The Economic and Labour Relations Review Vol. 18 No. 2, pp. 79–84

Unfair Dismissal Cases

Murray Wilcox QC *

A significant element in the new industrial regime proposed by the Rudd Labor government is the restoration, to most employees, of a right of action against their employer for unfair dismissal. Available remedies are intended to include orders for reinstatement of employment and payment of monetary compensation.

By 'unfair dismissal', I mean dismissal that is harsh, unjust and unreasonable. The unreasonableness might be substantive; that is, there was no reasonable basis for the employer's decision to dismiss. It might be procedural: the employer made the dismissal decision without following a fair procedure, such as giving the employee an opportunity to know the nature of the employer's concern and to explain any allegation of misconduct.

'Unfair dismissal' is to be contrasted with a dismissal that is unlawful, because it infringes one of the special protections set out in the relevant legislation. Examples are dismissals that infringe prohibitions on racial or sexual discrimination or are based on the employee's membership of, or activities within, a trade union. Protection against unlawful dismissal was maintained under WorkChoices. However, so far as most employees were concerned, the practical effect of that legislation was the abolition of any right of action for unfair dismissal, a much commoner situation than unlawful dismissal.

The Government's Proposal

The proposal of the Rudd government is to provide a right of action for unfair dismissal to all employees, subject to a qualifying period. The right of action will not be available where the dismissal takes effect within the first six months of the person's employment; 12 months if the employer has fewer than 15 employees.

Although it is not easy to see why the extent of the qualifying period should depend upon the size of the employer's workforce, the concept of a qualifying period makes sense. The concept recognises that an employer, and perhaps also the employee, may have made a poor decision in creating the employment relationship and therefore allows it readily to be terminated, during its early days. At that early point of time, it is less likely that the employee will have made significant commitments (personal or financial) on the strength of that relationship. The employee knows, or should know, that he or she is, in effect, on probation for the duration of the qualifying period.

* Former Chief Justice of the Industrial Relations Court of Australia, and judge of the Federal Court of Australia.

https://doi.org/10.1177/103530460801800210 Published online by Cambridge University Press

The Industrial Relations Court of Australia Experience

During the period April 1994 to June 1997 inclusive, the Industrial Relations Court of Australia (IRCA), of which I was then Chief Justice, heard and determined the unfair dismissal claims that were brought pursuant to rights conferred by the Keating government's 1993 amendments to the *Industrial Relations Act 1988*, and which had resisted earlier attempts at settlement. In relation to each unfair dismissal claim, the Act required a mediation conference to be convened by a member of the Industrial Relations Commission (the Commission). In a majority of cases, an agreement resolving the claim was reached at that conference. The only cases that were passed back to the Court were those in which the Commission's mediation failed. Notwithstanding this, each year there were several hundred such cases.

Mediation having already failed, in relation to those cases that were returned to the Court, it might have been thought a waste of effort for the Court to try it again. However, we did try and achieved a two-thirds success rate. This did not necessarily mean the Commission member had not tried hard enough. The effluxion of time often brings second thoughts.

The unsettled cases went to trial, either before a judge or a judicial registrar. Respondents (the former employers) were usually represented by lawyers; applicants (the former employees) less often. The hearing of many cases occupied less than a day; more often two or three days, occasionally more. A significant proportion of the cases that went to trial settled during the course of that trial, generally as a response to the emergence of damaging evidence.

Although the Court always encouraged the parties to agree about matters peripheral to the main issue, and took a relaxed attitude to formalities concerning those matters, the parties sometimes waged intensive and prolonged warfare about all issues. The reason was usually easy to discern. As with a matrimonial relationship, the break-up of an employment relationship, especially a long-standing one, often gives rise to hurt, resentment and recriminations. Especially in cases where serious accusations are made, such as allegations of dishonesty, a party may regard the clearing of his or her name as being more important than the money at stake.

What implications does the IRCA experience have for the design of the unfair dismissal provisions of the new Rudd government legislation?

The desirable ambit of the unfair dismissal jurisdiction is a matter of policy for the government to determine. It has apparently already done so, as noted above. I will say nothing more about that, but limit myself to the desirable procedures for dealing with the claims, within that jurisdiction, that are brought.

