

# **Small Business and Unfair Dismissal**

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Proposals to exempt small business from the unfair dismissal provisions in the Workplace Relations Act are not warranted. There are a number of reasons for why I hold this view.

## **1. There is no clear and convincing evidence that shows an exemption of small business from UFD will generate new jobs in small business (whether this is 50,000, 53,000 or 77,000).**

The rationale behind wanting to exempt small business from UFD is that small businesses generate jobs. However research has produced inconsistent or diverging results about the role of small business in job generation (see Storey (1994) for analysis of UK research; Parker (2000; 2001); Revesz & Lattimore (1997) for Australian overviews). It all depends on methodology and Kirchoff and Greene (1998) illustrate the problem when they outline the differences between a comparative static analysis and a dynamic analysis of small business job creation. They explain that the use of the former shows large businesses generate jobs and the use of the latter shows jobs are generated by small businesses. Their conclusion is that although these methodological arguments are interesting they distract policy makers.

Job generation studies rely on enterprise level, longitudinal data of job creation and destruction (Revesz & Lattimore 1997), and are therefore more than a snapshot of the changing size distribution of firms. [1] Furthermore, they identify where jobs are generated and therefore the question of whether jobs are generated by the small business sector or by social, economic and technical changes favouring small business creation, can be addressed. At present we do not have a national level longitudinal data collection that can address these questions. The previous Business Longitudinal (BLS) (which was also known as the Business Growth and Performance Survey) was conducted by the ABS from 1994-5 to 1997-8. It could be used to show the extent of job generation and destruction for business of all sizes and there was some support for the view that small business jobs are being generated by social, economic and technical changes favouring small business creation rather than by small businesses themselves. The Coalition government has only recently agreed to restart the BLS collection and therefore they have not had appropriate data to underpin their arguments for the past few years.

The idea that small businesses will generate new jobs is also problematic when we consider the fact that research shows only a very small proportion of small business will ever grow – David Birch estimates that is only 3-4% of any small business population that are, what he terms, ‘gazelles’ – the fast growth start-ups (Birch, Haggerty, and Parsons, 1995; Birch and Medoff, 1994). Moreover, David Storey (1982) has estimated that there is a 0.5% to 0.75% probability that a new firm will have 100 or more employees within 10 years of start-up. When it comes to who will contribute new jobs then Storey, Keasey, Watson and Wyncarczyk (1987) showed that out of every 100 new ventures it is only the largest four firms at the end of a decade that will contribute 50% of the jobs.

## **2. The exemption is likely to worsen the quality of small business jobs and therefore make it more difficult for small business employers to recruit quality employees.**

Small business jobs are generally of lower quality than jobs in larger business, particularly when they are compared in terms of objective criteria such as wage levels, employment status, job security, skill level, employment conditions, and training and career development opportunities (Barrett, 2002; 2004; Barrett and Khan, 2005; Revesz and Lattimore, 1997). Removing rights for new employees in small business create two classes small business employees (those with rights and those without) as well as further erode job quality.

## **3. Unfair dismissal is a symptom of a wider problem: that is poor human resource management practices in small business.**

There are multiple studies (Australian and international) that point to informality in managing people as being the defining characteristic of human resource management in small firms. This is unfortunate as there are a range of research studies which suggest that competitive advantage can be gained by taking a systematic approach to HRM – this is the case for all firms (Dyer 1993; Pfeffer 1994; 1998), as well as small ones (Deshpande and Golhar 1994; Heneman, Tansky and Camp 2000; Hornsby and Kuratko 2003; Marlow 2000; Mayson and Barrett, forthcoming 2005). A systematic approach can be achieved by aligning HRM policies and practices, for example, recruitment and selection, training and development and reward systems, with the overall business strategy. However, most small business research shows that this is not often the case – in fact the problem starts when planning is not given a high priority in small business – a situation all too common in Australian small businesses. Moreover some studies show that accounting, finance, production and marketing areas all take precedence over the development of personnel management practices and processes in small business (McEvoy, 1984).

The need to better understand HRM in small firms and the problems small business face in relation to their HRM is a key component of my current research agenda. With my colleague Dr Susan Mayson (Monash) we have reanalysed the CPA small business employment data and show that growing small firms are more likely to formalise their HRM practices (Barrett and Mayson, 2004; Mayson and Barrett, forthcoming 2005). We are currently writing up the results of a further survey (funded by CPA Australia) to investigate HRM in small firms.

