HUMAN RIGHTS REPORT CARD FOR WA 2012
COMMUNITY LEGAL CENTRE REPONSE

NAME OF CLC: Employment Law Centre of WA (Inc)

DATE: September 2012

1 What topic or area are your comments about?

Employment

2 Please give a brief description of any cases, matters, referrals you have encountered recently that illustrate how clients are affected by a particular law or government policy

UNFAIR DISMISSAL CLAIMS UNDER THE FAIR WORK ACT

Case study 1 – Comments from clients who have sought advice about unfair dismissal about whether the 14 day limitation period is sufficient to lodge a claim

"*I did not know where to get information or advice. I spoke to the Human Rights Commission first – I only spoke to FWA 19 days after the dismissal."*

"I was confused about when to lodge my claim. I was quite stressed. I had an offer to consider, and I had time pressure as well. I had a lot to think about and I still had to fill in the forms."

"There is a cooling off period before you realize what situation your [sic] in. You wouldn't want to be unfairly dismissed and miss out because you weren't aware. There are a lot of emotions involved."

"My dismissal was very abrupt, I was in shock and emotionally distressed. I think I was still in shock during the 14 days after dismissal and not able to think clearly."

Case study 2 – Application of unfair dismissal 14 day limitation period and "exceptional circumstances" test for lodging an out-of-time application

Mrs R is an Iranian immigrant to Australia. Her first language is Persian, she cannot speak English and she is of limited financial means.

On 29 July 2010, Mrs R and five other co-workers were dismissed from their positions as vegetable packers without any reason provided to them. Mrs R was dismissed by text message.

Mrs R unsuccessfully tried to contact her employer to dispute the dismissal. Mrs R sought advice from a community organisation within two weeks of her dismissal and was assisted in lodging a general protections claim.

Unfortunately, the general protections claim did not seem to fit Mrs R's circumstances. Subsequently, she was advised to contact a community legal centre and after speaking to a

*generalist community legal centre, she was then referred to the Employment Law Centre of WA (Inc) (**ELC**).*

After meeting with ELC (her first opportunity to obtain legal advice in relation to this matter), Mrs R immediately withdrew her general protections claim and lodged an unfair dismissal claim instead. The unfair dismissal claim was lodged just outside the 14 day limitation period.

In ELC's view, Mrs R clearly faced exceptional circumstances which hindered her ability to make an unfair dismissal claim within the 14 day time-frame.

However, her application for an extension of time was rejected by the Commissioner on the basis that each individual obstacle Mrs R faced did not constitute an "exceptional" circumstance.

ELC assisted Mrs R to lodge an appeal to the Full Bench of FWA, but the appeal was rejected on the grounds that it was not in the public interest to allow the appeal.

Case study 3 – Application of unfair dismissal qualifying periods

Jane began work as an accounts manager in late July 2010. She worked hard at her job and often did additional hours. It wasn't always an easy place to work. Jane's supervisor was very moody and was verbally abusive towards her on at least one occasion. Nonetheless, Jane never made a complaint about her supervisor's behaviour.

In early December 2010, Jane was asked to attend a meeting which she was told was a performance review. When she got to the meeting, however, she was dismissed. Jane asked for the reason for the dismissal and was told it was "performance" and that she should be doing more than her contract hours, even though she had been doing additional hours. Jane had not been told that her employer had any concerns about her performance, nor had she ever received any warning prior to this.

Jane was not eligible to make an unfair dismissal claim because she had only worked for the employer for 5 ½ months. There was no other claim that she could make to challenge her dismissal, despite the circumstances of the dismissal being very unfair.

BULLYING

Case study 4 – Effect of, and lack of protection against, bullying

ELC was approached in January 2011 by a client, C, who had been bullied at work. C had been employed by company Z in February 2007 as a part-time sales assistant.

Two of the managers employed by company Z began to gang up on C, calling him "Betty the Tranny" and forcing him to wear a name badge labelled with 'Betty' rather than his real name.

They also made offensive remarks about his weight, frequently implied that he was homosexual and made derogatory remarks about his perceived sexuality. One of the managers exposed himself to C on more than one occasion.

C made a formal complaint about this bullying, harassment and discrimination. Company Z conducted an internal investigation but favoured the managers' versions of events.

C contacted ELC seeking advice on his situation. At the time that he contacted ELC, C was suffering from serious depression (for which he was taking medication) and told ELC that his "life [had] been destroyed".

