

What effect are the federal industrial relations changes having on workers?

The WorkChoices industrial relations changes, which came into effect in March 2006, have already had a noticeable effect on the rights of workers.

Some of the main changes made by WorkChoices include:

- > The exclusion from unfair dismissal laws of workers employed in businesses employing up to 100 people, and
- > The removal of the 'no disadvantage test' for the making of new Australian Workplace Agreements (AWAs) and collective agreements, and its replacement with the Australian Fair Pay and Conditions Standard, which provides a basic set of minimum entitlements.

Job Watch believes that the significant changes to the unfair dismissal laws have already impacted on standards of workplace fairness.

This has been reflected in a significant reduction in the numbers of callers to Job Watch's Telephone Information Service who have the option of making an unfair dismissal claim.

In the 3 months preceding the commencement of the WorkChoices changes:

- > 834 callers to Job Watch whose employment had been terminated had access to unfair dismissal laws, ie. they would have been eligible to make a claim at the Australian Industrial Relations Commission (AIRC) on the basis that their dismissal was harsh, unjust or unreasonable.
- > 253 callers potentially had an unlawful dismissal claim, ie they had potentially been dismissed for a prohibited reason, eg. a temporary absence due to illness or injury.
- > A further 219 callers who rang about a termination of employment were either not eligible to apply for unfair dismissal or did not appear to have grounds for an unlawful termination claim.



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Melbourne Rally against the Federal Industrial Relations changes

- > Industrial Relations Changes
- > JobWatch's letter to the Prime Minister
- > Young People and AWAs

Job Watch recently made a submission to the Victorian Department of Justice in response to its June 2006 Issues Paper on possible amendments to the Equal Opportunity Act 1995 (the Act).

The Issues Paper proposed various amendments to the Act designed to:

- > Improve the legislative response to systemic discrimination
- > Improve the complaints resolution process, and
- > Deal with technical aspects of the Act.

Job Watch's submission strongly supported any amendments to the Act that would promote diversity and attempt to redress institutional and systemic barriers to equal opportunity.

Among other comments expressed in our submission we supported the following:

- > The proposed amendments that would give the Victorian Civil and Administrative Tribunal (VCAT) the power to make orders in relation to the conduct of employers that affects individuals other than the person making the complaint. This amendment could mean, for example, that if a particular employer paid its female employees less than its male employees for the same work, that employer could be ordered to compensate all its female employees regardless of the fact that they have not lodged a complaint and were not represented by the complainant;

- > The proposed amendments to the test for indirect discrimination. We supported the proposal to reverse the onus of proving that a particular rule or requirement is reasonable in the circumstances. This would mean that it would be up to an employer to prove the reasonableness of a requirement that an employee work full-time rather than part-time upon return to work from maternity leave (rather than the employee having to show that it was unreasonable); and
- > The proposed amendments which would extend the scope of discrimination on the ground of 'industrial activity' to include action taken by employees in their individual capacity, not just activity organised by a union or group of employees. Job Watch noted that in our experience, victimisation of employees by employers as a result of raising legitimate questions about pay and conditions is common. Unfortunately, the ability of employees to take legal action if they are dismissed for raising concerns about their pay and conditions has been severely limited by the WorkChoices amendments to the federal unfair dismissal laws.

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In contrast, in the 3 months following the commencement of the WorkChoices changes:

- > only 268 callers were eligible to claim unfair dismissal. This represents a significant drop of 566 calls.
- > 315 callers raised potential unlawful dismissal issues (a slight increase on the previous three months), and the number of callers who appeared to have access to neither unfair nor unlawful dismissal more than doubled to 454.

An example of a termination-related call post-WorkChoices came from David, who had been employed for over 6 months as a farm hand. He was dismissed on the spot and was not given any reason for his dismissal. David was living in a house that came with the job. He was told that he had 7 days to move out when he believed it was 14 days. The employer had less than 5 employees. David did not appear to have any legal remedies available to him.

Another caller, Richard, was a high school student working as a permanent part-time worker at a fast food store. He was dismissed because his employer wanted him to work on a Saturday despite Richard having given his employer one month's notice that he could not work that day because of studying for his VCE, and despite the employer's previous reassurances that they would accommodate his studies. The employer seemed to have less than 100 employees. Prior to WorkChoices, Richard could have lodged an unfair dismissal claim but this option was no longer open to him.

