WORKPLACE RELATIONS LEGISLATION (TERMINATION OF EMPLOYMENT) BILL 1999

The Workplace Relations Legislation (Termination of Employment) Bill 2000 ("Bill") proposes to introduce a number of changes to the federal unfair dismissal legislation. It is our opinion that the proposed Bill diminishes the rights of the majority of employees who have little or no bargaining power in the workplace.

1. THE REMOVAL OF RIGHTS FROM RETRENCHED EMPLOYEES:

The first proposed change makes it very difficult for retrenched employees to mount an unfair dismissal claim where their employer has undergone a business restructure. The Bill proposes to introduce a new sub-Section 170CG(4) to the effect that, if the employment of a particular employee or group of employees is terminated on the ground of, or on grounds which the include the ground of, operational requirements of the employer's undertaking the termination is not to be taken to be harsh, unjust or unreasonable, regardless of the termination process adopted by the employer.

This new provision will cause injustice to employees who are selected for redundancy for a reason which has no foundation or is totally unrelated to their conduct, capacity or performance or for being a workplace activist and standing up for either safety rights, union rights or just for their fellow employees on any issues or for any other improper reason.

The provision clearly removes any protection employees may have in redundancy situations and the employer is open to choose whoever it wants to be made redundant without consultation with either the employee or his or her union representative, and/or without a fair procedure of selection being adopted. It has never been difficult for employees to establish a redundancy situation and this is more the case now than ever before due to very complicated group company structures in place.

In our experience, the use of redundancy as a reason for termination has significantly increased, especially as a way of terminating employees for whom there is otherwise no valid reason. We also advise that this is done by changing a few titles and position descriptions of jobs and shuffling money and budgets around the different departments.

Trying to prove that the reason for termination is not because of operational requirements is a very difficult task as most evidence in such a situation is that created by the company, ie. financial statements and company structures. Such evidence can be easily manipulated resulting in most companies being able to create a valid redundancy situation with a little bit of effort and some legal advice.

Injustices which may arise are exemplified in the following fact situation which constituted a recent unfair dismissal claim. An employee had worked for a company for a number of years. The individual was highly skilled and experienced. The company faced a redundancy situation and sought 2 volunteers for retrenchment. Only one employee volunteered. Without any consultation or notice, he was informed that he was to be retrenched. The termination of the Applicant took place 13 days before he was to receive his pro rata long service leave. It had been company policy for the company to apply the last-on first-off rule in forced redundancy situations. The company chose to ignore this policy on this occasion. The company asserted that the now redundant employee didn't have the required skills. The assertion was factually incorrect. The redundant employee trained other employees in the use of certain machines and had numerous years of experience with the company. The company had also commenced to employ a large number of migrants who were uneducated and spoke little English. Under the new provisions, the Applicant would not have the ability to seek reinstatement or to seek compensation for the manner in which his employment was terminated.

2. THE EXPLOITATION OF SMALL BUSINESS EMPLOYEES:

The second main change introduced by the Termination of Employment Bill is in relation to small businesses. As a result of the changes, small businesses will be given extra shelter from unfair dismissal laws. The Bill proposes to include a new paragraph (da) in Section 170CG(3) of the Act to require the Australian Industrial Relations Commission ("the Commission") to take into account the degree to which the size of the employees undertaking establishment or service would be likely to impact on the procedures followed in effecting termination.

This change is clearly not warranted. Small businesses already receive concessions from the Commission in unfair dismissal cases under the present legislation. Under the general theme of "a fair go all round" it is open to the Commission to take into account the size of the business in determining what procedures are appropriate with respect to the termination of an employee.

It is submitted that the Commission should be left with the discretion to determine how the principle of a fair go all round should apply to the particular circumstances.

An example of abuse of procedure by small businesses is contained in the following statement by an Applicant in an unfair dismissal case.

> "When I applied in the then Commonwealth Employment Service, I was desperate for a job. I was new to Australia, too, having moved from New Zealand, and could not find a full-time job.
>
> In New Zealand I had worked as an journalist but, in the year I had been in Australia, I had found only casual jobs. The CES immediately referred me for an interview with a man called Bill, who ran an immigration advisory service.
>
> The position was for a receptionist, and Bill asked me to start immediately. He told me my hours would be from 8.30 a.m. until 5.00

p.m. but I soon ended up staying as long as it took to finish whatever work he gave me.