C made a complaint against company Z in the Equal Opportunity Commission for sexual harassment and discrimination. However, C was frustrated that not all of the behaviour that he was subjected to – i.e. the bullying more generally – could be dealt with as part of this claim. He had been told by Worksafe (the government agency responsible for investigating bullying complaints) that they couldn't assist him because he was no longer working in the workplace where the bullying occurred.

3 Please provide any comments or observations on the effect of a particular law or government policy on your clients and your work as a CLC

(a) Concerns that continue to be unaddressed by government policy or law

UNFAIR DISMISSAL CLAIMS UNDER THE FAIR WORK ACT

The *Fair Work Act 2009* (Cth) (**Fair Work Act**) was introduced some three years ago in order to wind back the very limited protection against unfair dismissal under the Work Choices legislation, amongst other things. However, in ELC's view, there are several aspects of the unfair dismissal laws under the Fair Work Act which unduly prevent employees from seeking protection against unfair dismissal even in circumstances where they have been treated very unfairly. A number of examples are provided below.

14 day limitation period

Under the Fair Work Act, an unfair dismissal claim may only be made within 14 days after the dismissal took effect.[1]

In the three year or so years since the unfair dismissal provisions of the Fair Work Act were introduced, ELC has found that large numbers of employees are being prevented from making unfair dismissal claims merely because they are outside the 14 day limitation period. For instance, in the 2011 calendar year, at least 88 callers who sought advice from ELC on unfair dismissal under the Fair Work Act contacted us after the 14 day limitation period had already expired. There were also many clients who contacted us on the last day of the 14 day limitation period.

ELC has found that many recently dismissed employees are not aware of their rights, do not know how to lodge an unfair dismissal claim or even who to go to for advice or assistance. Some employees are in such a state of shock at having been dismissed that they do not seek

[1] Fair Work Act s 394.

redress for an unfair dismissal for days, weeks and sometimes months after the dismissal. When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice straight away. These types of issues are apparent from case study 1.

These problems are further exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the laws or the legal system, or is geographically isolated.

Further, this 14 day limitation period is in stark contrast to most liberal democratic states, other than the United States. The three most directly comparable jurisdictions, the UK, Canada and New Zealand, all provide 90 day limitation periods for unfair dismissal claims.

ELC is of the view that the Fair Work Act does not achieve its goal of genuine unfair dismissal protection when large numbers of employees are prevented from making unfair dismissal merely by virtue of the 14 day limitation period.

It is acknowledged that there is provision in the Fair Work Act for unfair dismissal claims to be accepted outside the 14 day limitation period. However, as discussed below, in practice, very few claims are accepted outside this period.

A review of the Fair Work Act was conducted in early 2012. One of the Review Panel's recommendations was that the limitation period for unfair dismissal be extended to 21 days.[2] The government is yet to provide its response to the Review.

"Exceptional circumstances" test for out of time applications

As noted above, there is some provision for unfair dismissal claims to be made outside the 14 day limitation period. However, for such a claim to be accepted, FWA must be satisfied that exceptional circumstances exist, taking into account:

(a) the reason for the delay;
(b) whether the person first became aware of the dismissal after it had taken effect;
(c) any action taken by the person to dispute the dismissal;
(d) prejudice to the employer (including prejudice caused by the delay);
(e) the merits of the application; and
(f) fairness as between the person and other persons in a similar position.[3]

FWA has interpreted the test set out in section 394(3) of the Fair Work Act very narrowly, suggesting that it is a stricter test than that which previously applied under the Work Choices legislation.[4] In *Bernadette Shields v Warringarri Aboriginal Corporation* [2009] FWA 860, Senior Deputy President Kaufman noted that under the Fair Work Act, "exceptional" "evinces an intention that the hurdle for extensions of time is higher under the [Fair Work] Act than it was under the [Workplace Relations] Act."[5]

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[2] Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/Towards_more_productive_and_equitable_workplaces.pdf, accessed 13 September 2012, at p. 25 and 224..
[3] Fair Work Act s 394(3).
[4] See for example, *Robert Lim v Downer EDI Mining* [2009] FWA 457.
[5] *Bernadette Shields v Warringarri Aboriginal Corporation* [2009] FWA 860 at [4].

In many instances, the short limitation period for unfair dismissal claims, together with the strict application of the "exceptional circumstances" test, has had the effect of denying legal protection to those persons with a disability, who are of a non-English speaking background, who are in rural or remote areas, and/or who have taken steps to dispute their dismissal but have done so incorrectly – as illustrated in case study 2.

