

Unfair dismissal door opens for CEOs

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It appears that Mark McInnes has done what most CEOs do when faced with a dispute with the Board, negotiate a settlement of his contractual rights. Perhaps one of the factors motivating David Jones in such a negotiation was one of the new back door unfair dismissal actions by CEO's and senior executives.

Previously only employees earning less than \$108,000 could launch unfair dismissal claims. CEOs and senior executives had to commence expensive and lengthy breach of contract cases if they were dismissed. If their employment was being threatened and they had short notice periods they had really nowhere to go. Incentives that form a big part of packages can easily be contractually unattainable if an employer wants to play hard ball.

Now, thanks to the new definitions of "adverse actions" in the Fair Work Act, all employees under the national employment system - regardless of income - can seek remedies in relation to their dismissal if they can establish their dismissal related to their "workplace rights".

Workplace rights are defined very widely in the new legislation and damages which can be awarded in unfair dismissal actions related to workplace rights are not limited to 26 weeks. This opens the door for senior executives to seek potentially unlimited damages. A "workplace right" could be a claim by a person that they are complaining about bullying or safety issues and are then dismissed for other reasons.

Examples so far of this new type of action are a CEO alleging that she was going to be terminated because of her involvement with union negotiations. She successfully obtained an injunction stopping her employer from sacking her for six months while the full case was heard. The injunction was granted in November 2009 and prevented any termination of her employment until the Federal Court decision on 29 April 2010. The Federal Court eventually held that her employer acted fairly – but the case illustrates that CEOs or senior employees faced with dismissal may be able to delay any termination of employment if they can claim some breach of "workplace rights".

The two decided cases were unsuccessful for the employees for their own particular reasons. However the Judges' findings make it clear that as long as a CEO or senior executive can prove a loss suffered, and overcome the hurdles of the legislation, substantial damages can – and probably will - be recovered. There are many more cases in the pipeline.

Mr McInnes chose the route of a quick negotiated settlement. There are many other examples of CEOs who if they had the right avenue to pursue their employers would do so to ensure they can recover damages if they are being forced by their management to either ignore safety/discrimination issues in the work place. They can use this avenue to recover not just what they may have got under contract, but some of the more elusive benefits of long term incentives.

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