

The Fair Work Act: The key challenges for SMEs

This webinar will start at
12:30pm AEDST

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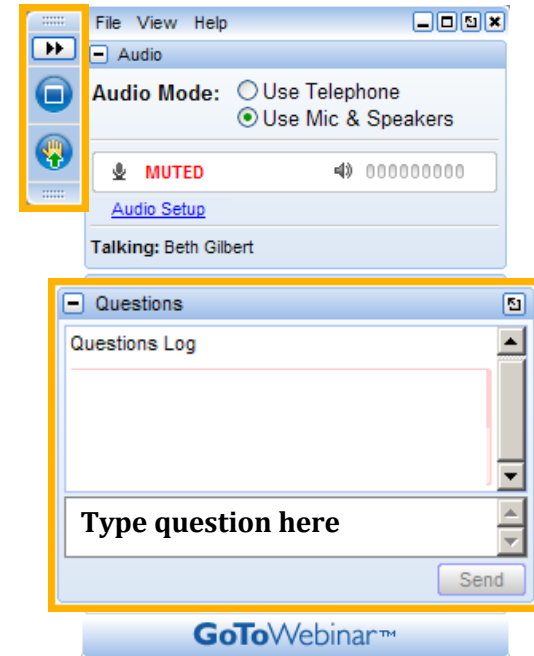
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Tools you can use

The Questions Pane

- Type in your question in the space at the bottom.
- Click on "Send."



Patricia Ryan

Practice Manager
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About Us

- Part of The EI Group
- OneStopHR – Fully outsourced Payroll, HR and Compliance
- EI Legal - An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- EI Legal manages OneStopHR compliance - a cost-effective and efficient way of getting the workplace relations legal support that you need
- Our legal services include:
 - Industrial Relations
 - Enterprise Agreement Making
 - Contracts, Policies
 - Terminations (including general protections claims)
 - Compliance
 - Legal Representation
 - Training



About the Presenter

- Patricia Ryan – Practice Manager of EI Legal
- Solicitor with over thirty years post admission experience
- Qualifications in Law, Human Resource management and Industrial Relations



Topics Covered

- Changes to the unfair dismissal laws
- Key issues around the NES
- Modern Award challenges
- Adverse Action



Changes to Unfair Dismissal

- Employees of employers with less than 100 employees can make claims
- Minimum employment periods
- Exemptions including high income employees
- Genuine redundancy exemption
- Small Business Fair Dismissal Code
- Time Frame



What is Unfair Dismissal?

- The employment was terminated at the initiative of the employer or;
- The person resigned but was forced to do so by conduct of the employer
- However the person has not been dismissed if they were demoted and remains with the employer and the demotion does not involve a 'significant' reduction in remuneration or duties



Who is Eligible?

- Employee must meet the minimum employment period
- Priggey v Manheim Fowles Pty Ltd [2010] FWA 28



Who is Not Eligible?

- Employee engaged for a specified time or task
- Trainees or apprentices during the term of the training arrangement
- Certain high income employees
- Genuine redundancy



High Income Earners

- (1) A full-time employee is a **high income employee** of an employer at a time if:
 - (a) the employee has a guarantee of annual earnings for the guaranteed period; and
 - (b) the time occurs during the period; and
 - (c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.

- (2) An employee other than a full-time employee is a **high-income employee** of an employer at a time if:
 - (a) the employee has a guarantee of annual earnings for the guaranteed period; and
 - (b) the time occurs during the period; and
 - (c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.



High Income Earners

- Roberts v High Professional Productions Pty Ltd [2010] FWA 3462



Genuine Redundancy

S389 defines a dismissal as a genuine redundancy if:

Step 1: The employer no longer requires the job to be performed by anyone because of changes in the operational requirements of the employer; and

Step 2: The employer has complied with consultation obligations in an award or EA

Step 3: A dismissal will not be a genuine redundancy if it would have been reasonable for the person to be redeployed.



