



# Unfair Dismissal – Case Roundup for 2011

20 October 2011

Hannah Mills  
Solicitor/Workplace Relations Consultant, EI Legal

# About Us

## EI Legal

- Part of The EI Group
- Experienced team
- Dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters

## Our Services

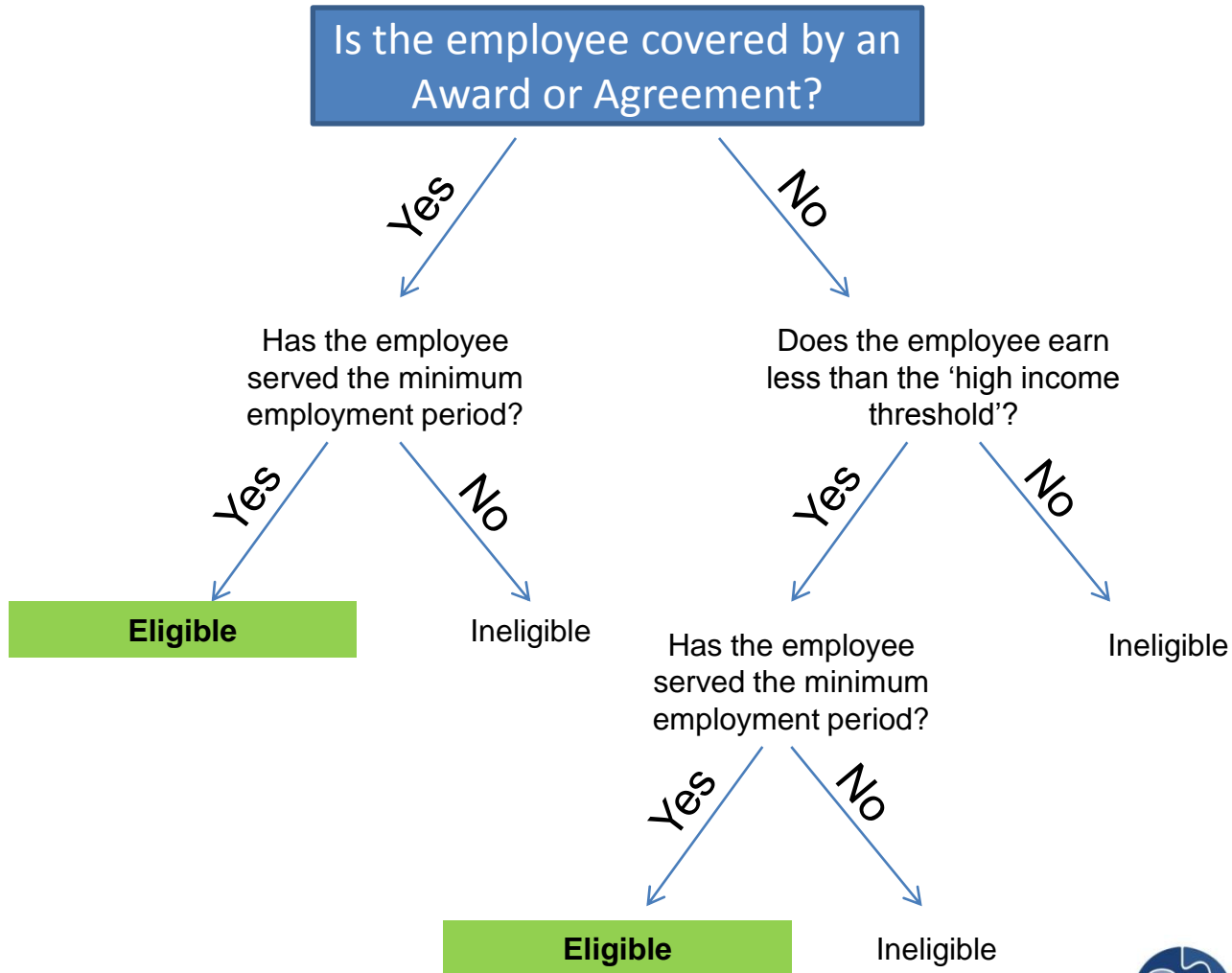
- Industrial Relations
- Enterprise Agreement Making
- Equal Employment Opportunity and Anti-Discrimination
- Terminations and Adverse Action
- Staying Compliant
- Legal Advice and Representation

