CHAPTER 8

SCHEDULE 7 - TERMINATION OF EMPLOYMENT

8.1 This chapter deals with Schedule 7 of the Bill which proposes changes to Division 3 of Part VIA of the Act – Termination of Employment. The changes are broadly aimed at minimising legal costs, and to discourage vexatious or unmeritorious claims in line with the Government's policy statement, More Jobs Better Pay.

Outline of proposed amendments

8.2 The changes: broaden the scope of the termination of employment provisions; prevent persons from choosing whether to lodge a claim under federal or state legislation if they are entitled to a federal remedy; limit the discretion of the Commission and the Federal Court of Australia to accept applications 'out of time'; limit access to a remedy in respect of termination of employment for employees who have resigned (constructive dismissal), except in exceptional circumstances; confer new powers on the Commission for dismissing an application; impose additional criteria on the Commission when deciding unfair dismissal claims; introduce new provisions relating to the awarding of costs; prevent multiple applications for the same termination; and prohibit advisers from encouraging the pursuance of unmeritorious claims.

8.3 This chapter reports on those aspects of the amendments which were most contentious, in that they generated the most comment in submissions and in oral evidence. Where specific amendments are not discussed explicitly it can be taken that the view of the majority of the Committee is that they be enacted as described in the Bill.

Constructive dismissal

8.4 The current operation of the Workplace Relations Act allows an employee who has been forced to resign to initiate an application for an unfair dismissal. Item 8 of the Bill qualifies the scope of the expression 'termination of employment at the initiative of the employer' in relation to cases of resignation. The amendment would limit access to a remedy for an employee who has resigned to circumstances where the employee is able to establish that the employer has indicated, directly or indirectly, that the employee would be dismissed if he or she didn't resign, or has engaged in conduct that the employer considered would cause the employee to resign. Where a prima facie case is established the onus is on the employer to prove their conduct did not involve the intent of forcing the employee to resign.[1]

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2368

8.5 The Shop Distributive and Allied Employees' Association (SDA) argue in their submission that these new provisions are unnecessary: that section 170CDA will add a significant layer of complexity to an issue which is already able to be dealt with properly by the Commission and Courts, through the application of well established case law.[2]

8.6 The Department suggests that some recent decisions have expanded the notion of what constitutes constructive dismissal beyond those that occur at the initiative of the employer. These amendments will ensure that the provisions operate as they were intended, that is, to allow employees to apply for unfair dismissal where the employer intends his or her actions to result in the resignation of the employee or directly indicated that the employee should resign or be sacked. They also note that the tightening of the provisions will act as a disincentive to make and pursue claims that have little prospect of success.[3]

Recommendation

8.7 A majority of the Committee **recommends** that these amendments be enacted.

Out of time Applications

8.8 The Act allows the Commission to accept applications after the 21-day lodgement period where the Commission considers that 'it would be unfair not to do so'. The Bill requires the Commission to consider whether 'it would be equitable to accept the application'. New subsection 170CE(8A) requires that the Commission be guided by a set of criteria to reach a decision.

8.9 According to the ACTU these conditions will remove the Commission's discretion to consider all the factors leading to the lodgement of a late application.[4] Similar concerns were raised by the SDA and the ALHMWU.

8.10 The Victorian Automobile Chamber of Commerce (VACC) told the Committee that they no longer bother to argue on jurisdictional grounds that an application is out time because their experience with the Commission is that they will accept it anyway.[5] The VACC give an example of an application that was lodged 16 days out of time while the applicant was on a skiing holiday for 10 days between the time of termination and submitting the application.[6]

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2 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3785

3 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2377

4 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4455

5 Evidence, Mrs Leyla Yilnmaz, Melbourne, 7 October 1999, p. 135

6 Submission No. 389, Victorian Automobile Chamber of Commerce, vol. 13, p. 2960-1

Conclusion

8.11 These amendments remove the historical tendency for the Commission to accept the vast proportion of late applications by providing a new benchmark from which to make these assessments. The provisions will allow late applications to be accepted when there are genuine reasons for it being so.

Recommendation

8.12 A majority of the Committee **recommends** that these amendments be enacted.

Commission Certificates

8.13 The Bill changes Commission functions for the conciliation phase of an unfair dismissal application. The requirements placed on the Commission are that if the Commission is satisfied that all reasonable attempts to conciliate an application have been unsuccessful, or are likely to be unsuccessful it must issue a certificate allowing the applicant to elect to proceed to arbitration. The certificate must state the Commission's assessment of the merits of the application and the Commission has the discretion to make recommendations to the parties at this stage, including that the applicant discontinue his or her application.[7]

8.14 The Bill introduces requirements for conciliation which would vary according to whether the application indicates grounds for unlawful or unfair dismissal or a mixture of both. In relation to an unfair dismissal application, the Commission is required to state, on the balance of probabilities, whether the application is likely to succeed at arbitration. That is, the Commission must make a finding at the conciliation stage about the merits of the application. If the Commission determines that the arbitration of an application is unlikely to succeed, then the applicant would not be able to proceed. The Department explained that this improves the effectiveness of the conciliation process and reduces the number of unmeritorious cases that proceed to arbitration.[8]

8.15 These amendments were criticised by both unions and legal practitioners. It was argued that there were a number of issues associated with this that may: prevent the Commission from being able to make an accurate finding; unfairly deny an applicant access to arbitration; and substantially increase the costs and time associated with conciliations. There were also concerns about conciliators who hear unfair and unlawful dismissal cases but are not legally trained.[9]

8.16 Redfern Legal Centre suggested that people often do not seek representation until after the conciliation stage and are unlikely to have sufficient evidence with them

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7 Submission No. 477, Maurice Blackburn Cashman, vol. 23, pp. 6090-1

8 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2377

9 Submission No. 484, Fitzroy Legal Service, vol. 24, p. 6163

to substantiate their case.[10] The BCA expressed doubt that the Commission would have sufficient evidence to support a finding of 'likely to succeed' in the conciliation stage where information provided was disputed or contradictory.[11] Many argued that conciliation would therefore need to become a mini-hearing which would involve substantial increases in costs and time imposed on all parties and that this would be a further imposition on small business.