Pre-Trial Procedures

As will be obvious from what I have written, IRCA's experience was that a large proportion of unfair dismissal cases settled before trial. Because cases were often initiated in one financial year but finalised (even in the Commission) in another, precise percentages are unavailable. However, over 90 per cent of all claims filed in the Commission settled before the commencement of a trial in IRCA.

https://doi.org/10.1177/103530460801800210 Published online by Cambridge University Press

The moral of that statistic is that every effort ought to be made, in both the design and administration of an unfair dismissals jurisdiction, to minimise the pre-trial costs incurred by the parties. This is a desirable principle in relation to all litigation; it is particularly apposite to claims for relatively small sums of money.

If pre-trial costs are to be minimised, two things are imperative. First, there must be a speedy and simple procedure for putting each party on notice about the other's position. The IRCA rules allowed applicants to initiate claims by completing and filing a simple claim form containing basic information about the parties and the claim. The Court served a copy of the claim form upon the respondent, using facsimile transmission. Today email would be an alternative. The respondent was required to complete, within a few days, an answer form that briefly stated his/her/its response to the claim, but without going into matters of evidence or law. The Court transmitted a copy of the answer to the applicant, by fax or mail. The Court also transmitted copies of all documents to the Commission, which then arranged a mediation conference.

It should be noted that, up to this point, there was usually no need for either party to have incurred any legal costs. I believe they commonly did not do so. The procedures developed by the Rudd government should replicate the IRCA approach.

The second pre-trial essential is to bring the parties together, as soon as possible, in a face-to-face conference presided over by an independent mediator. As I understand the position, this is the proposal of the Rudd government, using the resources of the new Fair Work Authority. It is suggested this initial meeting ought to be held at, or near, the employee's former workplace. I agree, at least as a general principle. To require parties to come to a central point — for example a State capital or regional centre — will often impose upon one or both of them an unacceptable costs burden.

Experience under the 1993 amendments suggests that a system of prompt, well-conducted mediations will result in a high proportion of unfair dismissal claims being resolved without the need for a court hearing and, if the mediation is held locally, without significant cost to the parties.

Should the parties be allowed to be legally represented at the mediation conference? In my opinion, no. There will usually be no need for legal representation. If either party feels the need for legal advice about the claim, so as to determine what position to take at the mediation, that advice can be obtained before the conference. Legal representation at a mediation must significantly increase that party's pre-trial costs, in a case that, statistically, is likely to be settled. Moreover, legal representation is contagious. It is the common experience of lawyers that, when people learn their opponent is to be legally represented, or represented at a particular level, they tend to replicate that representation, even though they would not otherwise have done so.

Professor Hancock's Proposal

In 'The Future of Industrial Relations in Australia', Professor Keith Hancock advocates the initial investigation of all unfair dismissal claims by an ombuds-

https://doi.org/10.1177/103530460801800210 Published online by Cambridge University Press

man, who would give a certificate about the merits of the claim before any further action is taken. The content of the certificate would determine the recoverability of costs by the ultimately successful party.

I do not favour this suggestion. Given the proposed width of the unfair dismissal jurisdiction, it must be expected that it will attract thousands of claims each year. Either the ombudsman would use a small army of investigators or there would speedily develop a bureaucratic bottleneck at the very stage of the process at which expedition is most important.

The ombudsman could not conscientiously give a certificate without first having considerable information about the case. How would this be obtained? If from the documents filed by the parties, this would require procedures under which the parties set out in writing the detail of their evidence and even their principal legal submissions. Few parties would feel confident of doing this without legal assistance. In practice, the documents would be prepared by the lawyers, taking all imaginable points. The ombudsman would then be asked to consider competing piles of paper, but with no means of evaluating their inconsistent assertions of fact.

If, on the other hand, the ombudsman is intended to determine the content of the certificate after hearing and questioning the parties, and forming an opinion about inconsistent assertions of fact, then the ombudsman is really being asked to conduct a pre-trial trial. Where is the virtue in that? The parties would be put to the full trouble and expense of a trial, even though experience teaches that, in over 90 per cent of cases, there need be no trial.

