

jobwatch
Employment Rights Legal Centre



Submission to the Productivity Commission- Workplace Relations Framework Inquiry

Prepared by:
Ian Scott (Principal Lawyer) with the assistance of JobWatch Volunteers

Job Watch Inc
Level 10, 21 Victoria Street, Melbourne 3000
Ph (03) 9662 9458
Fax (03) 9663 2024
www.jobwatch.org.au
Email: admin@jobwatch.org.au

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1. Introduction

Job Watch Inc (**JobWatch**) is pleased to contribute to the Productivity Commission's Workplace Relations Framework Inquiry.

In this submission, JobWatch will focus on Issues Paper 4, 'Employee Protections' and in particular, Unfair Dismissal and General Protections. JobWatch will also express its views on some of the other broader issues raised by the inquiry.

JobWatch recommends that:

- 1. The current workplace relations system, including the unfair dismissal and general protections provisions of the *Fair Work Act 2009* (Cth) (The Fair Work Act) remain largely unchanged as it strikes an appropriate balance between the interests of employers and employees.**
- 2. The general protections be amended so that the 'inherent requirements' defense to a disability discrimination complaint does not apply if the employer fails to make reasonable adjustments to the role to accommodate the disability.**
- 3. That it be open to the Fair Work Commission or Federal Circuit Court to consider claims where an employee was dismissed because they were about to become protected against unfair dismissal.**
- 4. That the time limits for the lodgments of general protection and unfair dismissal claims be amended so that employees have enough time to properly consider or obtain legal advice regarding which course or action to take.**
- 5. Restraint of trade clauses be made specifically unlawful.**
- 6. There be a higher level of regulation surrounding independent contracting, a statutory definition of the term 'independent contractor' and the Fair Work Act's general protections provisions be amended to protect independent contractors who inquire about the terms of their employment.**

2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to Victorian workers via a free and confidential telephone information service (**TIS**);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over 167,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 8000 calls per year.

The content of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. The case studies used in this submission are of actual but de-identified callers to or clients of JobWatch.

3. General Comments

JobWatch recognises that Australia's workplace relations system must be both productive and fair, and that it must balance the interests of both employers and employees.

However, Australia's growing population and increased workforce participation rates (particularly amongst women and older people) have increased the general surplus of labour¹ and have exacerbated the inherent power imbalance between employees and employers. An unregulated approach to workplace agreements in which workers individually bargain with employers without a meaningful safety net of minimum statutory or award based entitlements favours the more powerful party. The ultimate outcome of such a system is that workers are forced to compete against each other for jobs, not on the basis of skill or ability, but on the basis of price, i.e. the worker willing to work for the lowest wage is employed. The effect of this type of workplace relations system on living standards and social cohesion would be disastrous. JobWatch believes that an effective safety net, such as the current Fair Work system including the National Employment Standards, modern awards, minimum wages and penalty rates etc. are required to ensure a fair and equitable workplace relations system.

JobWatch therefore supports the current system of regulation and believes that it does not impose unnecessarily large burdens on employers regarding compliance and 'red tape'. This can be seen in the fact that, despite the Fair Work Act coming into force in 2009, labour productivity in the private sector has increased for the past 22 consecutive quarters.² Further, economic research on employment protection legislation shows that there is no clear link between the strictness of a nation's employment protection legislation and its economic productivity.³ Therefore, any costs the current workplace regulations do impose on individual businesses are not only necessary for the protection of employee rights but do not necessarily affect Australia's general economic productivity.