Qualifying period for unfair dismissal claims

Currently an employee cannot bring an action for unfair dismissal if he or she has not completed the minimum period of employment (s382). Section 383 of the Fair Work Act defines the minimum period to be 6 months at the time of the dismissal, unless the employer is a small business employer, in which case a 12 month qualifying period applies.

It has been ELC's experience that these 6 month and 12 month qualifying periods exclude a large section of the workforce from making unfair dismissal claims. In the 2011 calendar year, for instance, at least 163 callers who sought advice from ELC on unfair dismissal under the Fair Work Act were prevented from making a claim because they had not completed the relevant qualifying period. This represents more than 10% of callers who contacted ELC about unfair dismissal under the Fair Work Act last year. Case study 3 above illustrates the harsh effect the qualifying periods can have on employees who have been treated unfairly but who have been employed for less than the qualifying period.

We contrast the approach under the Fair Work Act with that set out in the *Industrial Relations Act 1979* (WA), under which an employee is potentially eligible to make an unfair dismissal claim regardless of his or her length of service. We note, however, that the Western Australian Industrial Relations Commission, in determining if a dismissal is harsh, oppressive or unfair must have regard to whether the employee was dismissed during a period of probation or had been employed for less than three months. In this way, the rights of employees to seek remedies where they have been unfairly dismissed are more appropriately balanced with the rights of employers to manage their workforces.

LABOUR HIRE WORKERS

ELC notes that the use of labour hire arrangements appears to have increased in recent years, particularly in the context of the mining boom. However, these type of arrangements can limit the protections available to the workers involved, as set out below.

In a labour hire arrangement, a labour hire agency engages a worker (typically as a casual employee or as an independent contractor) and enters into a contract with another entity – termed the "host business" – to provide that worker's services to the host business.

There is usually no contract between the worker and the host business. For this reason, the worker may not be regarded as an employee of the host business.

This can have serious implications for the remedies that the worker is able to seek. For instance, where the host business informs a worker that it no longer requires his or her services, this may not necessarily be viewed as a termination of the person's employment, particularly if he or she appears to remain an employee of the labour hire agency and it is a

term of his or her employment with the labour hire agency that he or she can be assigned to different host businesses.[6]

This is a potentially significant limitation on the rights of labour hire workers to make claims such as unfair dismissal claims and general protections claims under the Fair Work Act, even where they have been treated very unfairly by the host business.

BULLYING

Bullying can have a devastating effect on employees, resulting in high stress levels, anxiety, depression, loss of self-esteem, a loss of the ability to perform work, ill health, and in extreme cases, suicidal tendencies. In ELC's experience, the long-term effects of bullying are among the most severe of those associated with workplace issues. An example of a client who was severely affected by bullying is provided as Case study 4.

Currently, there is limited employee protection against workplace bullying in the Western Australian occupational safety and health (OSH) legislative scheme. In 2006, following the Laing review in 2002, a 'Violence, Aggression and Bullying at Work' Code of Practice (Code) was introduced by the then Department of Consumer and Employment Protection. The Code outlined methods that employers could use to minimise or resolve bullying in the workplace. The only external method of resolution proposed in the Code was to request that WorkSafe WA conduct an investigation.

The Code outlines that the role of an inspector is to determine whether all parties have met their obligations under the OSH Act. The inspector may not mediate between parties, nor may he or she become involved in the specific details of the alleged bullying activity.

Remedies that can be offered as part of an investigation are limited to:

- verbal advice by the inspector; and/or
- improvement or prohibition notices being issued.

These remedies do not offer any compensation to the employee who has been the subject of workplace bullying, nor do they penalise the responsible employer. Further, there is no avenue for mediation or conciliation. It has been ELC's experience that bullying issues are rarely resolved through investigation and will in some cases worsen as a result of the investigation occurring.

WorkSafe WA's statistics indicate that each year in Western Australia an average of 600 workers' compensation claims are lodged for time off arising from workplace violence and bullying. ELC understands that WorkSafe WA has not successfully prosecuted any employers on the basis of workplace bullying. In contrast, there have been several successful prosecutions for bullying in Victoria and New South Wales.