Recent Decisions

- Chaiprasroet-Wall v Standom Smallgoods Butchers Pty Ltd [2010] FWA 5263
- Kekeris v A Hartrodt Australia Pty Ltd t/as a.hartrodt [2010] FWA 674



Redundancy Wrap Up

Be Aware Of

- Consultation Provisions
- Redeployment opportunities
- Severance pay and notice
- Document all decision making



Small Business Employers

What is a small business employer?

- The Act defines “small business employer” as an employer employing fewer than 15 employees at the time of the dismissal.
- Employees employed by the employer at the time are to be counted. This includes casuals employed on a regular and systematic basis.



Small Business Fair Dismissal Code

- Provides a checklist to guide small business employers



Small Business Fair Dismissal Code

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

- Under 15 full-time equivalent employees
- 15 full-time equivalent employees or more

[If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

- Yes
- No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?

- Yes
- No

If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that: YES NO

- a. The employee was stealing money or goods from the business. YES NO
- b. The employee defrauded the business. YES NO
- c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace. YES NO

d. The employee committed a serious breach of occupational health and safety procedures. YES NO

5. Did you dismiss the employee for some other form of serious misconduct?

- Yes
- No

If Yes, what was the reason?

If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

- Yes
- No

If Yes

	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	<input type="checkbox"/>	<input type="checkbox"/>

b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?	<input type="checkbox"/>	<input type="checkbox"/>
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c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	<input type="checkbox"/>	<input type="checkbox"/>
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d. Did the employee subsequently improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>
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e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?	<input type="checkbox"/>	<input type="checkbox"/>
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f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.	<input type="checkbox"/>	<input type="checkbox"/>
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7. Did you dismiss the employee for some other reason?

- Yes
- No

If Yes, what was the reason?

8. Did the employee voluntarily resign or abandon his or her employment?

- Yes
- No

If Yes, please provide details

DECLARATION

I declare that I believe every statement or response in this checklist to be true.



Time Frame

- The claim must be filed within 14 days of the dismissal



Substantial and Procedural Fairness

- Substantive fairness is about the reason(s) for the dismissal
- Procedural fairness is about the process surrounding the dismissal