As stated in the Productivity Commission's own research note⁴, there is little agreement on the meaning of the term 'productivity'. Nevertheless, it seems to be assumed in the terms of the Workplace Relations Framework Inquiry that productivity results from businesses increasing their profits by spending less on labour. If so, this is a simplistic and unhelpful take on the meaning of 'productivity'. JobWatch would like to note that the driving down of the cost of labour (wage growth currently being at its lowest in 17 years⁵)

¹ Ellis Connolly, Kathryn Davies and Gareth Spence, *Trends in Labour Supply* (June 2011) Reserve Bank of Australia <<http://www.rba.gov.au/publications/bulletin/2011/jun/1.html>>

² 5206.0 - *Australian National Accounts: National Income, Expenditure and Product* (4 March 2015) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5206.0>>

³ Andrea Barone 'Employment Protection Legislation: A Critical Review of the Literature' (4 May 2001) Available at: <<http://jpkc.ojc.zj.cn/ldfx/UploadFiles/2010928214832623.pdf>> (10)

⁴ Gordon, J., Zhao, S. and Gretton, P. 2015, *On productivity: concepts and measurement*, Productivity Commission Staff Research Note, Canberra, February.

⁵ Jared Lynch, 'Real wages growth worst in 17 years' *The Sydney Morning Herald* (Sydney), May 22, 2014 <<http://www.smh.com.au/federal-politics/political-news/real-wages-growth-worst-in-17-years-20140521-38p5j.html>>

will not necessarily increase the general economic wellbeing of Australia, which is stated to be the central concern of the Productivity Commission.

Additionally, there are many other economic and non-economic aspects of wellbeing that are important to ordinary working Australians including job security, human rights protections, fair pay, the right to organise and bargain collectively and the dignity in work and being productive. Workers are not just individual economic inputs or units, they have families, cost of living pressures, they are consumers, voters, contribute to their community and make up the majority of our society.⁶

A fair and productive workplace relations system with an effective safety net of minimum entitlements and protections against unfair dismissal and discrimination for employees benefits all of the stakeholders in the economy because it benefits Australian society as a whole.

4. Unfair Dismissal

The Fair Work Act's unfair dismissal provisions play an important role in Australia's workplace relations system by preventing or mitigating against employers from acting capriciously or unfairly towards their employees. Legislation with this effect exists in many other OECD jurisdictions, including the UK, Canada, Germany and Sweden. As stated in the Fair Work Act, the objective of the unfair dismissal laws are to establish a framework for dealing with unfair dismissal that balances the needs of business and the needs of employees, and to establish procedures that are quick, flexible and informal. From a public policy perspective, if an employer wants to unfairly dismiss an employee, it should be the employer that compensates the employee for being out of work and not Centrelink, i.e. the taxpayer.

To be eligible to make an unfair dismissal claim, the employee's dismissal must fall within the Fair Work Commission's jurisdiction, i.e. the employee must have been employed for a minimum period (being 12 months for a small business, 6 months for all other businesses), not have earned more than the high income threshold⁷, their dismissal must not have been due to a genuine redundancy and have lodged their claim within 21 days of the dismissal. For a claim to succeed, the Fair Work Commission must find that it had

⁶ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0> In January 2015 there were 11,666,000 people in employment in Australia.

⁷ The high income threshold is currently set at \$133,000 per year. If an employee earns more than this, they must be covered by a modern award or enterprise agreement to be eligible for unfair dismissal.

jurisdiction to hear the claim and then decide that the dismissal was 'harsh, unjust or unreasonable'.

JobWatch's TIS receives many calls from employees who have been dismissed in unfair circumstances. Between January 2012 and January 2015, JobWatch received 5705 calls relating to potential unfair dismissal claims. Many of these callers would have no means of legal redress without unfair dismissal laws. For example:

Sally

Sally, a single mother, worked for a small food distribution business for two years. She was informed by her manager's son that her employment with the company was to be terminated and that he would be replacing her, as he no longer wanted to undertake the role in which he was working. Sally was reassured that her dismissal was not due to her performance but purely due to the fact that her manager's son would be taking over the position.

Erica

Erica had worked for nearly five years as a supervisor in the health industry. On return from her honeymoon she received a letter from her employer stating that she her employment was terminated. Erica did not know why she was dismissed, as she had left for her honeymoon on her good terms with her employer and her termination letter contained no reasons for her dismissal.

