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No action over dismissal 'bias'

Removing staff

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A perceived swing in favour of employees will be a key issue in the review of unfair dismissal laws under the Fair Work Act, according to employer lawyers.

But the confidence of the workforce is crucial for economic stability and the government cannot afford to limit workers' unfair dismissal rights any further, lawyers acting for employees said.

Employment lawyers from both sides of the political divide generally welcomed the government's approach to the review of unfair dismissal laws in a background paper published yesterday, but age-old tensions remain.

The paper showed unfair dismissal claims soared in the last financial year. Almost 13,000 applications were lodged compared with around 11,000 in 2009-10, although more than three-quarters were settled.

DibbsBarker employment law expert Paul Almond, who acts mostly for large businesses, said a critical issue missing from the paper was the need to look at the lack of financial penalties for employees who filed frivolous dismissal claims.

Employers are forced to pay their legal costs if they lose the cases but employees are not. "Employees can still push claims which are either very much borderline or completely unmeritorious, but still put the employer in a position where they still, in an economic sense, need to pay some money just to get rid of it," he said.

The background paper didn't raise the issue of income thresholds for claims, he said, an important question. "The legislation fails to take into account those types of employees where a substantial proportion of their income is actually bonus-based or incentive-based," he said.

The Fair Work Act stops staff earning more than a set figure (\$118,100 indexed annually), from suing for unfair dismissal. But a case involving a Jenny Craig employee showed people could receive more than that through bonuses and still claim unfair dismissal, he said. This should be reviewed.

People + Culture Strategies managing principal Joydeep Hor said the review should consider greater codification of laws to make tribunal decisions clearer and more consistent. "There is a feeling a lot is dependent on the individual member of the tribunal that you draw," he said.

The background paper suggests 10 issues on unfair dismissal laws should be reconsidered.

They range from questions about the philosophy of the act, such as whether the laws strike the right balance between business and the workforce, to procedure, such as whether the emphasis on telephone over face-to-face conciliation is desirable.

The head of workplace relations at law firm Middletons, Alice DeBoos, said the telephone conciliation process had benefited business by making it easier for employers to refuse to pay unmeritorious claims because they avoided the emotional pressure that face-to-face meetings often created.

One of the key issues raised by the paper was the introduction of the "genuine redundancy" defence, she said. It required employers to consider all avenues of redeployment first, including those in related companies, which was problematic for large organisations whose entities "don't necessarily talk to each other".

The Queensland head of employment at plaintiff firm Maurice Blackburn, Terri Butler, said while there was always a balance to be struck between employer needs and employee job security, the current laws had this balance "pretty much right".