See also

- Barrett, R. (Dec 11, 2001) 'Dismissal law reform is not the answer', *Australian Financial Review (Small Business)*, p.41. [**Reprinted** in DeCieri, H., Kramer, R., (2002) *Human Resource Management*, McGraw Hill: Australia.]
- Barrett, R. (Dec 11, 2001) 'Disciplinary procedures can reduce the success of claims', *Australian Financial Review (Small Business)*, p. 40.

**4. There are limited numbers of small business covered by the UFD provisions in the current legislation and exempting them will not make a discernable impact on job generation.**

This part of the legislation relies on the corporations power of the Constitution (section 51(xx)) and therefore only employees of 'constitutional corporations' (or incorporated companies) who are covered by a federal award, certified agreement or Australian Workplace Agreement (AWA) are eligible to seek a remedy for termination of employment on the basis of it being 'harsh', 'unjust' or 'unreasonable'. While the numbers of small business with different legal forms are not collected in any systematic way it is estimated that fewer than half of all Australian small businesses are 'constitutional corporations' and even fewer again of those are covered by a federal award, certified agreement or Australian Workplace Agreement (AWA). In 2001 the government estimated 20% of all Australian small businesses operated in the federal arena and only 35% of their employees were covered by the provisions in the legislation.

See also

- BARRETT, R. (2003) 'Small business and unfair dismissal', *Journal of Industrial Relations*, Vol. 45, No. 1, pp. 87–93.
- BARRETT, R. (19 March, 2002) 'Coalition knows its jobs creation claim is spurious', *Australian Financial Review (Small Business)*, p.47.

**5. The Act has already been amended such that the AIRC must take into account the size of a business when examining unfair dismissal cases and new employees can already be dismissed without recourse to unfair dismissal during a three month probation period.**

It would appear that there is little evidence to suggest that small businesses need further exemptions from the federal unfair dismissal legislation, particularly when the AIRC already has to take into account (at s.170CG(3)(a)) firm size when assessing whether their dismissal procedures were reasonable. Moreover in August 2001 the Act was amended to exclude employees serving a period of probation or qualifying period, the duration or maximum duration of which is determined in advance, and is three months or less, or otherwise reasonable given the nature and circumstances of the employment (AIRC, 2001) and extends the previous three-month probation exclusion by removing the need to specify a probation period in a new employee's contract. This should allow sufficient time for an employer to determine whether a new employee is suitable or not, particularly if they are closely monitoring and managing that new employee's performance.

**6. The Australian Industrial Registry (AIR) does not keep accurate records of the numbers of unfair dismissal cases lodged by small business employees and therefore there is no clear evidence that small business have a greater or lesser problem than other sized businesses.**

A document tabled by Senator Andrew Murray at the recent Senate Inquiry into unfair dismissal and small business prepared by Senator Abetz (Minister for Employment

and Workplace Relations) clearly states “As not all employers involved in federal unfair dismissal matters responded the AIR’s request for information on employer size, the information in the table is considered indicative only....” The table referred to is reproduced below.

*Federal Unfair Dismissal Applications Lodged During the 2003 Calendar Year\*\*^*

<b>Registry</b>	<b>No. terminations of employment applications</b>	<b>No. of employer responses to the AIR’s question on employment size</b>	<b>No. of responses received by small business</b>	<b>Small business responses as a %age of all responses received</b>
NSW	1270	275	76	27.6
QLD	397	186	29	15.6
WA	316	64	16	25.0
SA	153	59	16	27.1
Tas	109	38	6	15.8
Vic	4242	1353	524	38.7
ACT	227	53	18	34.0
NT	240	125	50	40.0
<b>Total</b>	<b>6954</b>	<b>2153</b>	<b>735</b>	<b>34.1</b>

\*The figures in this table are based on monthly lodgements and may differ slightly from final annual lodgement figures.

^Data collected on federal termination of employment applications do not differentiate between unfair dismissal and unlawful termination.

In summary, it is my firm belief, based on available evidence, that an exemption from UFD for small business is not warranted. There is not the evidence to suggest that by doing so further jobs will be generated in small business. In fact, I believe exempting small business from UFD, and thereby removing rights from new employees in small business, will worsen the quality of small business jobs and make it even harder for small business to attract skilled, experienced and committed employees.

**NOTE**

[1] With such statistics businesses are classified by size according to their size at the beginning of the period. Therefore a small business with 15 people which employs a further 10 people (thus becoming a medium sized business) is still classified as small, whereas in a snapshot estimate it would be allocated to the medium size category. So while a snapshot of the medium sized category would show an increase in employment, net employment change measured by a job generation survey may be negative. As a result the ABS (2000: 89) says it is important to note that in any particular size category, net employment generation figures do not mirror changes in total employment numbers.

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