John

John informed his foreman there was too much work at his job site and therefore could not attend a second job site. The foreman yelled at him and threatened physical assault, and immediately terminated John's employment. The director later told him he was still employed. He went to the next job another day foreman arrived and yelled at him as well as assaulted him. His employment was terminated.

Tony

Tony had worked full time as a sales representative for three years. Tony received a call from his boss telling him that his employment had been terminated. When Tony asked for reasons, his employer stated that an order had not gone through properly. Although Tony's employer had previously stated that the order's paperwork should be sent prior to 7pm and Tony had sent it at 6.45pm, the boss seemed to have wanted it sent earlier.

Another example of the important role of the unfair dismissal laws is illustrated by *Elton v Acupuncture Australia Pty Ltd [2015]*,⁸ in which a sales assistant was summarily dismissed for her alleged theft, despite the employer's lack of evidence and unfounded allegations. The dismissal was found to be harsh because the allegations had significantly affected the employee personally and economically, unjust because she was not guilty of the conduct and unreasonable due to the lack of evidence and unreasonable inferences drawn by the employer. Had unfair dismissal not been available to that employee, and the above callers, it would be difficult to find appropriate redress unless the employee was able to establish that there were also issues of discrimination or unlawful adverse action regarding a protected attribute. Generally speaking, employees cannot take action for breach of contract because an employer can legally unilaterally terminate a contract of employment by the giving of the required amount of notice or pay in lieu.

4.1 Unfair Dismissal adequately balances employee and employer interests

Issues Paper 4 suggests that unfair dismissal laws may require employers to use excessive processes for dismissing employees. Although the unfair dismissal laws may impose some costs on businesses (for example, to improve their Human Resources departments), the system fairly balances employers' rights with employee protection in multiple ways.

Firstly, the legislation's eligibility requirements allow small employers 12 months, and large employers 6 months, to ascertain the suitability of an employee before the employee is eligible to lodge an unfair dismissal claim.

⁸ *Elton v Acupuncture Australia Pty Ltd [2015] FWC 1394*

Secondly, in order for an unfair dismissal claim to be made out, the dismissal must be found to be 'harsh, unjust or unreasonable'. This test means that employers are not prevented from dismissing employees for valid reasons such as poor performance or misconduct. Where an employee is underperforming, unfair dismissal simply ensures that any dismissal process is fair and gives the employee a chance to respond before any dismissal occurs (for small businesses, the Small Business Fair Dismissal Code⁹ applies). For example, in *Ross Fichera v Thomas Warburton Pty Ltd*,¹⁰ the reasons provided for the dismissal of a manager of an underperforming branch with low sales were held to be valid, but the failure by the employer to warn the manager that his employment was at risk or to give the manager an opportunity to respond rendered the dismissal unfair. This was despite the fact that the manager was dismissed due to his poor performance and inability to provide the necessary leadership for the branch. The warnings and procedural fairness that may be required when dismissing an underperforming employee are not onerous and are simply an application of the concept of natural justice on which the Australian legal system is based.

When considering whether a termination of employment is 'harsh, unjust or unreasonable', the Fair Work Commission will consider whether there was a valid reason for the dismissal, whether the person was notified of that reason, whether the person was given an opportunity to respond, whether the size of the business would be likely to impact on the dismissal procedures and whether or not there was a dedicated human resource department. These considerations ensure that the Fair Work Commission can reach a fair and reasonable trade off between the competing rights and interests of employers and employees. For example, in *Janusz Tymoszuk v Comfort Delgro Cabcharge*,¹¹ a bus driver had used his phone while driving, causing him to miss two stops and come into contact with trees. His employment was terminated due to serious misconduct. The driver filed for unfair dismissal as he believed he had a valid reason for using his phone, however, the Fair Work Commission found that his dismissal was not unfair.

4.2 Effects of the Unfair Dismissal system

In JobWatch's view, one of the most important consequences of the unfair dismissal regime is its preventative effect, that is, it provides a disincentive for employers to dismiss their employees capriciously and encourages them to improve their human resources

⁹ The Small Business Dismissal Code can be used by small business to ensure that their dismissal procedures are fair. This Code makes it easy for small businesses, especially those without dedicated human resources departments, to comply with the Fair Work Act.

