



Australian Government

# Fair Work OMBUDSMAN

Our Ref MC10-005568

Mr Daming He  
upholding.peoples.rights@hotmail.com

Dear Mr He

Thank you for your email of 25 March 2010 to the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, about an employee's obligations concerning unlawful directions by employers. The Minister has asked me to reply on her behalf.

The Fair Work Ombudsman is the agency, established by the *Fair Work Act 2010*, responsible for providing education, assistance and advice about the Commonwealth workplace relations system. The Fair Work Ombudsman is also responsible for impartially enforcing compliance with the Act and fair work instruments.

The 'upholding people's right' website claims that an employee can lawfully be sacked for making a complaint about an employer's conduct or actions to the employer or to a union or government agency. It also claims that protection is only afforded to those workers making a complaint to a court or tribunal about an employer's conduct.

The Fair Work Act came into operation on 1 July 2009. The Fair Work Act prohibits an employer from taking adverse action, such as dismissing an employee or altering the employee's position, because the employee has made a complaint or inquiry in relation to employment to anyone. This includes a complaint made to an employer, union or to a government agency like the Fair Work Ombudsman. This is a marked departure from the previous legal provision.

In addition, if a worker makes a complaint or inquiry with a person or body capable of seeking compliance with a workplace law or a workplace instrument, such as the Fair Work Ombudsman, the Fair Work Act prohibits that worker's employer from taking any adverse action against him or her because of this or for reasons that include that reason.

The Fair Work Act also makes it unlawful for an employer to terminate an employee's employment because the employee filed a complaint against an employer involving a violation of laws or regulations or recourse to competent administrative authorities ('an unlawful termination'). This includes a complaint about a breach of workplace laws or occupational health and safety laws. This provision also applied prior to the commencement of the Fair Work Act. It is this provision that some of the workers in the case law cited in the documentation attached to your email relied on.

One of the cases referred to in one of the documents attached to your email, headed 'the petitioner's request, is *Ansari v Commonwealth Bank of Australia Limited* [2007] FCA 1908. In that case, the dismissed worker relied on the unlawful termination provision mentioned above. However, in that case, the complaint was made to the employer. The employer successfully relied on legal precedents to the effect that this ground of unlawful termination did not apply to a complaint made directly by an employee to an employer. The worker had made a complaint to the employer about certain matters.

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Similarly, in *Wang v University of New South Wales* [2005] FCA 1040, the applicant's reliance on the unlawful termination ground referred to above failed because, as she admitted, she did not complain to an external authority but to her employer, the university, itself.

I understand that this is one of the bases of your complaint about the legal position: that the unlawful termination ground does not extend to complaints made to an employer or someone other than an administrative body. Under the Fair Work Act, the unlawful termination provision remains unchanged.

However, the Fair Work Act creates a new workplace right that did not previously exist. As mentioned above, the Fair Work Act now includes a provision, separate from the unlawful termination one, which specifically protects employment-related complaints to whoever they are made.

In any event, some of the authorities quoted in the petition document attached to your email may have also been misinterpreted. For instance, the document refers to *Stanislawa Bahonko v Moorfileds Community Anor* [2005] FCAFC 116. The applicant worker in that case relied on a precursor of the unlawful termination provision referred to above, contained in the *Workplace Relations Act 1996*, which then applied. The worker claimed that she was dismissed partly because she complained about the employer to the Equal Opportunity Commission, the Human Rights and Equal Opportunity Commission, the Ombudsman and other administrative authorities. The Federal Court judge in that case decided that she was dismissed for other reasons, breach of medication protocol and behaviour, and that on the facts of that case, the complaints made to those bodies were not taken into account when dismissing the employee. The case was decided on its facts alone. There was no ruling that that complaints to administrative authorities were not protected.

If you have any concerns about any adverse action made by a specific employer against an employee in retaliation for making an employment-related complaint, please contact Fair Work Online on 13 13 94.

Thank you for bringing your concerns to the Minister's attention.

Yours sincerely



Murray Furlong  
Director, Government Policy  
**FAIR WORK OMBUDSMAN**  
29 April 2010