# Topics Covered

- The unfair dismissal regime under the Fair Work Act
- What is a “valid reason” for dismissal?
- Serious and wilful misconduct
- Procedural fairness – termination by text message?
- “Harsh, unjust, unreasonable” – what does this mean for employers?
- Compensation considerations



# Who is eligible to bring an unfair dismissal claim?



# “Minimum Employment Period”

<b>No of employees</b>	<b>“Minimum Employment Period”</b>
Business with 15 or more employees*	6 months
Business with less than 15 employees* (“Small Business”)	12 months

# When can an eligible employee bring an unfair dismissal claim?

1. There has been a “dismissal”
  - Termination by the employer;
  - Resignation by an employee who alleges they were forced to resign by the employer
  - NO DISMISSAL – when fixed term contract or training arrangement comes to an end, demotion which does not involve significant reduction in remuneration/duties, “genuine redundancy”
2. The employee believes the dismissal was “harsh, unjust or unreasonable”

# “Harsh, Unjust or Unreasonable” (s387)

- 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
- Whether the person was notified of that reason; and
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- 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
- If the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- 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
- 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
- Any other matters that FWA considers relevant.

# How does an eligible employee bring an unfair dismissal claim?

- ❖ Lodgement of application within 14 days of dismissal (other than in “exceptional circumstances”)
- ❖ \$62.50 application fee

# What will constitute a “valid reason” for dismissal? (1/3)

## Reedy v Global Cranes Pty Ltd [2011] FWA 3037

### Facts

- Deliberate attempt by employee to upset MD’s relationship with his fiancée
- Employee failed to discuss rumours with employer
- Highly dramatic manner in which employee informed MD’s fiancée of rumours

### Finding

- “Grossly unreasonable to expect an employer to work with, to trust and to rely upon, an employee in these circumstances” = valid reason



# What will constitute a “valid reason” for dismissal? (2/3)

## Cooper v Balfours Bakery Pty Ltd [2011] FWA 4595

### Facts

- Employee absent for 10 months due to shoulder injury, being paid pursuant to employer’s income protection insurance policy

### Finding

- No valid reason for termination, reinstatement ordered
- Absence did not “frustrate the employment relationship” as:
  - No reason to believe employee would not be able to return to work
  - Insurance policy provided for 2 years cover, therefore contemplated such extended absences

# What will constitute a “valid reason” for dismissal? (3/3)

O'Connor v Outdoor Creations Pty Ltd [2011] FWA 3081

## Facts

- Employee resigned but was summarily dismissed day before effective date of resignation as employer found had been “streaming online” rather than working

## Finding

- “Excessive use of internet for personal use may constitute misconduct”
- Insufficient evidence = no valid reason
- As he would have only been employed for 1 more day,  
1 day’s pay ordered as compensation

# Serious and Wilful Misconduct

Applicant v Virgin Australia Airlines Pty Ltd [2011] FWA 5595

## Facts

- Flight attendant terminated for theft of company property (2 bottles of wine) and obtaining financial benefits from allowing others to use staff travel benefits contrary to company policy

## Finding

- “A finding that an employee has breached company policy and lied about doing so, may provide valid reason for the termination of employment” – termination not unfair
- If had admitted breach of policy, would not have constituted valid reason
- Insufficient evidence of theft



# Serious and Wilful Misconduct

## Ellington v Newlands Coal Pty Ltd [2011] FWA 2150

### Facts

- Employee dismissed over corruption allegations
- After complaint lodged by one of tenderers re rigging of tender process, company discovered all original documents submitted by successful tenderer were missing