The changed unfair dismissal laws also make it more difficult for employees to raise legitimate issues with their employer

while still employed, including issues about their minimum entitlements or concerns over workplace health and safety.

For example, Bev worked as a sales assistant at a newsagency on a permanent full time basis for over a year. She was informed by the WorkChoices Infoline that her employer had underpaid her on holidays. Her employer knew that they had underpaid her but had done nothing to rectify it. Bev was concerned that if she lodged an underpayment form with the Office of Workplace Services, her employer would dismiss her, perhaps not immediately, as this would expose the employer to an unlawful termination claim, but further down the track. The employer had less than 5 employees.

Another caller, Barry, was paid above the award minimum wage. His boss wanted to reduce his wages. Barry could lawfully refuse to accept a reduction in his wages, however as his employer had less than 100 employees, he would not be able to claim unfair dismissal if his employer dismissed him for wishing to negotiate about changes to his employment contract.

Bev and Barry's case studies demonstrate the effects the new laws are having on the ability of employees to negotiate with their employers over issues in the workplace. Importantly, they also highlight how the new laws are creating a perception of powerlessness among employees. While employees may sometimes have alternatives to unfair dismissal available, these tend to involve a process which is much lengthier, more complex and more expensive than the unfair dismissal process. Despite the name of the legislation, Job Watch believes that WorkChoices has not led to real choice for many employees.

How much do you know about GEERS?

In this article, we examine whether an employer's insolvency give employees an automatic right to assistance under the Federal Government's General Employee Entitlements & Redundancy Scheme (GEERS)

If an employer cannot pay its debts as and when they fall due, it usually means that the employer is insolvent. An insolvent employer company will usually go into administration or liquidation. An individual employer who is insolvent will usually be bankrupted.

If an employee loses their job and accrued entitlements because their employer has entered liquidation or bankruptcy, he or she may be eligible for assistance under GEERS. GEERS may assist with unpaid wages, annual leave, long service leave, pay in lieu of notice and up to 16 weeks of redundancy pay for liquidations that occur on or after 22 August 2006. GEERS does not pay out unpaid superannuation guarantee contributions.

Any claim under GEERS must be received by the Department of Employment and Workplace Relations no later than 12 months after an employee loses their job or the employer becomes bankrupt or is placed into liquidation, whichever is the later.

However, when an insolvent employer enters a Deed of Company Arrangement (DOCA) or a Debt Agreement with creditors, including employees, which fails to preserve the priority given to employee entitlements under statute and provide for the distribution of all available funds and/or the employee does not otherwise act reasonably to maintain their rights as a creditor of the employer, it is unlikely that GEERS will pay the employee's unpaid entitlements.

This means that there is no automatic right to assistance under GEERS where an employer becomes insolvent.

Generally, in order to best protect the right to receive assistance from GEERS where an employer has become insolvent, each employee should:

- a) lodge a proof of debt with the appointed insolvency practitioner within the required time frame;
- b) attend the meeting of creditors in person or by proxy (if one is held); and
- c) vote to protect their rights as a priority creditor.

This means that, if the DOCA or Debt Agreement being considered by creditors does not preserve the priority of employee entitlements and provide for the distribution of all available funds, it will be necessary for the employee or employees to vote against accepting the DOCA or Debt Agreement if they wish to attempt to maintain the right to obtain assistance from GEERS.

Nevertheless, whether or not an employee should vote in favour of a DOCA or Debt Agreement is up to them as it may be preferable for some employees to receive a portion of their entitlements rather than wait many months in the hope that their GEERS claim will be accepted.

Either way, all employees should obtain independent legal advice about their particular situation before making a decision about a DOCA or Debt Agreement as the above information has only been provided as a general guide which does not take into account individual circumstances and preferences.



Caption to come

What rights do women have when returning to work after maternity leave?

Most people are aware that, as a minimum, employees with at least 12 months of continuous service with the same employer are entitled to 52 weeks of unpaid parental leave (ie. maternity, paternity or adoption leave). This leave allows mothers to care for their new born or adopted child. It applies whether an employee works on a permanent full-time or part-time basis and, in some cases, casual employees may also have a maternity leave entitlement.