In some circumstances, employees who suffer from workplace bullying may be able to access a remedy. An employee who is bullied on account of a protected characteristic under the *Equal Opportunity Act 1984* (WA) may bring a claim with the Equal Opportunity Commission. An employee who suffers from workplace bullying on the basis of having or exercising a workplace right may bring a claim with either Fair Work Australia or, in the case of employees in the state employment system, where termination of employment results, with the Western

[6] See for example, *David Tse v Ready Workforce Pty Ltd* [2010] FWA 8751.

Australian Industrial Relations Commission. An employee who suffers from physical or sexual assault in the course of workplace bullying may report the matter to the police and consider pressing criminal charges.

However, many employees who suffer from workplace bullying do not fall into any of these categories. These employees are unable to bring any statutory claim against their employer or the employee who has perpetrated the bullying. They are effectively left with no means of redress.

The Commonwealth, State and Territory governments are currently in the process of harmonising, to a large extent at least, the occupational safety and health laws across the country. However, in ELC's view, the national model Work Health and Safety Act, Regulations and Codes of Practice proposed by Safe Work Australia do not provide adequate remedies for employees who are bullied in the workplace.

Several of the States, including Western Australia and South Australia, have not yet adopted the model Work Health and Safety Act, Regulations and Codes of Practice. A review is currently underway in Western Australia to examine the benefits and costs of the model Work Health and Safety regulations and codes.

ELC considers that the existing South Australian legislation dealing with occupational health and safety issues, the Occupational Health, Safety and Welfare Act 1986 (SA), provides a better model for dealing with workplace bullying than either the Western Australian legislation or the existing model Work Health and Safety Act and associated Regulations and Codes of Practice.

For instance, s 55A of the Occupational Health, Safety and Welfare Act 1986 (SA) sets out a definition of workplace bullying, a list of exclusions from that definition and provides potential avenues an employee or employer may pursue to remedy workplace bullying.

This section includes the right to conciliation or mediation between parties, and also provides the Industrial Commission with the right to attempt to resolve the matter "as [it] sees fit".

DOMESTIC WORKERS

ELC notes that there continues to be a lack of protection for domestic workers in Western Australia.

Under the two main pieces of legislation regulating employment in Western Australia, the *Industrial Relations Act 1979* (WA) and the *Minimum Conditions of Employment Act 1993* (WA), a person who is engaged in domestic service in a private home is generally deemed not to be an "employee".[7]

Accordingly, domestic workers are not protected by the basic safety net of minimum pay and conditions applicable to employees in Western Australia.

This is potentially inconsistent with the International Labour Organisation's *Convention concerning decent work for domestic workers*. In ELC's view, there is no reason for domestic workers to be denied these basic protections.

[7] *Industrial Relations Act 1979* (WA) s 7; *Minimum Conditions of Employment Act 1993* (WA) s3.

APPRENTICES AND TRAINEES

We also note that there continue to be gaps in the protection of apprentices and trainees in Western Australia. For instance, apprentices and trainees who are employed by a partnership, sole trader or an employer that does not engage in substantial trading activities are generally prevented from accessing the unfair dismissal protections afforded to other employees under the *Industrial Relations Act 1979* (WA).

The reason for this is that apprentices can potentially appeal a termination of their training contract to the Western Australian Industrial Relations Commission under the *Vocational Education and Training Act 1996* (WA). However, the only remedy that appears to be available where an apprentice appeals the termination of his or her training contract is reinstatement – it does not appear to be possible, for instance, to seek compensation.

In ELC's experience, many apprentices and trainees whose training contracts have been terminated do not wish to be reinstated because their relationship with their employer has already broken down to too great an extent. As such, this is a potentially significant limitation on the rights of apprentices and trainees in Western Australia.

DISCRIMINATION ON THE BASIS OF CRIMINAL CONVICTION

In Western Australia, there is currently limited protection for employees or prospective employees who are discriminated against on the basis of a criminal conviction.

The *Spent Convictions Act 1988* (WA) offers some protections to people convicted of offences more than ten years ago and who have applied to have those convictions "spent" – they may be able to make a complaint to the Equal Opportunity Commission about discrimination by an employer or prospective employer. However, those persons who have been convicted less than ten years ago or who have not applied to have their convictions spent have very little protection.

An employee may make a complaint to the Australian Human Rights Commission (**AHRC**) about discrimination on the basis of a criminal conviction (not just a spent conviction), but at best, the AHRC can find that there has been discrimination and make non-binding recommendations to the employer.

