Picket Line

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Among the most controversial parts of the new federal industrial laws proclaimed last year were new provisions concerning unlawful termination of employment. Certainly, this aspect, together with trade union rights, fuelled fierce opposition from employer organisations.

As I reported in this column exactly one year ago, the new laws which came into effect from March 1994 fundamentally change the way in which employers can legally end an employment contract. In pursuit of genuine procedural fairness, the reforms imposed clear obligations on employers seeking to terminate employment. Now they must fully advise employees of deficiencies in performance, warn them that misconduct may lead to dismissal and give them the chance to improve, allow them to be heard on allegations against them and, if still intent on dismissal, provide appropriate notice and detailed reasons.

Forecasts that these new protections would spawn a host of unfair dismissal applications to the new Industrial Relations Court have proven accurate over the past year, to the extent that there is already a lengthy backlog of cases waiting to be heard. But numerous decisions have been made. They make interesting reading and establish important principles for proper operation of the employment contract. Some comments on the more important cases follow.

The question of whether employees have actually been terminated or whether they have resigned has received close attention. It seems that some employers have sought to avoid unfair dismissal laws by suggesting to employees that, though their dismissal is imminent, they have the choice of resigning to avoid the stigma of the sack. Faced with this dilemma most employees choose to resign. However, in *Stewart versus John N Pullin (Warren Village Newsagency)*, such a situation was held to fall within the scope of unfair dismissal laws. Judicial Registrar Parkinson decided that the relevant question was whether the employee would have written a resignation letter but for advice from the employer that she would be terminated if she did not. The court found she would not and therefore held that termination was brought about by the employer, who was ordered to pay six months salary as compensation. This decision makes it clear that the requirement for procedural fairness cannot be avoided simply by pressing the employee to resign.

A number of interesting cases have concerned dismissal following absence, illness or injury. In *Amino versus Menzies International (Aust) P/L* a shoulder injury at work had reduced an employee's capacity to carry out her normal duties. The employer issued a formal performance warning and when there was no improvement dismissed her. The Court ruled this action illegal because the warning had been issued in circumstances where the employee could do little about her performance due to her continuing injury. No opportunity was given for her to respond and no effort was made to discuss what assistance might enable her to reach the required standard. The employer was ordered to reinstate the employee immediately.

An employer's decision to sack a worker because it did not believe he was ill when absent was also overruled. In *AWU-FIME and Farrell versus Conangra Wool P/L*, management argued that unfair dismissal provisions concerning illness or injury had not been breached because the employee was dismissed, not because he was ill, but because they did not believe him. But the Court noted that, despite their supposed doubt, management had not contacted the employee's doctor about his claimed illness. And no case of unauthorised absence had been demonstrated. Moreover, the employee had previously been warned about absenteeism under the disciplinary code and had shown marked improvement. Yet the employer had ignored this and had terminated him before the agreed review period had elapsed. The dismissal was found to be harsh, unjust and unreasonable and the employer was ordered to reinstate the employee with payment of all wages since the date of dismissal.

The need for written warnings has also been emphasised. In *Sklivas versus P&R Melbourne Sock Shop*, the Court found that the Act's requirements meant that at the least, that a written warning was required where employment was to be terminated on grounds of unsatisfactory performance. In this case the employee, who had been dismissed without such a warning and without a chance either to learn of or defend herself against the allegations, was awarded $6 000 compensation.

These and various other cases decided by the Industrial Relations Court make it clear that employers must take the new laws seriously. Nothing in them can prevent the dismissal of employees guilty of misconduct or continued unsatisfactory performance if it is handled properly. But failure to follow a fair course involving advice to staff about shortcomings, a genuine chance to improve in a set period, followed by appropriate notice and reasons for termination will surely see decisions overturned and substantial compensation costs awarded. In short, the law is in place; it is not sensible to ignore it. ■