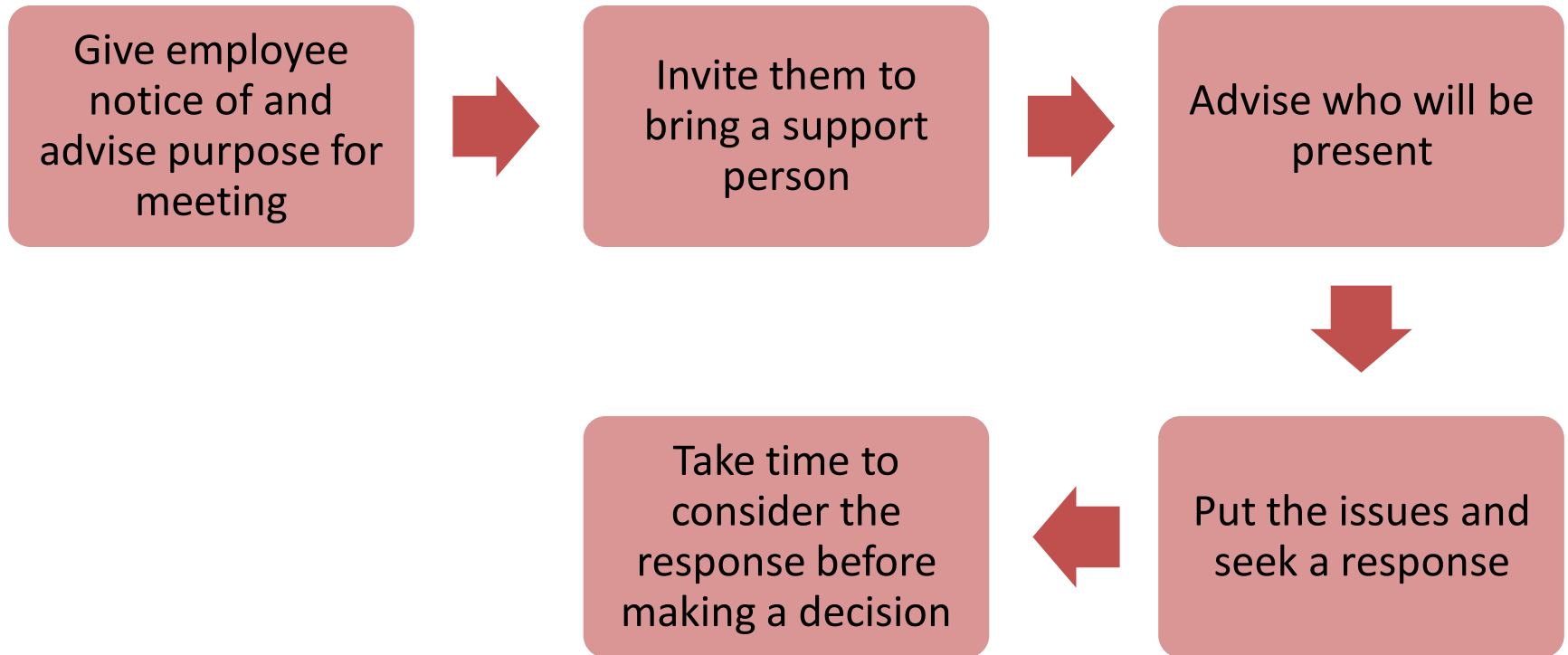


Substantive Fairness

- What are the grounds for dismissal?
- Are they harsh, unreasonable or unjust?



Procedural Fairness



Criteria for Considering Harshness

S387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.



Cases

- Tara Davies v Hip Hop Pty Ltd T/A Hippity Hop Child Care [2011] FWA 776
- Ben Starkey v Cootes Transport Group Pty Ltd [2011] FWA 228



Possible Outcomes of a Claim

- Reinstatement
- Monetary compensation
- Reinstatement and monetary compensation



Remedy - Compensation

Criteria for Deciding Amounts

s392 (2) In determining an amount for the purposes of an order under subsection (1), FWA must take into account all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that FWA considers relevant.



Recent Cases

- Hillbrick v Marshall Lethlean Industries [2010] FWA 7044
- Deng v Inghams Enterprise Pty Ltd [2010] FWA 8797
- Bashit v Versace Australia's Best Tyres, Automotive Services & Repairs Pty Ltd [2010] FWA 8790



Questions?



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NES

- Apply to all employees (cannot be excluded/modified to detriment of employee)
- Came into operation on 1 January 2010
- 10 minimum standards:
 - Maximum Weekly Hours of Work
 - Requests for Flexible Working Arrangements
 - Parental Leave
 - Annual Leave
 - Personal/Carer's and Compassionate Leave
 - Community Service Leave
 - Long Service Leave
 - Public Holidays
 - Notice of Termination and Redundancy Pay
 - Fair Work Information Statement



Maximum Weekly Hours of Work

- 38 hour working week for full time employees + “reasonable additional hours”
- Averaging hours provision
 - 26 weeks (Award/Agreement free employees)
 - 4 weeks (generally maximum for Modern Award)
 - Enterprise agreement averaging will depend on wording of agreement



Request for Flexible Working Arrangements

- Parent (or person with responsibility for care) of a child under school age, or child under 18 with disability, may request changes to working arrangements
 - Example: change in hours of work, patterns of work and location of work
- Procedural requirements:
 - Requests must be made in writing, set out details of change/s requested and reasons
 - Employer must respond within 21 days as to whether will grant request
 - Refusal only on “reasonable business grounds”, which must be detailed to employee



Request for Flexible Working Conditions

FLEXIBLE WORK ARRANGEMENT RECORD

To be retained on the employee's file as a record of the agreed flexible work arrangement.