Bill would give a pile of work at 4.50 p.m. that he needed by 8.30 the next morning. I asked him how he kept track of the hours I was working, because there were no time sheets. He said "We don't need them - we're not in kindergarten, now". My payslips never agreed with the number of hours that I worked, but I put up with it because I wanted the job. One day, I told Gus that I had to leave on time to go to an appointment. But, at 4.45 p.m., he brought me a pile of folders containing hundreds of pieces of paper that he wanted filed in alphabetical order by the next morning. A colleague offered to finish the filing for me and Bill just stormed off. I tried to do as much filing as I could, before rushing off to my appointment.

Bill also asked me to spy on his wife, who worked in the office. He told me to tell him if I saw her with any men or if any men phoned the office to speak to her. One day, a man came to the office to visit his wife and Bill threw the guy at the wall, then began swearing at him. I was terrified and did not feel safe in the office any more.

There was nobody I could tell because Bill owned the company. I had had trouble finding a job, so I did not want to leave and be unemployed again. I knew his behaviour and his demands were unreasonable, but I felt stuck. I needed a job.

Four weeks later, I was working one Saturday and I asked Bill what time my boyfriend should pick me up. Suddenly he turned to me and said if I couldn't handle the work, I should pack my bags. I told him I was fine with the work, but I just wanted to know what time I could be picked up. He told me where to go.

I started to cry because I didn't want to be unemployed and couldn't believe he was sacking me. But I just had to go. My case manager at the CES called Bill and asked him when I would be paid the wages that he owed me. Bill just swore at him.

My case manager then gave me the number of a law firm, Maurice Blackburn & Co. My solicitor advised me to file an unfair dismissal claim with the Industrial Relations Commission.

I felt I had no choice but to proceed with the claim. I knew that Bill owed me money and I wanted compensation. I was eventually awarded the maximum compensation I could receive in my situation, which was four weeks' wages.

It took me two months to find another job with an employment agency. Job interviews made me nervous for a while. After everything that has happened, I know people should not be treated the way I was when they are doing the best job they can."

The employer in the above case has disappeared and is uncontactable.

3. JUDGEMENTS BEING MADE AT CONCILIATION CONFERENCES:

A further change to the current legislation that the Termination of Employment Bill proposes is that an applicant will only be permitted to elect to proceed to arbitration where he or she receives a conciliation certificate from the Commission which indicates that, on the balance of probabilities, the unfair dismissal application is likely to succeed.

The effect of introducing this provision will result in Conciliation Conferences going from a brief rundown of events, and discussions aimed at achieving a resolution to a matter to a quasi hearing where parties will have to prepare statements, evidence and Contentions of Fact and Law to convince a Registrar to make a decision that the unfair dismissal is likely to succeed. The role of the Registrar at this stage will change from conciliator/mediator to arbiter. Should this amendment to the legislation be successful it can be expected that the length of the Conciliation Conference will increase enormously, causing both parties to incur unnecessary legal costs and put further resource pressure on the Industrial Relations Commission and its conciliators. It is our experience that the parties will move away from resolving the matter without hearing if they are forced into a position where they are fighting each other on the merits of their

respective cases. It is submitted that this is contrary to the nature and purpose of the Conciliation Conference.

In our opinion, this will cause fewer claims to settle resulting in a larger number of arbitration. Consequently, both the employer and employee will incur larger legal costs, which is not a benefit to anyone.

4. EXTRA OBLIGATIONS ON ADVISERS:

The proposed change introduces a deterrence for legal and other advisers to bring claims for former employees on a "no-win no-fee" basis. It does this by requiring this arrangement to be disclosed to the Commission. It also exposes advisers to penalties if they have been found to have encouraged unmeritorious or speculative proceedings.

The proposed Section 170HE states *"An adviser must not encourage an employee to make or pursue an unfair termination application if, on the facts that have been disclosed ought reasonably to have been apparent to the adviser, the adviser should have been or should have become, aware that there is no reasonable prospect of success in respect of the application".*

It is our submission that this provision will not reduce the amount of unfair dismissals being brought. It is our experience that a large number of enquiries we get relating to unfair dismissals are rejected either at the enquiry or interview stage. It is not economically viable for legal firms to take on cases without those cases having reasonable prospects for success, particularly in no win no fee situations.

