Employment, Industrial and Discrimination Law Practice

Turner Freeman

Lawyers Est. 1952

GREAT PEOPLE. GREAT RESULTS. GREAT VALUE.

Contents

Strict time-frames often apply in employment and industrial law matters making it important that you act quickly. Please contact one of our offices to get direct, practical advice.

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Employment, Industrial and Discrimination Law Practice

The introduction of the *Fair Work Act* in 2009 brought almost all employees under the umbrella of a national workplace relations system for the first time. All significant workplace regulation enterprise agreements, awards and minimum legal standards are now part of a single Australian system, rather than the old structure of various state and Commonwealth courts and processes.

Most unfair dismissal cases are now initially brought before and dealt with by Fair Work Australia, the federal body that has taken over from the old Australian Industrial Relations Commission. The *Fair Work Act* has also introduced Adverse Action claims, which protect employees from being treated adversely for exercising their workplace rights.

Rights under anti-discrimination law, contracts of employment and the *Competition and Consumer Act* continue to be enforceable.

At Turner Freeman Lawyers we aim to provide each of our clients with clear and concise advice to ensure you obtain a fair, sensible and positive outcome. We provide a cost-effective, straightforward approach to assist quick resolution.

Most cases are resolved through negotiation. If litigation is necessary our expertise can be relied upon for the best result.

This brochure is designed for individuals in need of legal assistance in relation to their jobs. Please be aware, however, the material contained in this document is of a general nature only; contact one of our lawyers for specific advice to suit your individual situation.

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Unfair Dismissal

Being fired from a job is a very stressful event. Employees are often left with a sense of unfairness and anger. The ability to secure alternative employment can be damaged.

Turner Freeman Lawyers are experts in advising employees of their rights on termination, and, where appropriate, assisting them to bring claims for unfair dismissal or any other claim they may have relating to the termination of employment such as Adverse Action.

For most workers Fair Work Australia is the appropriate body with which a claim should be lodged. Fair Work Australia has jurisdiction to deal with claims for unfair dismissal. A dismissal may be unfair if an employee can show that it was harsh, unjust or unreasonable.

Not all employees are protected from harsh, unjust or unreasonable dismissal under the *Fair Work Act*. To be protected, employees:

- must have completed a minimum employment period of 6 months, or 12 months if the employer is a small business; and
- earn less than a statutory maximum (currently $123,300 per year, although this amount changes from time to time) or be covered by an Award, by an Enterprise Agreement and not be subject to a high income guarantee.

A claim for unfair dismissal must be lodged at Fair Work Australia **within twenty one days of termination**.

NSW Government employees who are subject to an award or enterprise agreement, or who earn less than the statutory maximum have rights to bring a claim for unfair dismissal in the State Industrial Relations Commission. Proceedings must be commenced **within twenty one days of termination**.

After commencing an unfair dismissal claim in either Fair Work Australia or the NSW Commission, the usual process is that an attempt will be made to reach a negotiated settlement between the parties at a settlement conference. Such a conference usually occurs within a few weeks of the claim being lodged. In the event the matter does not settle, it may then proceed to a hearing where evidence is heard and a decision is made.

Constructive Dismissal

A dispute sometimes arises at the time a person leaves a job as to whether they resigned, or were dismissed. Where a person resigns their employment as a result of their reasonable belief that they have no alternative choice due to the conduct of their employer, they are able to assert that they were 'constructively dismissed'. Examples of conduct by employers which may amount to constructive dismissal include:

- continued failure to investigate harassment and bullying of the employee in the workplace
- an ultimatum to the employee to resign from employment or otherwise be terminated
- continued incorrect payment of wages after notification to the employer, on numerous occasions, over a reasonable period of time
- changes to an employment contract without the employee's consent that are unreasonable, for example: dramatic reduction in working hours, employment duties, or a demotion.

Constructive dismissal is simply a different type of termination of employment. The *Fair Work Act* provides the same level of protection against unfair dismissal for people who can show that they resigned their employment as a result of being forced to do so by their employer.

Like other unfair dismissals, a claim for unfair dismissal arising out of a constructive dismissal must be filed with Fair Work Australia **within twenty one days** of the end of the employment.

While the law provides some protection for people who are forced to leave their employment, you should consult a lawyer before resigning your employment in these circumstances.

Adverse Action

Adverse Action claims (also known as General Protections claims) were introduced in the *Fair Work Act* 2009.

