



Melbourne office
PO Box 16013
Melbourne VIC 8007
DX 128 Melbourne
Fax +61 3 8636 4455
Tel 1800 727 550

Sydney office
GPO Box 863
Sydney NSW 2001
DX 78 Sydney
Fax +61 2 9114 1792
Tel 1800 727 550

13 March 2015

Workplace Relations Framework
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: workplace.relations@pc.gov.au

Dear Commissioner

Productivity Commission Workplace Relations Framework Inquiry Submission

Summary

The Justice Connect Self Representation Service (Service) welcomes the opportunity to make a submission in response to the Terms of Reference of the Workplace Relations Framework through providing its observations on the effects of the current workplace law regime and, in particular, highlighting recurring issues experienced by unrepresented litigants in Fair Work court proceedings. Our submission is informed by our own casework and collaboration with community legal centres.

Given the specific focus of the Service on Fair Work matters in the Federal Court and Federal Circuit Court, this submission addresses points within the Issues Paper which relate directly to our clients' experience.

The Service recommends:

1. Section 366(1)(a) of the *Fair Work Act 2009* (the Act) be amended to require applications to be made within 90 days from the date the dismissal took effect.
2. Section 366(2) of the Act be amended to (a) replace the term 'exceptional circumstances' with 'special circumstances' and (b) include hardship as a circumstance the Fair Work Commission (FWC) is able to take into account in considering an extension of the time limit for general protection matters involving dismissal.
3. The availability of pro bono legal assistance in Fair Work matters be increased to facilitate early intervention legal advice and assistance prior to and during proceedings in the Federal Court and Federal Circuit Court.
4. A communications strategy be implemented to improve knowledge of the distinction between the FWC and the Fair Work Ombudsman (FWO).

About Justice Connect and the Self Representation Service

Justice Connect is an independent not-for-profit organisation based in Melbourne and Sydney. It was formed when the Public Interest Law Clearing House NSW (established in 1992) and Public Interest Law Clearing House Victoria (established in 1994) merged on 1 July 2013. Justice Connect provides access to justice to people experiencing disadvantage and the community organisations that support them, by connecting them with lawyers who will assist them for free. We also provide training and support for pro bono lawyers and community organisations and, in some circumstances, our lawyers provide legal advice directly to clients.

The Service provides unrepresented clients who are experiencing disadvantage with legal advice and assistance by facilitating free appointments with pro bono solicitors. Operating in the Federal Court and Federal Circuit Court jurisdictions in NSW, Victoria, the ACT and Tasmania, the Service assists with Fair Work matters, such as general protections and unpaid entitlements disputes. The Service helps clients who seek to pursue their matters through the Federal Court or Federal Circuit Court, who have generally exhausted their ability to do this through the FWO or the FWC. The Service is in a unique position to observe the effects of laws dealing with workplace relations on individuals experiencing disadvantage.

Issue paper 4 – Employee Protections

4.4 – General Protections and ‘adverse action’: Time limit for General Protections involving dismissal claims

To what extent has the recent harmonisation of the time limits for lodgements of general protection dismissal disputes and unfair dismissal claims increased certainty for all parties involved and reduced the ‘gaming’ of such processes?; and

Do the general protections within the Fair Work Act 2009, and particularly the ‘adverse action’ provisions, afford adequate protections while also providing certainty and clarity to all parties?

The 21 day time limit

General protections establish important rights for employees, ensuring workplace processes are fair and that employees are protected from improper and unlawful conduct in the workplace.

Section 366 of the Act was introduced from 1 January 2013 and unified the time limits to 21 days for making an application for relief in relation to a dismissal (either unfair dismissal or general protections involving dismissal).

The 21 day time limit may remove the ability for an individual to access the Fair Work jurisdiction and thereby restrict their access to justice. In the time immediately following a dismissal, an individual is likely to experience an emotional response such as shock or dislocation, and be attending to urgent needs such as finding alternate employment¹.

¹ Coumarelos, C, ‘Legal Australia-Wide Survey: legal need Australia’, (Report, Law and Justice Foundation of NSW, 2012),16

Furthermore, we have observed that many people do not understand their legal rights and there is frequent confusion about the appropriate body to which to make a complaint. There are a number of overlapping bodies responsible for workplace relations, many of which contain the term 'Fair Work', including the FWO, the FWC and the Federal Court Fair Work divisions. It is often difficult for an unrepresented person to know a) which body a complaint should be made to; and b) the time limit for making a complaint. These difficulties may be exacerbated if the individual has a disability, comes from a culturally or linguistically diverse background or lives in a rural, remote or regional location.

