

Submission to
Senate Employment, Workplace Relations, and
Education Legislation Committee

Inquiry into Workplace Relations Amendment
(WorkChoices) Bill 2005

The terms of reference indicate that the following areas will not be considered as they *'reflect government bills previously referred to, examined and reported on by the committee; namely those elements which relate to secret ballots, ...; reform of unfair dismissal arrangements;....'*

The proposal to exempt from the unfair dismissal arrangements situations where an employee has been terminated for reasons including reasons of operational requirements¹ has not at any stage been a part of a government bill or previously referred to, examined and reported by any committee.

The minister has repeatedly indicated that the reason for this exclusion is to prevent 'double-dipping' – so an employee who receives a redundancy payment should not be able to claim compensation for an unfair dismissal.

'If someone is made redundant in the sense that there is no longer a job for them to do within a business, then that person is entitled to their redundancy payouts, and that's the normal course.

*All we're saying is that if you're entitled to redundancy payments in the normal sense then you shouldn't be able to double dip and bring an unfair dismissal claim.'*²

This approach ignores the fact that the primary remedy in unfair dismissal cases under the Workplace Relations Act is reinstatement.³

¹ operational requirements where the employer decides that for economic, technological or other reasons the position or job occupied by an employee has become superfluous, in excess of, or unnecessary for, the requirements of that employer's enterprise.

² Workplace Relations Minister Kevin Andrews SMH November 3 2005

³ Workplace Relations Act 1996 S170CH3

Secondly it is an established principle of the AIRC that where a redundancy payment has been made, and an employee has successfully made the argument that he was unfairly dismissed (whether there was an issue in selection process, consultation or simply the redundancy was a sham) then the amount received as a redundancy payment is taken into consideration in determining any compensation that the employee is entitled to.

Further the legislation does not require that an actual payment be made for redundancy, just that the reason for termination includes operational requirements.

The proposed changes hence fails on numerous fronts– that is that employees that have been dismissed for reasons said to include operational grounds lose their right to seek re-instatement for unfair dismissal, whether a redundancy payment has been paid or not and the purported reason for the exclusion while not in the current legislation is an established principle in case-law.

Also, the legislation as proposed offers a significant loop-hole for employers seeking to avoid unfair dismissal legislation. All that is required is for them to state that the reason for termination includes operational requirements and the employee would be required to show that the stated reason is not the actual reason before he could lodge an application for unfair dismissal.

A simpler alteration which would not have these flow-on effects would be to require the AIRC to have regard for any payments made at termination in determining appropriate compensation. This is a simple formalization of the principles already extant, satisfies the Minister's stated desire to preclude 'double-dipping', and has no unintended consequences.

Alan Dircks
Just Relations