These claims allow employees to bring an action where their employer has treated them less favourably because they have exercised, or have tried to exercise, a workplace right, or where an employer has discriminated against them. There does not need to have been a termination of employment to give rise to an Adverse Action claim.

The definition of a workplace right in the *Fair Work Act* is wide and includes the following:

- an entitlement under a workplace law, instrument or an order made by an industrial body. This includes the right to be free from sexual harassment at work and the right to be a union representative
- the ability to initiate or participate in a process under a workplace law, which includes lodging applications with Fair Work Australia, attending court proceedings, taking part in protected industrial action and making a request for flexible working arrangements
- the ability to make a complaint to a body that has the authority to deal with a workplace law. This includes making a complaint to the Workplace Ombudsman and lodging a grievance with your employer regarding your terms and conditions
- the ability to refuse to participate in, or undertake workplace duties that are unsafe or hazardous.

Adverse Action claims will cover some types of unlawful discrimination, avoiding delays that arise in other jurisdictions.

If the Adverse Action complained of has led to the termination of employment, the claim must be commenced **within twenty one days of termination**. Otherwise, it must be commenced **within 6 years**.

After commencing an Adverse Action claim there is usually a settlement conference held where an attempt at a negotiated settlement will occur. This settlement conference will usually occur within a matter of weeks of the claim being started.

In the event the matter does not settle in any conciliation at Fair Work, proceedings may be commenced in the Federal Magistrates Court or Federal Court. The matter than proceeds to a hearing where evidence is heard by a Magistrate or Judge and a decision made. The Court may make a wide variety of orders including reinstatement, compensation, and penalties against an employer for their conduct.

Unlawful Discrimination

Unlawful discrimination can occur where an employer, or others in a workplace, treat an employee or a group of employees less favourably than others because of the employee's:

- race
- sex
- pregnancy or marital status
- religion
- sexual preference
- age
- disability
- trade union activity
- family or carers responsibilities
- political opinion
- social origin or some other characteristic recognised under anti-discrimination or human rights law

Anti-discrimination laws seek to ensure that all workplace participants work in an environment free of unlawful discrimination.

Discrimination can be indirect. Indirect discrimination occurs where policies or procedures, which are applied equally to everyone, have a discriminatory effect on one group of people.

Anti-discrimination laws also cover sexual harassment in the workplace. Sexual harassment is any unwelcome sexual advance, or other conduct of a sexual nature, that may reasonably offend, humiliate or intimidate the person harassed.

It is also unlawful for your employer to treat you less favourably, or to threaten to do so, because you have made a complaint about discrimination or sexual harassment.

There are a number of different courts and tribunals that may be able to assist in complaints in relation to discrimination in the workplace. These include the Australian Human Rights Commission, Fair Work Australia and the NSW Anti-Discrimination Board as well as various state and Federal Courts.

There are different rules as to how quickly a claim must be commenced for the different courts and tribunals. Each of them covers different areas of discrimination. They differ in the remedies that can be awarded and the ability to obtain payment of legal costs.

The decision as to which court or tribunal should be used to commence a particular claim is a difficult one, based on the individual facts.

Award Breaches and Minimum Entitlements

An employee's entitlements arise from a wide array of laws including awards, enterprise agreements and contracts of employment. The *Fair Work Act* provides some minimum standards known as the National Employment Standards.

Employees may make claims for up to seven years (although shorter periods sometimes apply) after a failure to pay the correct amount under an award or other entitlement, or a contractual entitlement, relating to things such as:

- wages, including shift allowances, overtime and penalty rates
- share offers
- holiday pay
- bonuses
- long service leave
- commissions.

Claims may also exist where there has been a failure to provide other minimum rights guaranteed under the law such as:

- parental leave (including limited paid parental leave from 2011)
- the right to request flexibility for family responsibilities
- personal and carer's leave
- public holidays.

Redundancy

Redundancy occurs when an employer no longer requires that work, or a type of work, be done at all due to changes in the corporate structure or operational requirements of the business.

Employers should generally consult an employee before making an employee's position redundant and should explore redeployment before terminating a person's employment on the grounds of redundancy.

Issues often arise in situations of redundancy where an employer determines that a team is overstaffed: for example, where a group of employees who all do the same work need to be reduced in number.

The law provides some protection against termination for redundancy if an employee can show that:

- the redundancy was not genuine; or
- there was not a fair process for the selection of the employee whose employment was terminated where there was a determination that the employment of some members of a group should be terminated.