8.17 The Committee is also aware that many employers, particularly small business proprietors, choose to settle at the conciliation stage because of both the financial costs, and costs associated with the time needed to progress with the case to arbitration. The VACC told the Committee

> …the majority of their members will decide to resolve an unfair dismissal claim at either the first conciliation conference or even prior to the conference in order to avoid having to appear before the commission to argue the matter because of the inconvenience and expense. Members will usually choose to settle on a sum that covers their legal fees.[12]

Conclusion

8.18 A majority of the Committee understands the difficulty of protecting the rights of employees who are dismissed unfairly or unlawfully while at the same time protecting employers from vexatious claims.

8.19 A majority of the Committee acknowledges the evidence raised in submissions about the problems identified in this Schedule. It supports the use of the Commission as a 'filtering agent' in cases involving unfair dismissal and believes that the amendment is warranted.

Recommendation

8.20 A majority of the Committee **recommends** that these amendments be enacted.

Amendments in relation to costs

8.21 Various items of Schedule 7 of the Bill will: introduce new tests and broaden existing tests to increase the scope for awarding costs in respect of frivolous or vexatious claims; allow the Commission to require an applicant to provide security for costs that may be awarded against them; require representatives from either side, to inform the Commission whether they are engaged on a cost arrangement, or in the case of a legal practitioner, a contingency fee arrangement; and allow the Commission to award a penalty against an adviser for encouraging a party to proceedings in relation to an unfair or unlawful termination to pursue an unmeritorious or speculative claim.

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10 Submission No. 369, Redfern Legal Centre, vol. 12, p. 2516

11 Submission No. 375, Business Council of Australia, vol 12, p. 2619

12 Evidence, Mrs Leyla Yilmaz, Melbourne, 7 October 1999, p. 131

Awarding of costs

8.22 Objections to the amendments have been made on grounds that costs of proceedings are more likely to be borne by employees than employers.[13]

8.23 Fitzroy Legal Services note that an applicant who has a punitive or vexatious application for costs made against them cannot make an application for the costs they incurred in defending the application. It is suggested that this tactic may be pursued by some employers to deter employees from making or pursuing a claim.[14]

8.24 Increased scope for the awarding of costs is aimed at deterring claims that have little chance of success. The Committee notes that while the scope has been increased, the amendments are unlikely to see a significant increase in the number of cases where costs are awarded against applicants. It is highly unlikely that applicants who believe they have a genuine claim and present a reasonable case but subsequently lose their case will have costs awarded against them.

Cost arrangement disclosure

8.25 Legal practitioners were concerned about the requirement on representatives to disclose cost arrangements to the Commission and the ability of the Commission to award a penalty against advisers for encouraging an unmeritorious claim. The Law Council of Australia claimed that revealing 'contingency fees' is an unwarranted intrusion upon the solicitor/client relationship.[15]

8.26 The Department suggested that the engagement of legal practitioners on a 'no-win, no-pay' arrangement can be a motivating factor for the pursuit of speculative claims as claimants have nothing to lose, and encourage advisers to advocate the lodgement and continuation of claims.[16] The Law Council, however, submitted that contingency fee arrangements serve the purpose of providing access to justice given increasing restrictions on Legal Aid funding.[17]

8.27 A majority of the Committee believes that the disclosure of such arrangements will equip the Commission with more information in determining the merits of an unfair dismissal application.

Penalties against advisers

8.28 The Bill prohibits an adviser from encouraging an employee to make or pursue an application for unfair dismissal if the adviser should have been aware that

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13 Submission No. 519, McDonald Murholme Solicitors, vol. 26, p. 6915

14 Submission No. 484, Fitzroy Legal Service, vol. 24, p. 6163

15 Submission No. 468, Law Council of Australia, vol. 22, p. 5728

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2375

17 Submission No. 468, Law Council of Australia, vol. 22, p. 5728

the application had no reasonable prospect of success. Where it is believed that an adviser has contravened this section, an application may be made to the Federal Court for an order imposing a penalty on that adviser.

8.29 The proposal to penalise advisers was criticised by legal groups. Maurice Blackburn Cashman[18] and the Victorian Bar Association[19] expressed concerns about several technical matters. It is the view of the majority of the Committee that any technical matters will be resolved in the normal course of implementation of the legislation.

Conclusion

8.30 A majority of the Committee supports the amendments contained in Schedule 7 of the Bill relating to costs. The amendments will help to ensure that unmeritorious or speculative claims are actively discouraged while maintaining a fair and equitable system of protection for people who have their employment terminated unfairly or unlawfully.

Recommendation

8.31 A majority of the Committee **recommends** that the amendments to the Commission's power in awarding costs and requiring the disclosure of cost arrangements as well as introducing penalties for advisers that encourage speculative claims be enacted.

18 Submission No. 477, Maurice Blackburn Cashman, vol. 23, p. 6094

19 Submission No. 463, The Victorian Bar Inc., vol. 22, p. 5673