



Australian Government

Fair Work

OMBUDSMAN

Our Ref MC10-016589

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

Dear Mr He

Thank you for your emails of 18 October and 22 November 2010 to Senator Chris Evans, Minister for Workplace Relations, concerning the unlawful termination statutory provisions. The Minister has asked me to reply on his behalf.

I note that you have written to Minister Gillard on this issue on 9 January 2008, 3 March 2008, 25 March 2010 and 3 June 2010. You also wrote to Minister Crean on 7 July 2010 and to Senator Wong and Senator Stephens on 11 July 2008. This issue has been dealt with exhaustively in previous correspondence. I recommend that you seek independent legal advice from an industrial law expert to discuss this issue.

As you have raised further questions in Section 5 of your email, I provide the following answers.

- (a) Reinstatement continues to be an available a remedy.
- (b) Section 772(1)(e) of the *Fair Work Act 2009* prohibits an employer from terminating an employee's employment for reasons that include the filing of a complaint, or the participation in proceedings, against an employer involving the violation of laws or regulations or recourse to competent administrative authorities. This is based on identical words used in the Termination of Employment Convention. The statutory provision is consistent with the Convention, not in breach of it as you allege. The paragraph immediately following the one you quote from the Report of the Committee of Experts entitled 'Protection against Unjustified Dismissal' specifically refers to 'the existence of guarantees providing protection against retaliatory measures for a person who **lodges a complaint with the appropriate body...**' (emphasis added). It is clear from the words in bold that the intention is to protect complaints made to an appropriate body. Complaints to an employer are not covered.
- (c) Section 351 of the Fair Work Act, which applies to national system employees, prohibits adverse action against an employee or prospective employee because of a discriminatory ground (race, colour, sex, sexual preference, age, etc.). Section 772(1)(f) also prohibits an employer from terminating an employee's employment for discriminatory grounds. The Fair Work Act contains provisions to prevent a person from 'double dipping' when that person has multiple remedies relating to a dismissal. An employee is limited to one single remedy. If you are a national system employee, you may rely on the general protection provision in section 351 and therefore don't need to rely on the unlawful termination provision in section 772. On the other hand, an employee who is not a national system employee could only rely on section 772.
- (d) There is nothing in the legislation that enables an employer's authority to supersede the employer's statutory obligations. The inapplicability of section 772(1)(e) has no bearing on the employer's obligations. This is discussed below.

Section 170CK(2)(e) of the *Workplace Relations Act 1996* (WR Act) is the precursor of s.772(1)(e) of the Fair Work Act (reproduced in paragraph (b) above) that was considered in *Zhang v The Royal Australian Chemical Institute In*; [2005] FCAFC 99 (*Zhang's Case*). An identical provision was later found in s.659(2)(e) of the WR Act (the Act as it was under WorkChoices).

In *Zhang's Case*, the Full Court of the Federal Court held that a complaint made solely to the employer did not fall within the ambit of that statutory provision. The Full Court affirmed similar reasoning in *He, in the matter of an application for Writs of Mandamus and Certiorari or Constitutional Relief against Lewin* [2004] FCAFC 161. All *Zhang's Case* established was that the ambit of the unlawful termination provision did not extend to complaints made internally to the employer alone.

The unfair dismissal or general protection provisions may apply. In fact, in *He's Case*, Commissioner Lewin found that the dismissal was harsh, unjust or unreasonable under the 'unfair dismissal' provision of the legislation. The Full Court commented that it was '*futile for Mr He to attempt to establish that the same finding in his favour [the unfair dismissal one] should have been made on other grounds*' [the unlawful termination provision].

In your email, you also state that in my discussion of *Zhang's Case*, I failed to make any reference to Mr Zhang's complaint made to WorkCover. It was not my intention to discuss all aspects of that case. For clarification only, I will briefly refer to the WorkCover complaint. In *Zhang's Case*, the trial judge relied on an earlier Federal Court decision in *Jennings v Salvation Army* [2003] FCA 1193 to the effect that a WorkCover claim 'involves nothing more than making a claim for compensation under a no-fault compensation scheme.' It does not constitute a 'complaint'. In addition, in *Zhang's Case*, the trial judge found that the evidence was unclear as to when the claim for compensation was lodged with WorkCover and whether or not it came to the attention of the employer before the dismissal. The court also found that, at the time of dismissal, the employer was not aware of the employee's complaint to the Victorian Trades Hall Council's occupational health and safety officer. Unless an employer is aware of a complaint, the complaint cannot be the basis for the dismissal.

As to the last paragraph of Section 4 of your email, section 27 of the Fair Work Act preserves the operation of state laws dealing with occupational health and safety.

I hope this clarifies your concerns. You may seek independent legal advice on this issue. Thank you for raising your concerns with the Minister.

Yours sincerely



Murray Furlong
Director, Government and Parliamentary Policy
FAIR WORK OMBUDSMAN
20 December 2010