H R Nicholls Society XXXII Conference
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How fair is Fair Work Australia?

Ladies and Gentlemen, I am Leyla Yilmaz, General Manager of the Industrial Relations, Occupational Health and Safety and Training Departments at VACC.
I have been asked to speak to you today on issues surrounding the concept of 'go-away money' and the experience of VACC regarding our Unfair Dismissal practice and experiences.

Let me first start by briefly explaining the Industrial Relations structure at VACC.
In total there are 8 employees in the IR team at VACC, including myself.
Of those 8, 5 share the responsibility of Unfair Dismissal representation of our members which takes up around 80% of their work time, occasionally meaning that the other 3 members of the IR team need to lend a hand in this area.
It is therefore, fair to say that representation of employers in Unfair Dismissal claims has been a large part of our work for some years now, initially dating back to the Victorian C&A Boards, then into the Federal Commission, the Federal Court and now to Fair Work Australia.
Our experiences have formed the basis of our submissions to numerous Senate Committee Hearings.

Since the Federal Commission has been given the jurisdiction for Unfair Dismissals, there has been, in our view, a pressing need for reform.
Over the years we have achieved some reform, but we have found that other problems emerge, or that the original problem resurfaces with some variation.
Hence our view that further reform is necessary.

An initiative introduced to address the concerns of small businesses, was the introduction of the Unfair Dismissal Code.
The Unfair Dismissal Code was meant to represent a simplified process where a small business in compliance with the code, would be exempted.
This formed a type of protection.

Facts: 75% of conciliated conferences from 1/7/10 to 09/10 involved payment (Senate Education & Workplace Relations Committee)

28%	<$2000
30%	2-4K
10%	6-8K
5%	8-10K
7%	10-15K
2%	15-20K
2%	20-30K
1% 979 CLAIMS	30-40K

Six months into the new regime, a Senate Estimates Committee was told that only half of Unfair Dismissals are resolved at conciliation. Of 5208 applications that were lodged in the second half of 2010, 2738 of these were resolved at conciliation.

Our experience is that 70-80% of our claims are resolved at conciliation conference, less than 5% are resolved soon after conciliation and 10-15% are resolved just before a hearing or even during a hearing. These figures are not significantly different from our previous experience pre Fair Work Australia Act.

It is interesting to note that it has been reported that under the Work-Choices regime, employers who employ under 100 staff, were exempted and around 80% of claims were settled at conciliation.

So what does this tell us? That smaller employers' are caught up in the Unfair Dismissal regime? That they dismiss more unfairly? That applicants or employers are choosing not to settle? Or is it something else?
My experience tells me that the figures do not paint the full picture.

Our experience shows that the money sought is generally excessive and has no bearing to the merits of the claim. The applicant refers to numerous issues, often citing discrimination or relying on the adverse actions provision. Often claims are ambit in nature. The claimant's story is at odds with the employer's story. All these issues mean that cases cannot easily settle at conciliation.

Conciliators themselves allocate 1.5 hours (the time frames are strictly adhered to) for a conference.
The skill of conciliators can also vary.
The conciliation occurs firstly over the phone which means that the lack of face-to-face contact reduces the ability to assess the reliability of potential witnesses. This is important when the stories differ so much.
Claims often settle once preparation for arbitration commences because that is when the costs start to kick in.

Our members, regardless of whether they followed a fair procedure or not, are reluctant to stand their ground because of the cost (time away from business,

involving other staff in the case as witnesses, the need to avoid contaminating the working environment, the cost of representation and ultimately the lack of confidence in Fair Work Australia to find the dismissal fair)

Our range in 'go away money' is predominantly in the 2-8k range rather than under 2k. This is because applicants are predominantly represented legally and the threat of litigation is too costly an option. It is not unusual to see settlements under $8k, particularly when preparation for arbitration is commenced.

We have found that the period to settle is slow due to legal processes and legal argument for example, contentious matters, reliability of evidence and even settlement agreements.
The new system was meant to resolve the old problems as previously, there were numerous claims, go away money, lawyers pushing claims to add cost to cases. These issues, unfortunately, are still prevalent.

So what in particular are our concerns?
The Unfair Dismissal checklist was supposed to be the Code for small business outlining the extent of their obligations. Fair Work Australia disagrees, not only do we have a Code but we have the obligation of other provisions and tests relating to "having a person present, and the reasonableness of the employer position", in other words, the tests that are applicable to larger employers contained in the Act also apply to small employers.
The Code in effect, has become the first step for employers. This was not the intention of Craig Emerson, the Minister for Small Business at the time it was developed and accepted by the Minister for Workplace Relations.

All employers are subject to tests relating to "harsh, unjust or unreasonable", not a "genuine redundancy" or inconsistency with the Code. The definitions for the tests are broad.
The decisions from Fair Work Australia demonstrate this. Clever lawyers coupled with various views from the Commission result in decisions that surprise us and create additional challenges, concerns and further uncertainty. For example an employee dismissed for refusing to follow OHS standards and puts himself and others at risk may be deemed unfairly dismissed. This is despite the fact that employers have serious OHS compliance laws. The concept of a fair go all round has disappeared. This is taken to mean that the only relevant individual in this process is the terminated employee, not the employer, other employees or customers etc. Breaches of discrimination laws may still be unfair dismissals, rendering the employer into a double jeopardy situation.

The use of the word "Harsh" means all things to different people
The range of factors Fair Work Australia can take into account, makes it impossible for an employer to know if they have done the right or wrong thing. An individual's private life-circumstances are taken into account, meaning an employer is required to have social responsibilities, yet must tread carefully due to privacy, OHS and discrimination law obligations.

The process has become cumbersome, making it too difficult and has had the effect of creating an almost adversarial environment. Employees in fear of dismissal are preparing a case when the employer wishes only to discipline them.

Regardless of the processes, employers expect to pay 'go away money' because there is no certainty that they have done the right thing. In fact my members question whether they should bother with all of the processes when they have a valid reason and have provided the right of reply, when they know they would likely be caught out on a technicality.

Another major concern is the adverse action or general protections provisions. We are seeing more claims in this area as awareness is raised. These provisions were so widely drafted and subjective so as to make it a minefield. The provisions are a further layer of regulation and place employers in positions of double jeopardy. Employers are not in a position to identify whether their actions have altered a position to the "employee's prejudice or injured them".

The types of claims we have had in this area are broad to say the least. Some related to disability discrimination, However, one related to "s341(1)(c) preventing the exercise of a workplace right in terms of making a complaint. In this claim the claimant was not legally represented and did not understand the legalities of the adverse action claim. This made it difficult to draft a response. Do you address the legalities and provide the claimant with the material they need to draw out the matter? Or respond by indicating that the claim is not correctly expressed hence waste the Commission's time? In this case an employee was terminated during her probationary period, but claimed the owner and his girlfriend did not like her and dismissed her after she allegedly complained to the CFO. Needless to say the employer paid her a sum to end the ordeal for all concerned.

Despite these issues that confront our members, we are not in principle opposed to legal protections for employees that are unfairly dismissed. However, we do have very genuine problems with the lack of a balance of rights, the abuse of the provisions and the uncertainty over what is fair and reasonable.