Employee:

- I confirm that I have entered into this Agreement with my Employer.
- In making this election I confirm I am making a free and informed decision and no undue influence or undue pressure has been exerted upon me.

Family Name _____

Given Name _____

Employee ID/Position _____

Identify the details of flexibility arrangement: _____

What arrangements have been agreed to meet (a) jobs, irregular, or unforeseen work circumstances: _____

Identify reason(s) for the request for flexibility arrangement: _____

Commitment to attend meetings, training etc. _____

Proposed commencement date of flexible work arrangement: _____

Proposed date of review: _____

Employee	Employer
Signature: _____	Signature: _____
Print Name: _____	Print Name: _____
Date: _____	Title: _____
	Date: _____



Flexible Working Policy

01/03/2011



Flexible Working Policy

[Company Name]'s flexible working policy recognises the importance of aiming to achieve a fair balance between work and family responsibilities. Different flexible working arrangements can be considered depending on the degree of flexibility necessary to best accommodate employee's family commitments, without compromising the achievement of the company's business objectives. The benefits of reviewing and implementing flexible working arrangements can include improved productivity, retention of skilled staff and improved employee satisfaction.

Entitlement

As of 1 January 2010 the National Employment Standards set out that certain national system employees are entitled to make a written request for flexible working. Eligible employees may request to change their working arrangements, such as working part-time, compressed hours, flexible hours, job sharing, term-time working, working from home, split-shifts and work re-design. The company will consider an eligible employee's request for flexible working and respond in writing to inform the employee whether their request is granted, partially granted or refused.

Eligibility: Permanent Employees and Casual Employees

Permanent employees must fulfill the following requirements before they are eligible to make a flexible working request:

- Been in the company's continuous employment for the past 12 months; and
- Are the parent of, or responsible for the care of a child under school age (i.e. the age at which the child is required by the applicable State or Territory law to start attending school); or
- Are the parent of, or responsible for the care of a child who is disabled and under the age of 18.

Casual employees must fulfill the following requirements before they are eligible to make a flexible working request:

- Been in the company's continuous employment for the past 12 months; and
- There must be a reasonable expectation that the employee will continue their employment on a regular and systematic basis; and
- Are the parent of, or responsible for the care of a child under school age; or
- Are the parent of, or responsible for the care of a child who is disabled and under the age of 18.

Documentation Requirements

An employee who believes they are eligible to make a request for flexible working and considers that a change to their working arrangements would have a positive impact upon their ability to balance their work and family responsibilities should set out their request in writing to [manager/HR/name of person]. In order for the company to properly consider the employee's request, it will be helpful if as much detail as possible is included in the employee's request. For example, the employee's request should include the following:

01/03/2011



- the type of flexible working arrangement that is requested, or different options of flexible working that could benefit the employee;
- how a new working arrangement would benefit the employee in their day to day life;
- a proposed start date and if relevant, an end date;
- suggestions as to how the employee's proposed flexible working arrangement could impact their fellow employees and how this could be overcome;
- if it may be unclear to the company why the employee is eligible to apply, then provide details as to why the employee believes they meet the eligibility requirements;
- any other relevant information.

Procedure

Once the company receives the employee's written request to change their working arrangements it will carefully consider the request, taking into account the employee's proposals and their impact upon the company's ability to continue to meet its business objectives. A written response will be provided to the employee within 21 days of the company receiving the request. The response will set out whether the employee's request is granted, partially granted or refused. In making its decision, the company will take into consideration some or all of the following objectives: its staffing requirements, technical operators, output and productivity, occupational health & safety and the specific circumstances of the employee.

Agreement or Refusal

If the employee's request for flexible working is agreed in full, then the term of the new arrangement will be agreed, a review date decided and the relevant change to the employee's terms and conditions will be documented in a Flexible Working Arrangement Record.

If the employee's request for flexible working is partially agreed, further discussion will then take place between the employee and the company to come to a mutually convenient arrangement.

