

News Alert: Protection of Workplace Rights!_____

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The **Fair Work Act 2009** which commenced operation on **1 July 2009** has continued the expansion of workplace rights and opened up alternate courses of action for employees where those rights are infringed.

In addition to unfair dismissal rights which may be pursued following dismissal from employment, the **Fair Work Act** also now provides for an expanded range of workplace rights to be asserted and prosecuted both **prior to and during the course of employment**.

These workplace rights under the **Fair Work Act** may be categorised as follows:

- Discrimination
- Employment
- Freedom of association
- General prohibitions

An injured employee is not always successful in prosecuting an employer under existing anti discrimination legislation where decisions have been made to change or terminate employment. This has often been due to how courts and tribunals have interpreted relevant legislative provisions. Where an employer is no longer able to assist with the provision of suitable duties under a rehabilitation process, an injured or ill employee may have no grounds on which to complain of discrimination.

An employee may find an easier course of action under **the discrimination provisions** of the **Fair Work Act**, as the employee need only show that an employer has discriminated, injured or altered the position to the detriment of the employee because of the person's physical or mental disability (or race, colour, age, carer responsibilities etc). Further, there is now a reverse onus of proof which requires the employer to disprove the allegations rather than the employee having to prove those allegations. An employer will act unlawfully where there are a number of reasons including a discriminatory reason for the action taken, ie. disability and restructure.

Unless the otherwise discriminatory action is able to be justified on the grounds that the worker is unable to carry out the inherent requirements of the position, an employer will struggle to successfully defend a complaint. The discrimination protections also extend now to include a right for employees who have carer responsibilities for ill/disabled relatives to complain of being disadvantaged by any actions of the employer because of those responsibilities.

Employers are also prohibited from dismissing employees because they are temporarily absent from work due to illness or injury which includes those who are WorkCover recipients.

The **Fair Work Ombudsman** is currently training a large number of its inspectors specifically on these discrimination protections. It will be very interesting to see how the Courts interpret these provisions!

The second set of **employment rights** is defined to include where a person:

- has a benefit, role or responsibility under a workplace law or instrument; or
- is able to initiate a process under a workplace law or instrument; or
- is able to make a complaint or enquiry to another under a workplace law in relation to his or her employment.

An example given in the explanatory memorandum to the **Fair Work Act** is of Paul, a shop assistant, who is requested to work overtime hours. When the employer refuses to answer Paul's query about the calculation of penalty rates under an industrial award, Paul confers with his union. Upon the employer ascertaining that Paul has conferred with his union, dismisses him. As Paul had the workplace right to make that enquiry of his union about his entitlements under the award, the employer was in breach of the award and the **Fair Work Act**.

A further example given is of Rachel who was working in a night filler position in a supermarket. Rachel raises her concern that a ladder she is using has a missing rung. Rachel has a workplace right to raise that concern under the Occupational Health & Safety legislation and the **Fair Work Act**. Her dismissal because of that report would breach this employment right and give her a right of action.

The third set of **freedom of associations** protections extends to protecting an employee's right to choose whether or not he or she wishes to be represented by a union or be involved in union activities.

Lastly, there are a number of **general protections**. One protection is directed to sham employment arrangements whereby an employer seeks to misrepresent an employment relationship as an independent contractor relationship or dismisses or threatens to dismiss an employee in order to engage that person as an independent contractor.

These extend to include prohibitions against an employer seeking to exert undue influence or pressure on an employee to enter into employment arrangements under the **National Employment Standards** or **Modern Awards**.

Where an employee or prospective employee believes their workplace rights have been infringed they are able to make an application to Fair Work Australia or, alternatively, lodge their complaint directly with the Courts.

Employers may find employees/prospective employees lodging a complaint assisted by a union or inspector from the Fair Work Ombudsman's office. If the **Fair Work Ombudsman** becomes involved, where penalties are sought in addition to damages or reinstatement to employment, employers may find an early resolution that much more difficult to obtain.

Resort to the Courts through this process may prove more attractive given that the Courts are unlimited in the damages that may be awarded and may also grant reinstatement. An order for reinstatement from the former Australian Industrial Relations Commission was rare. It virtually never occurs as relief granted by an anti-discrimination tribunal following its adjudication of a matter.

Employers should keep these workplace rights in mind when making decisions that will have an impact on a person's employment or job application. Further, the **National Employment Standards** and **Modern Awards** commence on **1 January 2010** and employers should note that these **minimum entitlements** will then be available to employees.



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