

Unfair dismissal: a returning concern for SMEs

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The Rudd government's proposed unfair dismissal exemption for small businesses with fewer than 15 employees from a claim if the employee worked for the business for less than a year returns to the forefront the dismissal practices of small and medium sized enterprises (SME). The Rudd government's Forward with Fairness implementation plan includes a provision for small business operators to seek advice and assistance through Fair Work Australia as part of a 'small business friendly unfair dismissal system'. The type of assistance, if it is to be beneficial for small business, will need to include the provision of an advocacy service for those SME owners facing unfair dismissal claims based on the results of an analysis of pre-Work Choices unfair dismissal claims processed by the AIRC. This analysis revealed a statistically significant variance between the favourable decisions returned to large employers compared to those won by SME owners. These findings suggest that the biggest impact of undoing the Work Choices 100 employee unfair dismissal claim exemption will be felt by those SMEs employing between 50 and 100 staff.

The recent study into the success of SME employers at unfair dismissal arbitration by the Australian Industrial Relations Commission (AIRC) was presented to the 30th Institute for Small Business and Entrepreneurship Conference in Glasgow, Scotland. The research assessed the unfair dismissal decisions of the Australian Industrial Relations Commission during 2004 and 2005, prior to the WorkChoices restrictions on small business employees. Whilst the AIRC made favourable decisions of approximately 50/50 between the employer and the dismissed employee, the complexion changes when this is analysed according to business size. The results indicate that businesses employing between 50 and 100 staff were found to have significantly less chance at winning their case compared to businesses with less than 50 or more than 100 staff. Evidence also showed that businesses of less than 100 staff carry out their dismissals without the support of inhouse HR experts. And conversely and not surprisingly, businesses of over 100 nearly always have a human resource expert involved in the dismissal. These results suggest that the best gains from the Rudd revisions will be for the employees in businesses between 50 and 100 staff.

The study results suggest that in businesses of less than 50 staff, AIRC commissioners were likely to have taken into account the use of informal HR management practices and limited availability of HR expertise in small firms. The good news for businesses of this size is that informal HR practices appeared to meet the business needs when arbitrary retribution was sought by aggrieved employees. In practical terms, the Rudd '15/12' reforms may have less of an impact on the up to 50 employee business compared to the over 50 employee business.

For businesses with 50 to 100 staff the higher incidence of unsuccessfully defending their decision to dismiss an employee may be a message that an arbitrator's tolerance for procedural mistakes lessens for employers in this size range. It is suggested that fifty employees could be the threshold for implementing formal discipline processes, providing arbitrators with indications that the business has approached the dismissal with neutrality and procedural fairness in mind. On reflection, the results of this research provide some substance as to why the Howard government so generously and surprisingly set the unfair dismissal exemption so high. With their aim of improving job growth, a 100 employee threshold incorporated those businesses which are more likely, according to this study, to experience a tougher time at the arbitration table compared to larger business counterparts. With the Rudd reforms undoubtedly heralding good news for the employees of SMEs, the alternate case for the SME owner is that the '15 /12 ' rule is likely to have its biggest impact on owners of the 50 to 100 employee sized operation.

All employees are entitled to a procedurally fair termination process, but businesses of over 50 staff are likely to benefit from publishing a policy and setting procedures for disciplining staff, of which termination may be one of the outcomes. Formal procedures in dismissing an employee include a range of actions. For example, conducting full workplace investigations into claims and providing time for the employee to respond to an accusation. If dealing with a performance issue, setting a timeframe to improve performance and providing remedial assistance or training. Allowing the employee to have a representative of their choosing present during interviews also indicates a just process. It is paramount that the employee is made aware of the seriousness of the matter and that they are being engaged in a disciplinary process. Dismissal should not be the intention of the process; rather it should be one of the options resulting from the discipline process. Finally, documenting the process including furnishing file copies to the employee, provides evidence of the steps taken to provide a procedurally fair process.