If the employee's request is refused, the company will explain in its response letter the reasonable business grounds that lead to the company's decision to refuse the employee's request. Reasonable business grounds may include:

- the effect on the workplace and the company's business of approving the request, including the financial impact and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing employees;
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request;
- the effect the arrangements will have on the company's other employees;
- the arrangements that will be required to enable the employee to fulfil their parental or carer responsibilities;
- the timing of the request. For example, how quickly do the new arrangements need to begin and how long do they need to stay in place for;
- what effect of not having the flexible work arrangement may have on the employee;
- whether other legal obligations will be breached by modifying the work arrangements, for example, occupational health & safety laws.

01/03/2011



Review

The company reserves the right to review the flexible working arrangement at any time, in accordance with the following criteria, to determine whether the arrangement shall continue, be amended or terminated:

- the effect on the workplace and the company's business of approving the request, including the financial impact and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing employees;
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request;
- the effect the arrangements will have on the company's other employees;
- the arrangements that will be required to enable the employee to fulfil their parental or carer responsibilities;
- the timing of the request;
- what effect of not having the flexible work arrangement may have on the employee;
- whether other legal obligations will be breached by modifying the work arrangements, for example, occupational health & safety laws.

Interaction with State Entitlements

Any State or Territory laws (delete one as appropriate) that provide employee entitlements in relation to flexible working arrangements, such as carer's provisions under anti-discrimination laws, continue to apply.

If you require a Flexible Working Policy that is customised to suit your business, please contact one of our workplace lawyers or workplace consultants for assistance on 1300 261 180

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Parental Leave and Related Entitlements

- Extended to same sex couples
- Entitled to 12 months unpaid maternity leave after 12 months of service
- Request for extra 12 months will be reduced by amount of parental leave taken by other partner and employer may only refuse on “reasonable business grounds”
- 3 weeks concurrent leave introduced



Adoption Leave

- The NES now provides parental leave following placement of child up to age 16



Annual Leave

- Both annual leave and personal leave will accrue from the day an employee commences, on a day to day basis
- Modern Awards (very few), EAs or written agreements (for Award/Agreement-free employees) may allow for cashing out of annual leave, provided that employee has at least 4 weeks annual leave remaining after cashing out
- Must be recorded by separate agreement in writing on each occasion



Personal / Carer's Leave

- Modern Awards (very few) or EAs may allow for cashing out of personal leave, provided that employee has 15 days personal leave remaining after cashing out
- No cap of 10 days on carer's leave



Community Service Leave

- New entitlement
- Allows for leave to participate in eligible community services activities (unpaid) and jury service (top up pay for maximum 10 days)
- Leave period may include reasonable travel time and rest time



Notice of Termination

- Written notice of termination required for permanents

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
Not more than 1 year	1 week
Not more than 1 year, less than 3 years	2 weeks
More than 3 years, less than 5 years	3 weeks
More than 5 weeks	4 weeks



Redundancy Pay

- Statutory scale of redundancy pay for all businesses with more than 15 employees (including regular and systematic casuals with expectation of ongoing employment)

Permanent Employee's period of continuous service with the Employer	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay



Redundancy Traps

- **Employees excluded:**
 - Employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
 - Employee whose employment is terminated because of serious misconduct;
 - Casual employee;
 - Trainee or apprentice;
 - Employee to whom an industry-specific redundancy scheme in a Modern Award applies; or
 - Employee to whom a redundancy scheme in an enterprise agreement applies if:
 - (i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a Modern Award that is in operation; and
 - (ii) the employee is covered by the industry-specific redundancy scheme in the Modern Award.