In our experience working with unrepresented litigants, we have seen how the operation of the time limit may restrict an individual's ability to enforce their legal rights following dismissal. This includes where individuals:

- have contacted the FWO within the 21 day time limit period and have been unaware (until after the expiration of the time limit) that the more appropriate avenue for their complaint is through the FWC;
- experience trauma and emotional response at the loss of their employment and income and take longer than the 21 day time limit to decide to take legal action; and
- have resigned in circumstances where the termination of the employment was at the employer's initiative and is more properly characterised as a constructive dismissal, but where those individuals are unaware they have been terminated for the purposes of the Act until after expiration of the time limit.

In our submission, the 21 day time limit unduly prejudices former employees, particularly those who are experiencing disadvantage. There are many reasonable circumstances which prevent a person taking legal action within 21 days, and it is appropriate for employers engaging in unlawful conduct to be called to account. The Service submits that a longer time period would be appropriate and in this respect, endorses the position of the Employment Law Centre of Western Australia, which recommends a 90 day time limit.

Recommendation 1:

Section 366(1)(a) of the Act be amended to require applications to be made within **90** days from the date the dismissal took effect.

Circumstances permitting out-of-time applications

The FWC may allow an extension of time, according to the Act, if there are exceptional circumstances. In determining whether exceptional circumstances exist, the FWC takes into account (per s366(2) of the Act):

- (a) the reason for the delay;
- (b) any action taken by the person to dispute the dismissal;
- (c) prejudice to the employer (including prejudice caused by the delay);
- (d) the merits of the application; and
- (e) fairness as between the person and other persons in a like position.

The term ‘exceptional circumstances’ has been interpreted strictly by the FWC. See for example [*Alicia Atkinson v Vmoto Limited; Yi \(Charles\) Chen; Trevor Beazley \[2012\] FWA 9043*](#) at [48]:

“Most people are not legally qualified and do not have expertise in human resources. And most people are, unfortunately, not aware of their rights and entitlements pursuant to the Act in this respect. However in applications for an extension of time, where this has been pressed as the reason for the delay, the Tribunal does not accept this mere ignorance as representing “exceptional circumstances”.

The limited scope for ‘exceptional circumstances’ may provide a level of certainty to employers when dismissing employees, however the corollary of this can be unjust outcomes for individuals who have been dismissed in breach of their general protections.

In our experience, the strict application of the ‘exceptional circumstances’ clause may lead to unjust consequences, particularly for people experiencing disadvantage. For example, applying the time limit so rigidly can restrict access to justice where individuals cannot afford legal advice or cannot access free legal services before the expiration of the 21 day time limit. The adverse effects of loss of employment on income is particularly severe for people experiencing financial disadvantage, and can lead to social and health consequences, which in turn leads to significant difficulties in taking requisite legal action within the time limit. Furthermore, compliance with a tight legal timeframe following a dismissal is likely to be disproportionately difficult for those already experiencing disadvantage due to disability, mental health issues, language/communication difficulties, or residence in a rural, remote or regional location.

Case study: Locked out of the Fair Work regime

Frank (not his real name) contacted the Service and explained that he had been dismissed from his job more than a month earlier because he had to take some time off to look after his sick son. Frank hadn’t made an application to the FWC for a number of reasons – he had never heard of the FWC until he conducted an internet search a few days earlier and didn’t know about the 21 day time limit. To make matters worse, Frank had been busy dealing with another bout of his son’s illness.

The Service considered that Frank, on his version of events, probably had good prospects for a General Protections application. However, he had not made the application within the time limit and was unlikely to meet the FWC’s definition of ‘exceptional circumstances’ in order to get an extension of time.

As a result, Frank was unable to access the FWC to deal with his dispute. The employer’s conduct was not challenged or corrected and Frank was left without legal recourse or any financial relief, and feeling that he was denied justice.