Employees may have claims for Unfair Dismissal, Adverse Action or breach of contract if the redundancy process was not properly handled.

Many employees covered by awards or enterprise agreements are entitled to a payment on termination on the grounds of redundancy calculated by reference to the length of service. From 2011, the *Fair Work Act* also offers guarantees of minimum redundancy payments.

Breach of Contract

An employee's wages and conditions are to be found in the terms of legislation, award and enterprise agreements, and contracts of employment. All employees have a contract of employment, even if no written contract exists.

A contract of employment is simply the agreement between an employer and an employee that the employee will be ready and willing to work in return for the payment of wages. It may also contain other terms and conditions that govern that employment. A contract can be written or verbal, or a combination of both.

It can often be very difficult to determine the terms of the contract of employment, particularly where a person has been employed for many years and changed roles and responsibilities.

A breach of contract can occur where one party to the contract does not fulfil its rights and obligations under the contract.

For example, breach of contract will likely arise where:

- an employee is not paid in accordance with the contract that governs their employment. Such a failure to pay may relate to an allowance, a bonus or a commission
- an employee is not provided the correct amount of notice of termination of their employment
- an employer does not comply with policies or procedures that it is obliged to follow under a contract
- an employee breaches obligations of confidentiality or obligations to not undertake work in competition with the employer, including after the employment has ended
- an employee does not undertake work as directed.

A party that suffers a loss as a result of a breach of contract may sue for damages. Where the breach of contract has led to termination of employment, the law will generally only award damages up to the amount of the period of notice of termination that was required to be provided. If there is no explicit provision in a contract, the law requires that reasonable notice be provided. Reasonable notice may be up to twelve months or more.

Restraint of Trade

Employment contracts (and partnership agreements) often contain provisions that seek to control the behaviour of an employee who leaves a business in an attempt to prevent that employee from competing with their former employer.

These restraint of trade provisions are important to businesses which rely heavily on client relationships and where employers are trying to protect their legitimate business interests. However, the law recognizes that a restraint provision can effectively prevent a person from earning a living.

In NSW the *Restraint of Trade Act* 1974 ensures that courts usually only enforce clauses which restrain trade reasonably. Our expertise in this area will assist you to make the right decision whether you are an employer wishing to engage the services of a new employee, or if you are an employee leaving your current position and wishing to ensure you are not in breach of any restraint of trade clauses.

Matters which the court will take into account in deciding whether a restraint of trade clause is reasonable include:

- the time period of restraint – the restraint must be for a period of time which is necessary to protect the business interest
- the geographical area of restraint – the area covered by the restraint must be reasonable, and not prevent the employee from working altogether
- the restraint must protect a legitimate interest of the employer, for example its customer lists or goodwill.

An employer that asserts a breach of a restraint provision will generally look to commence a claim for damages for breach of contract. The amount of damages sought can often be significant. It can take into account all of the lost profits/income suffered as a result of losing clientele.

An employee who may be prevented from working should seek advice as to how they should deal with the restraint, by seeking to have it set aside, by negotiation or by some other means.

Independent Contractors

An increasing numbers of workers are no longer direct employees, but are engaged as sub-contractors.

Turner Freeman Lawyers have extensive expertise in acting for independent contractors in relation to work-related issues.

Independent contractors may need legal assistance in the following areas:

- **Contract negotiation and advice** Unlike employees, most independent contractors do not have the protection of legislation, awards and enterprise agreements. They cannot bring a claim for unfair dismissal. The terms of the agreement between them and a principal contractor (who is often far bigger with professional management staff) are very important. Independent advice before entering into an agreement can save significant time and cost later on.
- **Breach of contract** When the relationship between an independent contractor and the principal contractor breaks down, issues of breach of contract often arise. These issues may relate to the termination of the contract without cause, failure to provide notice of termination, failure to provide work as promised under the contract, or failure to pay amounts due under the contract.
- **Unfair contracts and sham arrangements** While there are only limited protections for independent contractors, the Federal Government has provided some by legislation. These protections permit a contractor who is a party to an unfair contract (such as where the amount earned under the contract is less than the amount payable to comparable workers), to have the contract varied to render it fair. There are also provisions that assist people who are in fact employees from being treated as independent contractors. Independent contractors may also be able to take advantage of protections in the *Trade Practices Act*.