Fair Work Information Statement

A copy of the Fair Work Information Statement must be provided to all employees before, or as soon as practicable after, the employee starts employment (but in any event no more than once in any 12 month period if the employer employs them more than once)



Modern Awards

- 122 industry and occupational Modern Awards commenced operation on 1 January 2010 for companies
- Modern Awards will not “apply” to:
 - employees covered by enterprise award or enterprise agreement
 - high income employees with guarantee of annual earnings
- Award “covered” employees can bring unfair dismissal claims
- Where Modern Award “applies”, employer must abide by full terms and conditions (subject to flexibilities discussed in next section)



Coverage and Application of Modern Awards

- What is meant by coverage and application?
- How to determine which award applies?
 - Audit
 - Coverage
 - Definitions
 - Exclusions
 - Classifications



Modern Award Terms

What terms are included in a modern award?



Guarantee of Annual Earnings

- A Modern Award will not apply to high income employee with a “guarantee of annual earnings”
- Written document must guarantee that an employee’s:
 - Wages
 - Non monetary benefits with an agreed value (eg. car, laptop)
 - Amounts paid on behalf of employee or upon their direction,
will exceed the high income threshold (currently set at \$113,800) for a specified period
- Should be audited (updated as necessary) on an annual basis



Transitioning

- Incremental phasing-in of the following (in 5 equal instalments of 20%) until 2014:
 - Minimum wages
 - Piecework rates
 - Industry allowances
 - Casual/Part-time loadings
 - Saturday/Sunday/Public Holiday penalties
 - Evening and other penalties
 - Shift allowances



What Flexibilities can be Utilised in Respect to Modern Awards?

- Individual Flexibility Agreement
- Enterprise Agreement
- Offsetting
- Salaries



Individual Flexibility Agreement (IFA)

- Allows employer and an employee to vary certain Modern Award terms to “meet the genuine needs of employer and employee”
- Model flexibility term permits variation of:
 - Arrangements for when work is performed
 - Overtime rates
 - Penalty rates
 - Allowances
 - Leave loading
- Employee must be “better off” (not assessed by FWA)



IFA Procedural Requirements

- Procedural Requirements
 - Must be recorded in writing (setting out which terms will be varied and how employee “better off”)
 - Must be signed by employer and employee (and parent or guardian if employee aged under 18)
 - Copy of IFA must be given to employee
 - Do not need to be registered
- Written IFA must be kept as time and wages record
- Terminable by either employer or employee on four weeks notice or at any time by written agreement



Other flexibilities

- Enterprise Agreements
- Set off
- Salaries



Adverse Action

- A person (such as an employer) must not take any adverse action against another person (such as an employee) because the other person has a workplace right, has exercised a workplace right, or proposes to exercise such a right.
- Workplace rights is broadly defined and includes an entitlement under an award or agreement or a workplace law, being able to initiate a proceeding under a workplace law or able to make a complaint or inquiry in relation to their employment.



Adverse Action

- Adverse action includes dismissing or refusing to employ someone, and also includes discriminating against them or otherwise injuring them in their employment (by for example demoting them).
- Further a person (such as an employer) must not take adverse action against another person (such as an employee) because he or she has engaged in lawful industrial activity (such as belonging to or participating in a union).
- Also, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury.



Onus of Proof

- This falls on the employer- it is a reverse onus of proof



Time for Bringing a Claim

- Claims must be lodged within 60 days of the dismissal



Possible Outcomes of a Claim

- Claims are referred to a conference at FWA but if not resolved, a certificate will be issued and the applicant can file proceedings in the Federal Ct or Fed Mags Court.
- If successful, orders include damages, reinstatement, interlocutory orders, injunctions, civil penalties



Recent Cases

- Barclay v The Board of Bendigo Regional Institute of TAFE [2011] FCAFC 14
- Phillips v Phillips Engineering Pty Ltd [2010] FCA 611
- LHMU v Arnotts Biscuits Limited [2010] FCA 770



Tips for Employers

- Make sure all decisions are transparent and not for a reason related to workplace rights
- Give reasons to employees for decisions that affect them
- Revisit procedures for dealing with grievances
- Provide training to managers on the General Protections provisions of the Fair Work Act
- Keep records of the decision making process



Questions?

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Thank you