¹⁰ *Fichera v Thomas Warburton Pty Ltd* [2012] FWA 4382 (unreported, Gooley C, 24 May 2012)

¹¹ *Janusz Tymoszuk v ComfortDelgro Cabcharge Pty Ltd T/A Westbus Region 1* [2013] FWC 3507

procedures. It is impossible to accurately quantify the number of harsh, unjust or unreasonable dismissals prevented every year by unfair dismissal laws, but anecdotally and based on JobWatch's experience, it is likely to be in the tens of thousands. The laws not only protect workers, but mean that employment rates are more stable. This, in turn, results in flow-on economic benefits such as decreased numbers of individuals requiring welfare services, and greater economic and social security.¹² Although it is difficult to measure, it is likely that workers who feel secure in their employment are ultimately more productive than workers who would otherwise have no protection against unfair dismissal regardless of their length of service.

In Issues Paper 4, it is suggested that the current unfair dismissal arrangements may produce various unintended impacts and compliance costs. Evidence suggests that actual costs imposed on business by unfair dismissal regulations are small¹³ and do not necessarily have a direct impact on national productivity or GDP, as stated above.

Another suggested impact is that unfair dismissal laws necessitate more costly recruitment screening processes. However, as mentioned above, the 6 or 12 months prior to employee eligibility can be, in itself, a screening process. The use of a fixed term contract can also act as a screening process, as an employee is not eligible to file for unfair dismissal merely because the set time period of their fixed-term contract has expired.

Another impact of unfair dismissal suggested by Issues Paper 4 is that employers may be reluctant to hire people with a higher perceived risk of 'underperformance'. However, economic reasons alone provide employers with sufficient disincentive to hire workers at risk of 'underperformance'.

There have also been concerns regarding unfair dismissal's impact on employment levels generally. However, it is not economically rational for a business experiencing increasing demand for its product to not hire extra workers to meet that demand and therefore eschew profit because of unfair dismissal laws. Additionally, a business experiencing a temporary or fluctuating increase in demand can hire employees on a casual basis. Under existing unfair dismissal laws, in addition to the minimum employment period, casual employees must also be employed on a regular and systematic basis with a reasonable

¹² Andrea Barone 'Employment Protection Legislation: A Critical Review of the Literature' (4 May 2001) Available at: <<http://jpkc.ojc.zj.cn/ldfx/UploadFiles/2010928214832623.pdf>> (6)

¹³ Benoit Pierre Freyens and Paul Oslington 'A First Look at Incidence and Outcomes of UD Claims under Fair Work, WorkChoices and the Workplace Relations Act' (2013) 16.2 *Australian Journal of Labour Economics*, 295, 295 .

expectation of their employment continuing to be protected against unfair dismissal. Unfair dismissal laws are not, therefore, a bar to hiring new workers.

A benefit of the unfair dismissal system is that, in JobWatch's experience, unfair dismissal proceedings are relatively quick and efficient in comparison to proceedings under contract law or anti-discrimination law. An employee has 12 months to file a claim under anti-discrimination laws or six years to commence most common law claims. In contrast, the 21 day period to file an unfair dismissal claim ensures the matter is commenced quickly. Once a claim is filed, a voluntary telephone conciliation is normally held within two to three weeks and approximately 79% of unfair dismissal matters are settled during this conciliation.¹⁴ Therefore, the vast majority of unfair dismissal claims are completely resolved in a quick and efficient manner, leaving both the employee and employer to direct their attention towards other aspects of their respective lives and businesses.

Indeed, a reduction in the capacity for workers to commence unfair dismissal proceedings with the Fair Work Commission may force them to use another legal remedy possibly involving higher costs and longer delays, and therefore place a greater burden on both business productivity and the legal system.