Mothers returning to work

This basic entitlement to unpaid maternity leave is set out in the Federal Workplace Relations Act. It is part of the minimum terms that make up the Australian Fair Pay and Conditions Standard. However, despite concerted campaigns for workplace flexibility and work-family balance, the rights of mothers returning to work from maternity leave are still not clear cut or straight-forward. This article explores the rights of working mothers and the obligations of employers when employees return to work after maternity leave.

Which job?

An employee is entitled to return to the job she held immediately before going on maternity leave. If that job no longer exists but there is another position available for which she is qualified and it is similar to her old position in both status and pay, then she is entitled to return to this other position. If the employee's pregnancy required a temporary adjustment to her role, she is entitled to return to the job she held before the adjustment.

Breastfeeding

It is unlawful for an employer to discriminate against an employee because she chooses to breastfeed her baby after she returns to work. Nevertheless, this does not mean that women are always entitled to breastfeed at work. Whether or

not employees are entitled to breastfeed at work will depend on what is reasonable in the circumstances. Employees should discuss with their employers what practical arrangements can be made to allow them to continue to breastfeed at work.

Unlawful discrimination occurs if an employee is treated less favourably than her colleagues who do not breastfeed and she can show that a substantial reason for her unfavourable treatment is her breastfeeding. It also occurs if an employer tries to impose an unreasonable requirement with which an employee cannot comply because of her breastfeeding.

Dismissal

It is unlawful for an employee to be dismissed from her job because she is or may be pregnant or she is absent from work on maternity leave. It is also unlawful for an employee to be dismissed because of her family responsibilities.

Part-time work

There is no automatic, basic right for a woman to return to work on a part-time basis after maternity leave if she was previously employed on a full-time basis.

The employee may be entitled to return to work part-time if her employer is bound by an award or workplace agreement that provides for part-time work after maternity leave. Alternatively,

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A recent call to our Job Watch telephone inquiry line highlights how employer/employee misunderstandings can lead to dire consequences for an employee in the absence of unfair dismissal protection.

Michael Hemburrow, Security Guard, was dismissed summarily after a 3 day absence from work on compassionate leave. Michael had advised his employer that his father had suffered an angina attack and it was believed that he was about to die. Michael's employer initially agreed to grant him compassionate leave to be with his father. However, after Michael needed an extra day off than originally anticipated for the purpose, Michael's employer told him that he wasn't entitled to compassionate leave and said that he was fed-up and dismissed Michael on the spot. Michael has no access to unfair dismissal protection following the implementation of WorkChoices, as his employer has less than 101 employees.

Whether or not Michael was entitled to compassionate leave is dependent upon the conditions of Michael's Award which is the industrial instrument governing his employment. It is a matter that can be easily resolved by referring to the Award. However this matter wasn't easily resolved by a discussion and due and proper consideration of the circumstances. It was resolved harshly with Michael losing his job. Pre-WorkChoices, an employer may not have been as hasty to dismiss Michael given the potential for an unfair dismissal claim. Even if the employer had dismissed Michael, Michael would have had some legal recourse in mounting an unfair dismissal claim. Now however, in the absence of unfair dismissal protection, Michael's options are limited.

Michael is just one of many workers since the introduction of WorkChoices who can no longer make a claim for unfair dismissal.

The number of callers to the Job Watch telephone inquiry line with access to unfair dismissal protection has been slashed by 2/3 since the WorkChoices legislation was introduced in March. In the 3 month period pre-Work Choices, 834 callers had access to unfair dismissal laws, but this fell to 268 callers in the 3 month period post-Work Choices. This is significant given that the number of workers sacked post-WorkChoices was essentially the same number sacked pre-WorkChoices. Over the same period, the number of workers who were sacked with no recourse to either unlawful or unfair dismissal protection more than doubled from 219 to 455 calls.

Overall with limited access to unfair dismissal protection, workers' rights have been eroded and the sense of fairness in the workplace diminished.

Zana Bytheway
Executive Director
Job Watch Inc

Job Watch is pleased to announce the addition of two new solicitors, Ian Scott and James Fleming, to its Legal Practice team. The Legal Practice now consists of four solicitors: Gabrielle Marchetti, Andrew McCarthy, Ian and James, all of whom are dedicated to assisting disadvantaged Victorian workers through representation, advocacy, education, and law reform.