A more reasonable application of the time limit could be achieved by amending s366(2) to (a) replace the term 'exceptional circumstances' with 'special circumstances' and (b) include hardship as a circumstance the FWC is able to take into account in considering an extension of the time limit. This would be consistent with approaches set out in other legislation, such as the *Industrial Relations Act (NSW) 1996*, where s85(3)(b) expressly provides that, in considering out of time applications (in respect of unfair dismissal applications), the NSW Industrial Relations Commission have regard to '*any hardship that may be caused to the applicant or the employer if the application is or is not rejected*'.

Removing the need for 'exceptional circumstances' will allow the FWC more flexibility in applying the 21 day time limit, which will have a significant impact on access to justice, especially in relation to unrepresented individuals who have recently lost their employment. The strict application of the time limit comes at the cost of access to justice for some of the more vulnerable members of the community and, in our submission, should be removed through legislative amendment. This could be achieved by adding a new s366(2)(f) to the *Fair Work Act*, which would read:

366(2) *The FWC may allow a further period if the FWC is satisfied that there are **special** ~~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; and*
- (f) ***any hardship that may be caused to the applicant if the application is rejected.***

Recommendation 2:

Section 366(2) of the Act be amended to (a) replace the term 'exceptional circumstances' with 'special circumstances' and (b) include hardship as a circumstance the FWC is able to take into account in considering an extension of the time limit for general protection matters involving dismissal.

Issue paper 5 – Other Workplace Relations Issues

5.2 – How well are the institutions working?

Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?; and

Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?

Increased availability of legal assistance in Fair Work claims

The Service is one of the few organisations to assist people experiencing disadvantage with their Federal Court or Federal Circuit Court Fair Work proceedings. The FWO is able to investigate individual complaints, but does this on a targeted and strategic approach and only deploys its

resources in specific directions. Meanwhile the resources of most community legal centres are severely stretched. These factors mean that many unrepresented litigants cannot access practical legal assistance. Despite the existence of helpful written resources and legal information, in many cases individualised legal assistance and advice is necessary to assist an unrepresented litigant to pursue their rights and effectively conduct their proceedings.

The Service has observed a number of individuals experiencing disadvantage who have struggled to articulate, calculate and pursue their complaints while at the FWC or FWO stage. In our view, individuals such as these would benefit immensely from the early intervention of a free legal service able to advise on Fair Work matters. Increased availability of assistance in Fair Work matters, prior to litigation, could help to resolve workplace disputes at an early stage, before the matter proceeds to litigation and uses costly and limited court resources.

Recommendation 3:

The availability of free legal assistance in Fair Work matters be increased to facilitate legal advice and assistance prior to proceedings in the Federal Court and Federal Circuit Court.

Confusion in respect of Fair Work institutions

The FWO is charged with providing information about roles, rights and responsibilities in the workplace relations system, monitoring compliance with workplace laws and seeking penalties for breaches through the Federal Courts. The FWC sets minimum wages and conditions, registers awards and agreements and hears cases relating to unfair dismissals and bullying. Both the FWC and FWO have the ability to conduct conciliations to assist parties to resolve their disputes.

The Service observes that unrepresented litigants are often confused about which areas the FWO and the FWC respectively operate. We have seen a number of instances where unrepresented litigants have pursued claims by making a complaint to the FWO, only to find that the matter is more appropriately dealt with by the FWC and the FWC time limit has passed. The repercussions of this are potentially severe, from the emotional trauma and delay of having to lodge another claim and deal with another organisation's bureaucratic structure, to being prohibited from bringing a claim due to the expiration of the time limit.

The confusion in relation to the FWO and FWC could be ameliorated by the instigation of a communications strategy that clearly delineates the scope of the operations of both bodies. A number of our clients have indicated confusion over the demarcation between the FWO and FWC and have reported finding it difficult to access information that clearly outlines the difference between the two bodies. In our view, an educational communication strategy aimed at informing the community about the role of the FWO would be beneficial and would reduce confusion in this regard.

Recommendation 4:

A communications strategy should be implemented to improve employee's knowledge of the distinction between the Fair Work Commission and the Fair Work Ombudsman

Conclusion

The Service is confident that the above recommendations will help enhance Australia's workplace relations framework and improve access to justice for people who cannot afford private legal representation. Thank you for the opportunity to submit our views for consideration as part of the Productivity Commission Inquiry. We would be pleased to discuss these issues in greater depth or provide further detail upon request.

Yours sincerely

Joanna Mansfield

Manager and Principal Solicitor
Self Representation Service
Justice Connect

Shane Wescott

Lawyer
Self Representation Service
Justice Connect