

(Fair Work Act 2009)

### **344 Undue influence or pressure**

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

- (a) make, or not make, an agreement or arrangement under the National Employment Standards; or
- (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
- (c) agree to, or terminate, an individual flexibility arrangement; or
- (d) accept a guarantee of annual earnings; or
- (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

(Fair Work Act 2009)

## **Subdivision A—Contraventions involving dismissal**

### **365 Application for the FWC to deal with a dismissal dispute**

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

### **366 Time for application**

- (1) An application under section 365 must be made:
  - (a) within 21 days after the dismissal took effect; or
  - (b) within such further period as the FWC allows under subsection (2).
- (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
  - (a) the reason for the delay; and
  - (b) any action taken by the person to dispute the dismissal; and
  - (c) prejudice to the employer (including prejudice caused by the delay); and
  - (d) the merits of the application; and
  - (e) fairness as between the person and other persons in a like position.

### **367 Application fees**

- (1) The application must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under section 365; and

- (b) a method for indexing the fee; and
- (c) the circumstances in which all or part of the fee may be waived or refunded.

### **368 Dealing with a dismissal dispute (other than by arbitration)**

- (1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

- (2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

- (3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

- (a) the FWC must issue a certificate to that effect; and
- (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

- (4) A *general protections court application* is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

### **369 Dealing with a dismissal dispute by arbitration**

- (1) This section applies if:

- (a) the FWC issues a certificate under paragraph 368(3)(a) in relation to the dispute; and
- (b) the parties notify the FWC that they agree to the FWC arbitrating the dispute; and
- (c) the notification:
  - (i) is given to the FWC within 14 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 14 days; and
  - (ii) complies with any requirements prescribed by the procedural rules; and
- (d) sections 726, 728, 729, 730, 731 and 732 do not apply.

Note: Sections 726, 728, 729, 730, 731 and 732 prevent multiple applications or complaints of a kind referred to in those sections from being made in relation to the same dispute. A notification can only be made under this section where there is no such other application or complaint in relation to the dispute at the time the notification is made. Generally, once a notification is made no such application or complaint can be made in relation to the dispute (see section 727).

- (2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

- (a) an order for reinstatement of the person;
- (b) an order for the payment of compensation to the person;

- (c) an order for payment of an amount to the person for remuneration lost;
- (d) an order to maintain the continuity of the person's employment;
- (e) an order to maintain the period of the person's continuous service with the employer.

(3) A person to whom an order under subsection (2) applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).

### **370 Taking a dismissal dispute to court**

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

- (a) both of the following apply:
  - (i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;
  - (ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or
- (b) the general protections court application includes an application for an interim injunction.

Note 1: Generally, if the parties notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 369(1)), a general protections court application cannot be made in relation to the dispute (see sections 727 and 728).

Note 2: For the purposes of subparagraph (a)(ii), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.