
KINGSFORD LEGAL CENTRE

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