### Finding

- Actions “raised serious issues about her judgement, suitability and her actions” but did not constitute gross misconduct because emails upon which termination based were “speculation” and “inexact proof”
- Roughly \$17,000 in compensation ordered

# Procedural Fairness

- Termination by text message?
- Martin v DecoGlaze Pty Ltd [2011] FWA 6265



*"In most situations, termination of employment by telephone texting is not appropriate. However, in this case I am not prepared to be too critical of the Respondent. Indeed, even if there had been a face to face meeting, the outcome would probably have been the same. It was not, after all, the Applicant's case that there was anything that he could have told the Respondent that he did not put in the telephone conversation of 12 May 2011."*

# Procedural Fairness

Sokolovic v Modestie Fashion Australia Pty Ltd [2011] FWA 3063

- *"The implementation of dismissal by way of text message clearly deprived the applicant of any opportunity to respond, offer explanation or defence about any of the issues that may have contributed to the decision to dismiss. It is difficult to accept that it could be reasonable or just for any employee to be dismissed without a fundamental process involving an opportunity to put a case, face-to-face, to the decision maker. The requirement for such a process is primarily derived from the notions of natural justice".*

# Procedural Fairness

Dismissal via text message only appropriate in very limited circumstances, for example:

- Where employee has committed gross and wilful misconduct that was admitted or undeniably existent and no possible explanation or mitigation could alter the decision
- Where face-to-face contact may involve genuine prospect of violence or aggression

# “Harsh” – A special consideration

- Even where valid reason and procedural fairness, a dismissal may nevertheless be “harsh”
- *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54
- *Notman v Neway Transport* [2011] FWA 5162

# Coal & Allied Mining Services Pty Ltd v Lawler

## Facts

- Employee employed for 28 years
- No disciplinary action or safety breaches in 28 years
- Employee admitted breach and was very remorseful
- Employee was 55 and would face considerable difficulty finding another job
- Employee was primary breadwinner

## Finding

- *"It is no exaggeration to say that the dismissal of someone in Mr Lawrence's circumstances has the potential to effectively ruin his life...We regard the unqualified dismissal of an exemplary employee...as manifestly harsh".*
- Reinstatement ordered



# Notman v Neway Transport

## Facts

- Employee employed for 10 years
- Unzipped his pants and went to urinate in toilets serviced by female cleaner (who immediately left before he did, but who described being offended and humiliated notwithstanding)

## Finding

- Dismissal was harsh because sacked for something he didn't do and disproportionate to conduct
- No remedy due to gravity of misconduct ("unacceptable disregard for another person")