ELC acknowledges that in many cases, it may be reasonable for the employer or prospective employer to discriminate against someone on the basis of a criminal record. However, in other cases, the effect of the existing laws and policy may be unduly harsh – for instance, where a person committed a minor offence some time ago (but not yet the amount of time required for the conviction to be spent) and the offence is not relevant to the position for which he or she is applying. There may be other good reasons for widening the scope of the anti-discrimination laws in this area – such as promoting rehabilitation of offenders and promoting social inclusion.

(b) Improvements experienced as a result of changes to laws or government policy

DAD AND PARTNER PAY

In June 2012, the federal Parliament passed a bill expanding the existing paid parental leave scheme so that fathers, adopting partners and partners in same-sex couples who take time off

work to care for a newly born or adopted child will receive 2 weeks' "dad and partner pay" at the minimum wage – currently $606.40 per week. The expanded scheme will apply to children born or adopted from 1 January 2013.

The *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* (Cth) (**Dad and Partner Pay Act**) expands the paid parental leave scheme through amendments the *Paid Parental Leave Act 2010* (Cth) (**Paid Parental Leave Act**).

Under the paid parental leave scheme which is currently in force, it is only the primary carer of the child who is eligible for parental leave pay. The birth mother or adoptive parent of the child is usually considered to be the primary carer. Under the new scheme, the primary carer will still be eligible for parental leave pay as before, but eligible fathers and partners will also be entitled to "dad and partner pay".

In order to be eligible for dad and partner pay, the father or partner must be caring for the child, must not be working, and must satisfy the work test, the income test and the residency test set out in the Paid Parental Leave Act.

Under the work test, the person must have been engaged in continuous work for approximately 10 out of the 13 months before the child's birth or adoption, and have worked for a minimum of 330 hours during that period. To satisfy the income test, the person's income in the previous financial year must not be more than $150,000. To satisfy the residency test, the person must be an Australian resident or hold a particular type of visa and have not been absent from Australia for an extended period.

As with the parental leave pay available to the primary carer, the dad and partner pay is paid by the federal government but is administered by the employer.

In addition to expanding the paid parental leave scheme, the Dad and Partner Pay Act also refines some of the provisions of the Paid Parental Leave Act, and amends the Fair Work Act to provide for "keeping in touch" days (a concept in the Paid Parental Leave Act) and to provide for unpaid parental leave arrangements where there is a stillborn or infant death.

In ELC's view, the expansion of the paid parental leave scheme to include payment for fathers and partners is a positive development.

(c) Recommendations or submissions for future changes to the laws or government policy

In line with the observations above, ELC recommends as follows:

Fair Work Act – unfair dismissal and labour hire workers

(i) That the limitation period for unfair dismissal claims be extended to 90 days;

(ii) That there be no reference to "exceptional circumstances" in section 394(3) of the Fair Work Act but that FWA be given discretion to allow claims to be lodged outside the limitation period, taking into account the factors currently listed in that section.

(iii) That the minimum period of employment be removed from the criteria for determining whether an employee is eligible to make an unfair dismissal claim.

(iv) That an employee's length of service be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

(v) That unfair dismissal protections be extended so that labour hire workers can expressly make unfair dismissal claims against host businesses.

(vi) That section 342 of the Fair Work Act be amended such that labour hire workers are expressly able to make general protections claims against host businesses.

Bullying

(vii) That the protections afforded to bullied employees be improved, for instance by amending either the State occupational health and safety legislation or the national model Work Health and Safety Act, Regulations to reflect more closely the anti-bullying provisions in South Australian occupational health and safety legislation.

Domestic workers

(viii) That the *Industrial Relations Act 1979* (WA) and the *Minimum Conditions of Employment Act 1993* (WA) be amended such that a person engaged in domestic service in a private home is not excluded from the definition of an "employee".

Apprentices and trainees

(ix) That the protections afforded to apprentices and trainees be improved under Western Australian legislation, for instance, by removing the bar against their making unfair dismissal claims under the *Industrial Relations Act 1979* (WA).

Discrimination on the basis of criminal conviction

(x) That consideration be given to improving the protections for discrimination on the basis of criminal conviction in employment in Western Australia, particularly where the offence is a minor one, the conviction occurred a long time ago or the offence is not relevant to the position.

4 Are there any other issues you would like to see included in the Report Card (other than the topics listed above)?

N/A – ELC only deals with employment law.

5 Any other comments you would like to make?

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