

Productivity Commission Enquiry into Workplace Relations

Submission – by email to: workplace.relations@pc.gov.au

Malvern East, January 27th 2015

1. Background

Now retired, I submit these views as a result of my experience as a small employer. Our family company employed up to about 10 persons at a time between 1987 and 2011.

In the course of running our business, I came across a few workplace relations issues, but it is the treatment I received in an unfair dismissal case that motivates this submission as well as suggestions for an improvement to that element of the workplace relations edifice.

2. Views and Values

As a young migrant and factory worker in the early 1980's, I benefited from the old Australian ethos of a 'fair go' dispensed by my employers. I was given a chance by these people and subsequently sought to emulate them in my relationships with my own employees.

Until Bill Kelty's days, I never thought much of trade unions, as they treated us workers with what I felt was a lack of respect. I was a member of the Metal Trades Union for a short period of time in my factory worker days. Our opinions and views were never sought. We were just assembled to vote as directed by the delegates and got a vigorous elbow nudge in the ribs if we failed to put our hand up when and as required. I hope that things have changed these days.

I nonetheless believe that unions are an essential element in Workplace Relations, as employees need a voice and need to be represented if fair and just outcomes are to be achieved.

I believe that it is in the best interest of employees and employers for every industry sector to have a well-trained, respected, adequately rewarded workforce. Issues like safety, respect and equal opportunity are non-negotiable and should be pursued jointly by employers and employees.

I believe that the withdrawal of any employee benefits such as penalty rates should be approached with extreme caution. Such a measure, if perceived as abrupt and unfair will inevitably lead to a corresponding industrial backlash and might throw us back to the bad old days of the 70's and early 80's.

All this being said, I also believe that all employers should be treated fairly by the Workplace Relations system, and that an employer who is evidently not at fault should never be faced with an unfair dismissal claim. I was, and this experience has left me with a lasting sense of injustice.

I am aware that this experience goes back nearly 15 years now, but I do not think that the systemic shortcomings I faced at the time have changed since, hence my desire to make this submission.

3. My Unfair Dismissal Experience

In the year 2000, our business was accumulating losses and I had to reduce our workforce for our small business to remain viable.

I retrenched one person, a very unpleasant experience, and scrupulously met or exceeded every one of my obligations regarding notice, entitlements, etc.

To my surprise, I received a solicitor's letter accusing me of unfair dismissal. I was a member of VECCI (Victorian Small Employers' Body), and contacted their Industrial Relations service and sought assistance and representation.

We were duly asked to attend a 'mediation' meeting at the relevant authority at the time. Our former employee attended with a solicitor from a law firm specialising in such matters. We were seated in adjoining rooms, and the mediator shuttled between us.

I asked to be told specifically what I had done wrong in my handling of the retrenchment. The only answer I got was that it was 'arbitrary'.

My VECCI adviser told me that there was no objective reason for the unfair dismissal claim to be upheld: I could prove the financial necessity to retrench, I could justify why I retrenched this particular employee, and I had met or exceeded all my obligations.

I then queried 'why then am I here?'. The answer was enlightening, as follows:

I was told by my own adviser that it would cost me about \$10'000 to be represented if the case went to adjudication. I was told that a few of the presiding judges were former union officials who never find against an employee, and that they would find a reason to uphold some of the claim, exposing me to damages and additional costs.

The cherry on the cake was that I had no recourse against the employee to recover costs or seek compensation for lost time, aggravation, etc., even if the presiding judge found entirely in my favour.

So, to see justice done and be vindicated as an innocent party would - at best - cost me \$10,000, with no guarantee that the presiding judge would find in my favour.

Both the mediator and my VECCI representative told me that it would be in my best interest to pay the former employee some 'go away' money to save myself costs, time and aggravation. I nearly stormed out in disgust, but eventually realised that it would be wiser to comply, and after some angry haggling agreed to pay several thousand dollars to the former employee who then withdrew his claim.

I call this a racket. It is not the stolen dollars as much as the feeling of injustice and powerlessness that I found hardest to stomach.

What is interesting is that large companies are apparently immune from such tactics, because they have the resources to fight such claims, and eventually build a track record of tough nuts to crack and are left alone by the specialised legal firms.

Small employers like us will face at most a handful of cases over a lifetime and are therefore easy pickings for such parasitic activities.

4. Suggestions for Improvement

I believe that the laws must be changed to protect small employers against this kind of extortion, and I take the liberty of making the following suggestions:

- a) Presiding judges in unfair dismissal cases should be legally bound to find against the employee if a specific list of proven objective criteria indicate that the dismissal was justified, and that the employer has met or exceeded all their obligations. There should be an administrative mechanism to quickly and efficiently overturn decisions that disobeyed this directive.
- b) No-fault employers should be entitled to a full cost recovery, plus damages.
- c) The person representing the claimant should be the debtor in the event that the employer is awarded costs and damages. This would discourage parasitic law firms such as the one I was confronted with.

I submit that if such a system was in place, unfounded unfair dismissal claims would be purged from the system without in any way impinging on the rights of legitimate claimants to seek redress from unscrupulous employers.

It would also force a few parasitic lawyers to seek a more legitimate source of income, which would do no harm to the reputation of the profession.

I thank you for the opportunity of submitting my views.

Yours sincerely,

Rémy Favre