A large numbers of independent contractors are afforded the benefit of the flexibility of work, and remuneration that are not generally available to “employees”. However, there are real risks associated with working as an independent contractor as independent contractors do not have the same level of protection over their basic workplace rights and entitlements as do employees working in a normal employment relationship.

Fee Policy

Turner Freeman is committed to providing access to high quality legal services in employment matters, for individuals. Where possible, we assist people so that legal fees are not a barrier to them exercising their legal rights.

We seek to achieve this goal through flexible billing arrangements including:

- a no win, no pay basis for approved clients
- a partially no win, no pay basis for approved clients
- a discounted basis for approved union members
- a pay-as-you-go basis for some clients
- a pay-at-the-end basis for some clients
- other terms that we agree with the client that will enable him or her to access our services.

Please speak to one of our lawyers about the terms on which we are willing to act.

We will always provide a written costs disclosure as to the terms and conditions on which we will act. Clients should refer to and rely upon that document for details of the terms of our retainer.

For some clients in employment law matters we are able to act on a no win, no pay basis. We also often undertake work on a partially no win, no fee basis. Under this retainer, the client is required to contribute towards the costs and disbursements of our acting on their behalf. However, their contribution is limited to an agreed amount, or type of expense (for example expert's reports or barrister's fees).

The terms of our retainer do not affect any order made by a court or tribunal that may require a client to pay the other side's costs. While such costs orders are very rare in employment matters, our retainer is distinct and independent from any such order.

When we act on a no win, no pay basis, if any compensation is received, we are paid our legal costs and disbursements incurred in accordance with our costs disclosure. We do not ever charge a percentage, but rather charge on the basis of the work we have undertaken in your matter.

We are willing to discuss the terms of our retainer with clients so as to enable us to act for them. We are committed to seeking to ensure that people with meritorious claims are not prevented from running their claims because of their inability to pay the legal costs.

For more details about the terms on which we are willing to act please see **http://www.turnerfreemannsw.com/employment/fee-policy** or speak to one of our lawyers.

Turner Freeman's Employment and Industrial Law Team

David Taylor (SYDNEY OFFICE)

David is a partner at the Sydney office and the firms Employment and Industrial Law Practice Group Leader. He is an accredited specialist in employment and industrial law.

Prior to becoming a lawyer David worked as an Industrial Officer for a union. He was admitted as a lawyer in 2001 and joined the firm in the year. He was promoted to be an Associate in 2004, and become a Partner in 2007.

David has a diverse practice in employment and industrial law. He has acted in significant cases for both employers and employees concerning:

- the enforcement of employment contracts;
- harassment and discrimination;
- adverse action;
- independent contractors rights, and the unfair contracts jurisdiction;
- breaches of pre-employment promises and claims under the *Competition and Consumer Act* (formerly the *Trade Practices Act)*;
- executive remuneration agreements;
- the underpayment of wages.

David also regularly acts for a number of trade unions. This work has included the provision of advice on enterprise bargaining and industrial action as well as acting in Courts and Tribunals on breaches of award and agreement obligations.

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Gerard McMahon (NEWCASTLE OFFICE)

Gerard was admitted to practice as a solicitor in July 1988 and joined Turner Freeman in 2000. Gerard is the managing partner of the Newcastle Office. Since his admission as a solicitor Gerard has practised in litigation with an emphasis on civil rights and workplace issues. Gerard has acted for and advised employees, union members and employers with respect to industrial and workplace issues.

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Michelle Walsh (WOLLONGONG OFFICE)

Michelle Walsh is a Senior Associate in the Wollongong office. She was admitted to practice in 1997 and joined Turner Freeman in 2000. Since admission as a solicitor she has practiced in litigation across a broad range of jurisdictions including employment law, industrial relations and discrimination. She provides advice and representation to employees and employers in the Illawarra across a range of employment law issues.

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Turner Freeman Lawyers will give you the personal service you deserve. Employment matters can often be stressful. Our experienced team is here to advise and guide you through the process.

Turner Freeman Lawyers has been providing quality legal advice and assisting people to resolve their legal disputes quickly and efficiently for over 50 years. Our well-established and experienced employment team is here to provide you with pragmatic advice and help you secure a successful outcome.

At Turner Freeman Lawyers we focus on building a strong and trusting relationship with you and listening to your needs. With over 50 lawyers nationwide, fluent in numerous languages, you are in good hands.

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