We also submit that, if the legislation is to permit the representatives of the applicant to be penalised for encouraging them to make a claim, then the representatives of the employer should also have an obligation not to discourage their client to settle where it would be reasonable to do so. There is no corresponding obligations on the employers contained in this Bill.
There is no clear definition of what is a case "without a reasonable prospect of success" and this lack of clarity on ambiguity alone will result in further litigation and costs being expended by the parties.

Putting such an obligation on advisers goes against the nature and purpose of the legislation to conciliate disputes between parties. On many occasions the quantum of money will not be the main issue, but other matters such as Statements of Service and Confidentiality may be of greater importance and can be agreed upon to allow the parties to separate amicably. If an Applicant is advised not to bring an application, they will never have had the chance to hear the other parties side and reassess their position. Instead they will leave the employment with a sense of bitterness. Conciliation, even where a party has limited prospects of success is very effective in cooling down the relationship and effecting closure between the parties. The conciliation process has also proven to be an effective tool in resolving other outstanding claims between the parties, for example contractual and discrimination issues.

5. PREVENTING PERSONS EMPLOYED PURSUANT TO A CONTRACT FOR SERVICES FROM BRINGING AN APPLICATION FOR UNFAIR DISMISSAL

The Bill proposes to insert into the legislation a new sub-Section 170CD(1A), which states that persons engaged under a contract for services (i.e. independent contractors) are not entitled to apply for a remedy under the Act in respect of termination of employment.

In our submission, the above provision is not warranted.

Increasingly, persons engaged as independent contractors are for all intends and purposes carrying out duties of employees. These people are contracted by a company to undertake all duties that an employee would normally do. In many circumstances these individuals are contracted and not employed to enable a company to reduce cost overheads by avoiding the obligations of tax, superannuation and Workers' Compensation legislation. Like employees, these contractors are solely under the control of the company and are totally dependant on the company for a weekly income. (see, e.g. the Full Bench of the Commission in Sammartino). The only difference is that the company has created an artificial situation by requiring the contractor to sign a document whereby they agree to become an incorporated entity, create their own business

or accept that they are not an employee. It is unfair to reward companies who engage in these practices and in turn punish other companies who accept their statutory obligations instead of finding ways of avoiding them on a technical basis.

Secondly, the exclusion of contractors is in breach of Australia's international obligations pursuant to the Termination of Employment Convention. In the decision of the Full Court of the Federal Court in Konrad, Finkelstein J held that the Convention intended that contractors who were dependent on the contractee came within the definition of employee used in the unlawful termination provisions. Therefore, the exclusion of contractors from bringing an unfair dismissal pursuant to the Workplace Relations Act removes a right the Contactors have under the Convention. Such a provision is also in conflict with the objectives stated in the WRA which is to assist in giving effect to the Convention.

6. DEMOTION

We can see no reason why an amendment to the *Workplace Relations Act* is required to exclude people who are demoted and have not received a significant remuneration decrease.

Where a demotion has occurred, a decrease in wages or salary is one among many issues. Of significant concern to many demoted employees is the loss of face among colleagues and being placed in a position by an employer which is so untenable that they are for all intents and purposes forced into resignation.

7. NO COMPENSATION FOR SHOCK, DISTRESS OR HUMILIATION OR OTHER ANALOGOUS HURT

There is no justifiable reason why compensation for shock, humiliation and stress should be excluded from being awarded in unfair dismissal cases. We believe that it is proper for the Commission to have the power to award such damages where circumstances justify it. Currently, the law only provides for the payment of such compensation in very extreme situations. There must be some

remedy where employers engage in callous and/or humiliating behaviour in connection with an unfair/unlawful termination.

8. POWER OF THE COMMISSION TO DISMISS AN APPLICATION IF THE APPLICANT FAILS TO ATTEND A PROCEEDING

It is very rare for the applicant not to attend a proceeding. It is far more common for the employer to fail to attend a proceeding than a former employee. We believe it is not necessary to give the Commission the power to dismiss an application if the applicant fails to attend a proceeding.

If the Commission is given such a power, then there must also be a corresponding obligation on the Respondent so that the Commission can award the relief sought by the employee should the Respondent fail to attend at a proceeding.

9. REQUIRING AN APPLICANT TO LODGE AN AMOUNT AS SECURITY FOR ANY COSTS THAT MIGHT BE AWARDED AGAINST HIM OR HER

This firm has a substantial unfair dismissal practice. We are yet to have a cost order awarded against an applicant client. Security for costs place is a substantial financial burden upon applicants, many of whom are impecunious due to their recent termination.