As noted in Issues Paper 4, businesses may choose to pay 'go away money' to settle an unjustified unfair dismissal claim. If a matter proceeds to the Fair Work Commission, there is a risk that the Commission will find that the claim was made vexatiously, without reasonable cause, or with no reasonable prospect of success, and may consequently award costs in the employer's favour. Although the payment of 'go away money' allows matters to settle quickly and quietly, employers are under no obligation to offer 'go away money' and have discretion to offer any amount of money they feel is appropriate or make no offer of settlement at all.

4.3 Remedies

It should be noted that the only remedies available in unfair dismissal if a claim is successful is reinstatement and/or compensation capped at 6 months pay or less depending upon the quantification of the employee's actual economic loss. No compensation can be awarded for pain or suffering or any other ground, unlike in other jurisdictions.

¹⁴ Fair Work Commission, *Results and Outcomes* (13 February 2015) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>>.

4.4 Does Unfair Dismissal achieve its purpose?

JobWatch supports the Fair Work Act's unfair dismissal laws and believes they achieve their purpose as stated in the Fair Work Act.¹⁵ Although JobWatch has previously recommended improvements to the unfair dismissal regime, we are of the view that generally, the laws adequately protect workers and any small requirements imposed on employers are necessary. JobWatch believes the present arrangements are a reasonable trade-off between the interests of employers and employees, and any alterations to the unfair dismissal system may compromise the fairness of Australia's workplace relations landscape.

5. General Protections

The Fair Work Act's general protections provisions also play a crucial role in ensuring Australia's workplace relations system is fair and equitable. Between January 2012 and January 2015, 5807 calls received by JobWatch related to potential General Protections claims. For example:

Tam

Tam worked as a kitchen hand. She complained to her employer that she was being paid under the minimum wage. Her employer did not change her pay and her employment was subsequently terminated.

Karen

Karen had worked in a permanent full-time role for an educational institution for almost 6 months. She informed her manager that she was pregnant. Three days later she was dismissed.

Unlike the unfair dismissal regime, the general protections provisions contain no eligibility requirements. JobWatch believes that the absence of eligibility requirements is appropriate and necessary as an individual's right to not be discriminated against should

¹⁵ *Fair Work Act 2009* (Cth) Section 381.

be consistently and widely upheld, regardless of their length of service and including in recruitment. Indeed, there is a growing body of international law and literature that suggests that workers' rights to non-discriminatory treatment should be recognized as human rights.¹⁶

Nevertheless, the general protections provisions have often provoked expressions of concern from employers and other stakeholders. These concerns have generally been based in the view that the provisions favour the interest of employees and unduly burden employers.

For example, it has been suggested that the reversal of the traditional burden of proof as provided by section 361¹⁷ unjustifiably encroaches upon the traditional common law right to a fair trial. However, this reversal is necessary due to the general imbalance of power and resources between employers and employees. General protections claims necessarily involve the determination of the employer's 'reasons' for action, and relevant evidence of these reasons are often entirely controlled by the employer, making them generally better placed to lead direct evidence.¹⁸ A general protections claim can fall on the way an employer defines and subdivides their reasons for acting.¹⁹ It is clear that, in this context, it would be particularly difficult for an employee to make their case out if it were not for the reverse burden of proof.

The High Court's interpretation of the general protections, as clarified in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,²⁰ indicates that the interests of employers have been taken into account by these provisions. In this case, the Court held that, for a general protections claim to be made out, the prohibited reason must be the 'substantial and operative' reason for the adverse action. Therefore, the mere existence of a prohibited reason for adverse action is not enough to render an employer liable.

Further, if the employer's evidence as to whether or not they acted for a prohibited reason is accepted as reliable then it will be capable of discharging the burden of proof.

¹⁶ See, eg, Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005).

¹⁷ *Fair Work Act 2009 (Cth)* Section 361: "**Reason for action to be presumed unless proved otherwise** If: (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and (b) taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise"

¹⁸ See Mason J in *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605, at 241.