# Compensation – Top 5 Reminders

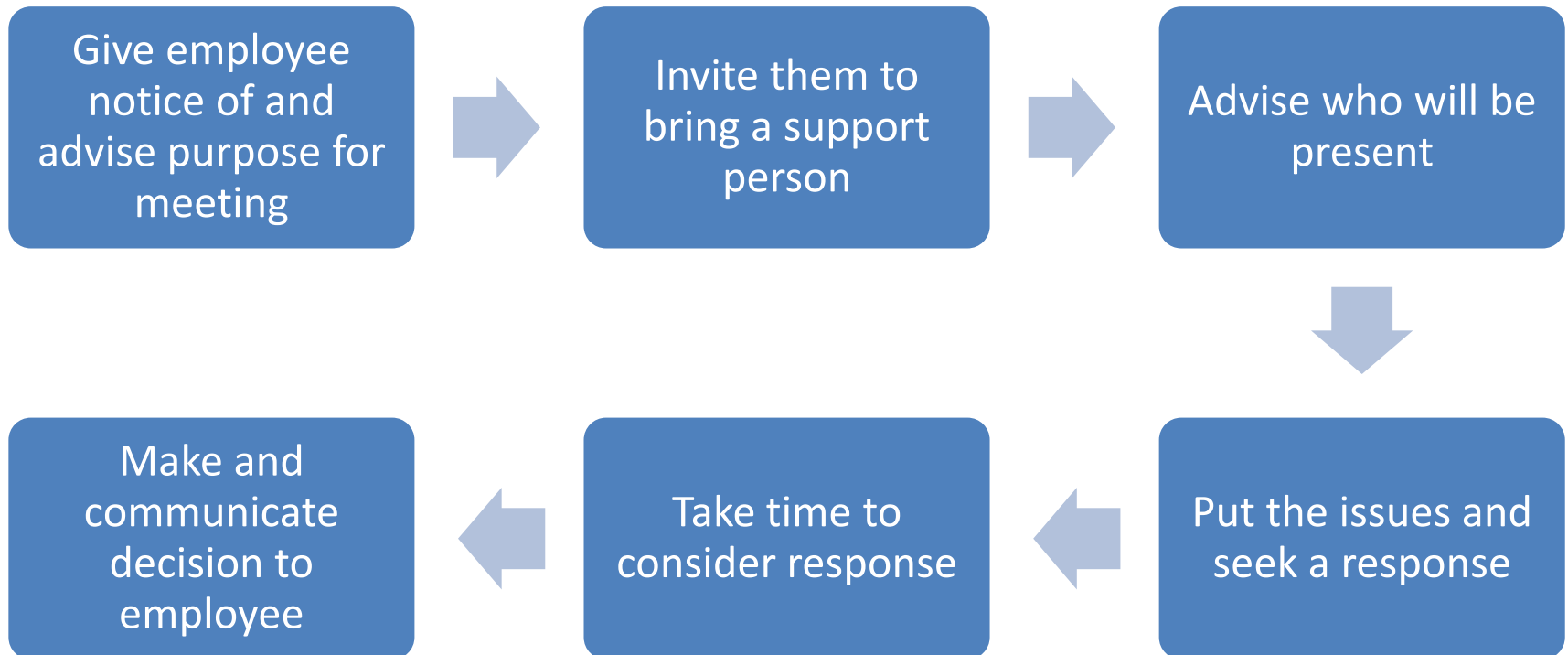
1. Compensation will only be considered where reinstatement inappropriate
2. Certain factors FWA must consider but non-exhaustive
3. Amount due will be reduced for employee's misconduct (where this is reason for termination)
4. No award of compensation for shock or distress
5. Max compensation =  $\frac{1}{2}$  high income threshold (currently \$59,050) or 6 months wages (whichever is higher)



# Factors to Consider (s392)

- The effect of the order on the **viability** of the employer's enterprise; and
- The length of the person's **service** with the employer; and
- The **remuneration** that the person would have received, or would have been likely to receive, **if the person had not been dismissed**; and
- The efforts of the person (if any) to **mitigate** the loss suffered by the person because of the dismissal; and
- 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
- The amount of any **income reasonably likely to be earned** by the person during the period between the making of the order for compensation and the actual compensation; and
- **Any other matter** that FWA considers relevant.
- **Case example: Stewart v Axxcess Demolition & Excavations Pty Ltd [2011] FWA 5286**

# Procedural Fairness



# Lessons for Employers

- Remember casuals who have served the “minimum employment period” are eligible to bring unfair dismissal claims
- Importance of objective investigation to determine “valid reason”
- Small Business Fair Dismissal Code for “small businesses”
- Training for managers is essential
- Ensure any redundancies meet the requirements of a “genuine redundancy” under the Fair Work Act
- Be cautious of “constructive dismissals” – complex area, seek advice
- Be aware of risks of other types of claims

# Questions?

[www.theigroup.com.au](http://www.theigroup.com.au)

Email: [info@eilegal.com.au](mailto:info@eilegal.com.au)

**THANK  
YOU!**