Nothing is fair about unfair dismissal laws

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From: The Australian March 20, 2012 12:00 am

Hands up, all those in favour of unfair dismissal.
I can't see any hands. Are you sure? So here are some stories.

A worker in a factory located in a regional town refuses to wear safety glasses, which is a requirement of work health and safety laws. He is reminded several times, but he still refuses. He is given a warning. The employer dismisses the worker lest the firm be found guilty of violating the safety laws.

The tribunal finds that the worker has been unfairly dismissed, in part because it will be hard for him to find alternative work and he has a family to support. He is awarded monetary compensation.

Another worker - this time a teacher of English as a second language - decides to use the F-word as the basis of his lessons. His employer discovers this and dismisses the workers on the basis of gross misconduct.

The tribunal finds that the worker, who has since left the country (he was a temporary migrant), was unfairly dismissed. There was no specific instruction given to the teacher to refrain from using swear words as an aid to teaching, so the argument went. The worker receives monetary compensation (more than $20,000).

Yet another worker is found to have daubed the factory wall with swastikas, which some of the other workers understandably find offensive. But there is a culture of joshing within the workplace, according to the tribunal, and the worker is found to have been unfairly dismissed. He also is awarded monetary compensation.

So are we all still against unfair dismissal? Let's face of it: none of these actual cases passes the common sense test. Note that we are not talking about unlawful dismissal, the sacking of a worker for specified reasons that are deemed to be unlawful. We are dealing with the much more subjective adjective unfair. What may seem unfair to one party to an employment contract may seem fair - indeed, necessary - to the other.

There is no doubt that the Fair Work Act has opened the floodgates to more claims for unfair dismissal. This was always going to be the case as the exemption in the Work Choices legislation (all employers with fewer than 100 employees) was removed. The numbers are now running at about 17,000 a year, up from 6000 a year under Work Choices.

In research undertaken by academics Paul Oslington of the Australian Catholic University and Ben Freyens from the University of Canberra, they note that Fair Work Australia has failed to release important data in relation to conciliated outcomes, which are the vast majority of cases. (This is yet another blot against this organisation. Note also its clearly deficient website, which is designed mainly to confuse and obscure.)

For the 3 per cent of claims in 2010-11 settled by arbitration, 51 per cent were in favour of the plaintiff compared with 33 per cent under Work Choices. And "walk away" money is back in town, with the most common range of payment being from $2000 to $4000, with 10 per cent from $6000 to $8000.

Perhaps an even more worrying development for the business community than unfair dismissal claims is the take-up of actions under the general protection provisions of the act related to adverse action.

Adverse action is defined as any deleterious action affecting an employee or potential employee (including dismissal, but also other eventualities) that is taken by an employer for prohibited reasons. Inserted in the act at the last minute, these provisions provide much easier access for disgruntled employees to sue their employers.

One of the key sections is 346, which states "a person must not take adverse action against another person because the other person is or is not an officer or member of an industrial association (trade union)".

There is also prohibition against adverse action being taken against an employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

In the case of claims of adverse action, there is more time to lodge a claim, there are no earnings restrictions and compensation is not capped.

This is in contrast to the unfair dismissal provisions, where claims must be lodged within 14 days; earnings must be below $118,000 a year unless the worker is covered by an enterprise agreement or award; and compensation is limited to six months' pay.

Moreover, for adverse action claims, the onus of proof is reversed, so employers need to demonstrate that any adverse action affecting an employee has not occurred for a prohibited reason. It is hardly surprising that there has been rapid rise in the number of claims under this part of the act: from 1200 in 2009-10 to 1900 in 2010-11. The number is tracking to reach 2200 this financial year. (These are Oslington and Freyens's figures.)

One of the most significant adverse action cases is still being played out through the courts. It is due to be heard by the High Court at the end of this month, with the Victorian government having appealed the decision of the full Federal Court.

The background to this case is that a teacher, Mr Barclay, at a regional TAFE college, who was also president of his union sub-branch, sent an email to other union members alleging an instance of serious misconduct against a named senior person, without naming the complainants. His employer queried why the teacher had not raised the issue before sending the email, alleging that Mr Barclay was in fact guilty of serious misconduct. He was stood down on full pay.

The Full Bench of the Federal Court found in favour of the teacher because the employer action was seen to have taken adverse action against the teacher in his capacity as a representative of the union.

As Joe Catanzariti of Clayton Utz notes: "Subjective good intentions (on the part of employers) are not good enough. You've got to be very cautious if you are contemplating action against an employee in response to something the employee has done, or has arguably done, in the capacity of the union member or union official."

This sort of statement is just music to the ears of the trade union movement.

The decision of the High Court will be significant. In the meantime, employers are faced with the burden of this part of the act and Catanzariti's advice is that employers' "decision-making processes need to make sure that there are clear guidelines and to give reasons to employees for their decisions based on the work process and conditions. And, of course, document everything."

I wonder what the Deregulation Minister has to say about that - more paperwork, just what business needs.

The combined operation of the unfair dismissal and adverse action provisions sends a chill through the business community, crimping its willingness to take on new workers, particularly ones who could pose a risk. Strong employment protection laws and strong employment growth are infrequent bedfellows. It is time to reconsider these provisions and to debate the case for exempting small business.