¹⁹ Anna Chapman, Beth Gaze and Kathleen Love, 'Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence' (Paper presented at Australian Labour Law Association Annual Conference, 2012).

²⁰ [2012] HCA 32.

Therefore, if an employer has a genuine non-discriminatory explanation for the adverse action, they will not be liable.

5.1 Coherence and clarity of the General Protections

Issues Paper 4 invites a response to the question of the 'coherence of the general protections' and the level to which the general protections provide certainty and clarity to all parties. The *Fair Work Act* brought together what was previously, in the *Workplace Relations Act 2006* (Cth), two separate Divisions: 'Unlawful Termination' and 'Freedom of Association'. In JobWatch's experience, this bringing together of the two divisions is both logical and practical as it is not uncommon for employees to have a claim that covers both areas, (see case below) and in such cases it is more efficient for all parties to have the claim fall under just one Division. For example:

Barry

Barry was bullied by a co-worker. He took sick leave in relation to stress caused by the bullying. After complaining to his employer about the bullying, his employment was terminated. Barry was able to make a general protections claim regarding protected attribute of his exercise of a workplace right (making a complaint regarding his employment) and a temporary absence due to illness.

As noted in Issues Paper 4, there is overlap and some degree of inconsistency between the Fair Work Act's general protections provisions and other anti-discrimination regulations that currently apply in Australia. For example, under the general protections, a disability discrimination complaint can be successfully defended if the employee is not able to perform the 'inherent requirements' of the role. Under the *Disability Discrimination Act 1992* (Cth), however, the 'inherent requirements' defense does not apply if the employer did not make reasonable adjustments to the role to accommodate the disability. A revision to the general protections to reflect the latter approach would provide greater consistency and greater protection to disabled workers.

Recommendation 2: That the general protections be amended so that the 'inherent requirements' defense does not apply if the employer does not make reasonable adjustments to the role to accommodate the disability.

Although consistency is important for all parties, it should not be achieved by compromising the robust protection of employees provided by the general protections provisions, which cover the employment context in a more targeted manner than Commonwealth and State anti-discrimination legislation. For example, although a complaint can be made to the Australian Human Rights Commission (AHRC) regarding discrimination against an individual based on trade union activity²¹, the general protections ensure that an employee cannot be discriminated against for the exercising of any general workplace right, e.g. for inquiring about their employment entitlements, and so provides protection for *all* employees regardless of whether they are trade union members or not.

The general protections provisions also provide stronger protection than anti-discrimination law by containing a reverse burden of proof (as discussed above), in contrast to both State and Commonwealth Anti-Discrimination law which place the burden of proof with the claimant.

Overlap or inconsistency between the Fair Work Act and other anti-discrimination legislation may be a result of the fact that anti-discrimination legislation serves a broader purpose for the community, while the general protections of the Fair Work Act have been specifically developed in, and are thus specifically suitable for, the employment law context. In JobWatch's experience, the overlap between the two schemes does not, generally, create any large inefficiencies or inconveniences for the relevant parties and the minimal compliance costs that may exist are necessary for the protection of the human rights of Australian workers.

5.3 Effectiveness of the General Protections

The general protections provisions play a crucial role in ensuring a fair and equitable workplace relations system in Australia. JobWatch believes that the human rights of Australian workers should not be put at risk or diminished due to alleged inconsistencies or compliance costs. In this respect, the general protections strike an appropriate balance between the interests of employers and employees.

²¹ It should also be noted that discrimination complaints regarding trade union membership are of limited consequence as the AHRC cannot provide a remedy unless there is settlement by agreement and such complaints cannot be taken to the Federal Court or Federal Circuit Court if conciliation at the AHRC is unsuccessful.

6. Additional Comments

6.1 Minimum Employment Period

JobWatch has noticed an influx in callers who have been dismissed from their employment when they are close to reaching the minimum employment period required to lodge an unfair dismissal application. For example:

Jane

Jane made a call in relation to her daughter Katie who had worked at two associated businesses for approximately five months. After working the weekend in one of the businesses, Katie was asked by her manager if she had switched off the cake fridge. Katie explained that she had not. The manager told her that somebody had switched off the fridge and \$500 dollars worth of stock had been ruined. Katie was informed that she would be held responsible and that the amount would be deducted from her wages. Katie's employment was then terminated and she was not paid for her last few shifts.