I suspect, with respect, that Professor Hancock has overlooked the numbers of likely claims, the high settlement rate in unfair dismissal cases and that they commonly, indeed overwhelmingly, involve disputes of fact. Unless the parties agree not to resolve the factual disputes, by settling the whole case, those disputes, or at least the more important of them, must be resolved before anybody can fairly say anything about the merits of the case. Resolution of disputed issues of fact can satisfactorily be effected only at a trial at which all available relevant evidence is received and evaluated. Such a trial necessarily involves considerable expense (public and private) and inconvenience. It is a misfortune that ought to be confined to those cases where factual resolution is essential, because all attempts at settlement have failed. It ought not be visited upon the parties as the system's first reaction to the making of a claim.

The Trial

I turn to issues concerning the trial of cases in respect of which mediation has failed. A key issue is the permissible representation of the parties.

Contrary to what appears to be the Rudd government's current thinking, I do not believe legal representation should be prohibited. I accept that legal representation will usually increase the costs of the trial, but it must be remembered that we are speaking here only about the small minority of cases that have defied efforts to achieve a mediated settlement. In relation to that minority, where one or both parties is insisting on a trial on the merits, the paramount objective must be to provide a fair trial and a decision soundly based upon the

https://doi.org/10.1177/103530460801800210 Published online by Cambridge University Press

evidence and relevant law. As in other types of cases, the court is likely to be assisted in that task by the involvement of legally-trained advocates operating in accordance with accepted ethical and professional standards.

There appears to be a common impression that legal representation necessarily increases the length of a court case. I am not aware of any empirical study on the subject but I doubt the impression is correct. Anybody who has sat through a case in which one or more parties is self-represented will have noticed the amount of time that is wasted because of the party's understandable ignorance of the relevant law and of court procedures and the best method of placing factual material before the court. The main determinant of the length of a court case is not the parties' representation but the attitude and efficiency of the presiding judge.

Even if the common impression were correct, I would still maintain that, at the trial stage, parties should be allowed legal representation. Few non-lawyers have the experience and knowledge that is necessary for them to do justice to their case. Many people become intimidated by authority figures; in court they can be rendered almost inarticulate.

Another problem about self-representation at trial is the position in which it places the judge. Most self-represented litigants have little idea about what questions to ask, either of their own witnesses (if they think of calling any) or in cross-examination. This leaves the judge with the invidious choice of either deciding the case on the basis of obviously incomplete and untested evidence or of appearing to descend into the arena of conflict by asking the questions himself/herself.

Applicants, who usually bear the onus of proof, would be particularly disadvantaged by denial of legal representation. How many meritorious cases would be lost because of the applicant's failure to call a witness who, or produce a document which, would have supported his or her case?

The situation of respondents would generally be less dire. Overwhelmingly, respondents are, or have been, in business. They are generally more familiar with, and therefore less intimidated by, officials and legal requirements. Large respondents, particularly, generally have trained and experienced human resources personnel, sometimes with law degrees, who would have an enormous advantage, in court, over a typical applicant. Simple fairness requires that applicants be entitled to litigate on an equal footing, through a trained lawyer.

I referred earlier to the attitude of the presiding judge. In my opinion, the key to minimising trial costs is not a blanket prohibition on lawyers but a rule, which should be built into the legislation, requiring the judge to make orders, regardless of the overall result, requiring parties — or, in bad cases, the party's lawyer — to pay all the costs occasioned by the raising of an unnecessary or unarguable point or by any other action that unnecessarily protracted the trial. Resolute compliance with this requirement would do more to limit trial costs (public and private) than banning lawyers.

This is not the place to discuss other means of controlling costs. I mention only a few matters that warrant consideration: local trials, so as to reduce the parties' travelling and accommodation costs; the extensive use of video-

conferencing to take the evidence of distant witnesses; extended sitting hours to reduce the number of days upon which people need to attend the court; and perhaps limitations on appeal rights excluding parties from re-agitating issues of fact. In the drafting of the legislation, others will think of other possibilities.

Conclusion

The design of the unfair dismissal legislation requires remembrance of two key points:

1. The vast majority of unfair dismissal claims will be settled. It is a matter of critical importance that the legislation be structured in such a way as to minimise the costs associated with those claims. This will be best achieved by simple pre-trial paperwork followed by a speedy, preferably local, conference conducted by a trained and experienced mediator.
2. In the minority of cases that reach trial, the emphasis must be on fairness. This necessarily involves permitting parties to be legally represented; nonetheless, the legislation should require the court to force parties, or lawyers, to bear any unnecessary costs they cause.

https://doi.org/10.1177/103530460801800210 Published online by Cambridge University Press