Ian is happy to be rejoining Job Watch after three years of working in private practice in the field of litigation and employment law. Ian worked at Job Watch previously as a Telephone Advice Worker in 2002. Since that time he has graduated in law with Honours and has

become a father for the first time. Ian became interested in workers' rights following his own experiences working in a number of low-paid, seasonal and precarious jobs after leaving high school.



James is a recently admitted solicitor who joins Job Watch after completing an Arts/Law degree with Honours at ANU and an Associateship in Canberra. Drawn to Melbourne by the 'vibrant arts scene and warm people', James is enthused about the prospect of practising employment law in the community legal sector.

Ian and James are both looking forward to contributing to the ongoing work of Job Watch, made all the more important by the changing industrial relations landscape.

Job Watch Inc AGM Notice

The Annual General Meeting will take place:-

Date 23rd November 2006

Time 5.30pm

Place Job Watch Inc

Level 5, 21 Victoria Street, Melbourne

Job Watch recently negotiated a settlement on behalf of a young female worker during a conciliation conference held at the Equal Opportunity Commission of Victoria. Ms M worked as a casual for up to 38 hours per week at a company that distributed hampers but she was engaged through a labour hire agency. After 7 weeks' employment, Ms M rang the agency to tell them that her doctor had advised her to take a week off because of tonsillitis, but that she expected to return to work after 3 days. On the third day, the agency telephoned Ms M and told her that she was no longer required by the host employer. She was told that the business needed 'people at desks, not at home sick'. Her assignment at the host employer was terminated, and no alternative suitable work was found for her. She then lodged a discrimination complaint on the basis

of impairment against both the labour hire agency and the host employer.

In a very different matter, and in what is a good example of the importance of co-operative arrangements between the community and government sectors, Job Watch assisted an elderly woman from rural Victoria in recovering unpaid annual leave and wages through the Department of Employment and Workplace Relations. This worker had been employed on a regular and systematic basis for 23 years, working 30 hours per week, always at a flat rate of \$10 per hour. The employer's initial offer of settlement was to pay the worker the token sum of \$1000 but, after persistent negotiations, she ended up receiving close to \$30,000.

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 an employee's employment contract (including any internal workplace policy) may allow her to return to work on a part-time basis.

If an employee started working part-time immediately before her maternity leave because of her pregnancy, she will be entitled to return to the position she held immediately before starting to work part-time but not necessarily to the part-time position. Nevertheless, if a woman has worked part-time before maternity leave, her employer may be able to accommodate a request to continue to work on a part-time basis after maternity leave. Importantly, any changes to a woman's employment conditions must be negotiated.

Any woman intending to return to work on a part-time basis after maternity leave should attempt to reach agreement about this with her employer as early as possible in her pregnancy. Employers are required to genuinely consider and assess any reasonable requests for part-time work.

If an employer does not agree to let an employee return on a part-time basis after maternity leave, the question of whether or not she has been discriminated against will depend on the facts of her situation and what is reasonable in the circumstances.

Information sheets available

At Job Watch we have a wide selection of publications available on various topics. If you would like to see a full list of our publications please visit www.job-watch.org.au

Some of the information sheets are:

- > Federal Workplace Changes 2006
- > Casual Employment
- > Constructive Dismissal
- > Employment Contracts
- > Employment Contracts: Changes to existing contracts
- > Getting Paid and Payslips
- > Making workplace agreements
- > Redundancy and Retrenchment
- > Unpaid trial work
- > Warnings

JobWatch telephone advice

> Phone (03) 9662 1933 or 1800 331 617

Open 9.00am - 5.00pm Monday to Friday

(service closed between 12:00pm and 2:00pm on Tuesdays)

> Night service operating 6:00pm - 8:00pm Wednesdays

Job Watching's articles are authored and edited by Job Watch's Legal Practice, consisting of Zana Bytheway, Gabrielle Marchetti, Andrew McCarthy, Ian Scott and James Fleming.

Disclaimer JOBWATCHING is the official newsletter published by Job Watch Inc. Its aim is to inform and educate on employment rights and exploitation in the workplace. The views expressed in this publication are those of the contributors and are not necessarily endorsed by Job Watch Inc nor should they be relied upon as legal advice or as a substitute for legal advice. Contributions are welcomed and interested persons should contact the editor, Zana Bytheway, at Job Watch on (03) 9662 9458.

www.job-watch.org.au