Recommendation 3: That it be open to the Fair Work Commission or Federal Circuit Court to consider claims where an employee was dismissed because they were about to become protected against unfair dismissal.

6.2 Time Limits

The recent harmonization of the time limits for lodgments of general protection and unfair dismissal claims has placed increased pressure on employees who do not know the reason for their dismissal. For example:

Lucy

Lucy was employed by an online retail outlet. One Friday she was asked to meet with her employer. In the meeting she was informed that her contract was being terminated. When Lucy asked for the reasons for her dismissal, she was told she had been disrespectful to another colleague. Lucy was unaware of this and had not been given any prior warnings.

Lucy informed JobWatch that, earlier that Friday, she had been on her ten minute break when her employer had asked her to return to work. Lucy told him that she would not return to work until her break was over. Lucy also noted that a few weeks earlier she had asked her employer why she had not been paid overtime. Lucy was not sure what the true reason for her dismissal was.

Callers like Lucy are forced to make a decision between filing for unfair dismissal or a general protections claim within the 21 day time limit, despite the fact that they may not have all the relevant information regarding the reason for their dismissal, and therefore do not know which avenue is more appropriate.

Recommendation 4: That the time limits for the lodgments of general protection and unfair dismissal claims be amended so that employees have enough time to properly consider or obtain legal advice regarding which course or action to take.

6.3 Restraint of Trade Clauses

In our experience, restraint of trade clauses are widely used in employment contracts. These clauses stifle competition and restrict the productivity of individuals and businesses. While the current legal presumption is that restraint of trade clauses are invalid unless reasonable, JobWatch recommends that they could specifically be made unlawful.

Recommendation 5: Restraint of trade clauses be made specifically unlawful.

6.4 ‘Sham Contracting’

Issues Paper 5 invites submissions regarding concerns about the workplace relations system as it applies to independent contractors. In JobWatch’s experience, the problem of ‘sham contracting’ is widespread, i.e. workers being hired as ‘independent contractors’ despite being, for all intents and purposes, employees. If hired as an independent contractor, the worker does not have the safety net of the workplace relations system to protect their rights. For example, they will not be entitled to the minimum wage or eligible for unfair dismissal. Often, the worker will be under the impression that they are an employee until a problem arises with their employment (such as an unfair dismissal) and they are informed that they were, in fact, an independent contractor. For example:

John

John responded to an online advertisement for a painting job. He received the job and worked his first day. The next day, he was told to remove his safety boot as it was making the tiles dirty. After doing this, he fell from a ladder and broke his toe. John wanted to make a WorkCover claim, but his employer refused to tell him the business's company name or their ABN. The employer also refused to pay John for the work he had already completed. The employer informed John that he was an independent contractor and therefore needed to provide his own insurance. The employer had asked for John's ABN, but only after he had had his accident.

In JobWatch's experience, vulnerable workers, such as recently arrived immigrants with minimal English skills, are especially likely to be exploited in this way. This may be because they do not understand the difference between the rights of an independent contractor and those of an employee, or because the job is offered as an independent contracting role on a 'take it or leave it' basis.

Recommendation 6: There be a higher level of regulation surrounding independent contracting, a statutory definition of the term 'independent contractor' and the Fair Work Act's general protections provisions be amended to protect independent contractors who inquire about the terms of their employment.

7. Conclusion

Thank you for considering our submission. JobWatch is confident that the above recommendations will increase the fairness of Australia's workplace relations framework.

We would welcome the opportunity to discuss any aspect of this submission further. Please contact Ian Scott on (03) 8643 1118 if you have any queries.

Per:
Ian Scott
Principal Lawyer

ians@jobwatch.org.au