

**INDUSTRIAL ARBITRATION (UNFAIR DISMISSAL)
AMENDMENT ACT 1991 No. 11**

NEW SOUTH WALES



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**INDUSTRIAL ARBITRATION (UNFAIR DISMISSAL)
AMENDMENT ACT 1991 No. 11**

NEW SOUTH WALES



Act No. 11, 1991

An Act to amend the Industrial Arbitration Act 1940 with respect to unfair dismissal. [Assented to 3 May 1991]

Industrial Arbitration (Unfair Dismissal) Amendment 1991

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Industrial Arbitration (Unfair Dismissal) Amendment Act 1991.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Industrial Arbitration Act 1940 No. 2

3. The Industrial Arbitration Act 1940 is amended as set out in Schedule 1.

Transitional

4. The Industrial Arbitration Act 1940, as in force without any of the amendments to that Act made by this Act, applies to any dismissal, or threat of dismissal, of an employee that occurred before the commencement of Division 3 of Part 8B of that Act, as amended by this Act.

**SCHEDULE 1—AMENDMENT OF INDUSTRIAL
ARBITRATION ACT 1940**

(Sec. 3)

**PART 1—AMENDMENT RELATING TO UNFAIR
DISMISSAL**

Part 8B, Division 3 (sections 91ZA–91ZN):

After Division 2, insert:

Division 3—Unfair dismissal

Application of Division

91ZA. (1) This Division applies only to the dismissal or threatened dismissal of:

- (a) an employee for whom conditions of employment are fixed by an award or agreement; and
- (b) any other employee of a class prescribed by the regulations as a class of persons to whom this Division applies.

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ACT 1940—*continued***

(2) This Division does not apply to the dismissal or a threat of dismissal of any such employee who is a trainee or an apprentice or who is declared by the regulations not to have the benefit of this Division, despite subsection (1).

(3) This Division does not apply to any dismissal, or threat of dismissal, of an employee that occurred before the commencement of this section.

(4) Nothing in this Division prevents the commission (pursuant to section 30) from having the powers or exercising the jurisdiction conferred on a conciliation commissioner by this Division.

Employees in the public sector

91ZB. (1) In this Division, a reference to the dismissal, or threatened dismissal, of an employee is, in relation to a person employed in the public sector, a reference:

- (a) to the Crown's dispensing with, or proposing to dispense with, the services of the person under any right or power of the Crown; and
- (b) to the dismissal, or the proposed dismissal, of a person as a consequence of disciplinary proceedings against, or the commission of an offence by, the person or to the resignation, or proposed resignation, of the person (in accordance with a direction that the person resign or be allowed to resign) as such a consequence; and
- (c) if the person is a temporary employee, to dispensing with, or proposing to dispense with, the services of the person.

(2) This Division does not apply to a person to whom Part 2A (relating to public sector executives) of the Public Sector Management Act 1988 applies.

Applications

91ZC. (1) If an employer dismisses, or threatens to dismiss, a person who is an employee of the employer and the person claims that the dismissal was, or that the threatened dismissal would be, harsh, unreasonable or unjust, the person (or an industrial union of employees on behalf of the person) may apply for the claim to be dealt with under this Division.

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ACT 1940—*continued*

(2) Any such application must be made in a form approved by the registrar and should be lodged with the registrar not later than 21 days after, or (in the case of a threat of dismissal) may be lodged with the registrar before, termination of the employment.

(3) A conciliation commissioner to whom an application lodged out of time is allocated must reject the application unless the commissioner considers there is a sufficient reason not to reject it.

(4) In deciding whether there is a sufficient reason, the conciliation commissioner is to have regard to:

- (a) the reason for, and the length of, the delay in lodging the application; and
- (b) any hardship that may be caused to the applicant or the employer if the application is or is not rejected; and
- (c) the conduct of the employer relating to the dismissal or threat of dismissal; and
- (d) such other matters as the commissioner considers appropriate.

(5) An application is to be dealt with by a conciliation commissioner sitting alone.

(6) The conciliation commissioner to whom an application is allocated may make an order dismissing the application if the commissioner considers the application frivolous or vexatious or for such other reason as to the commissioner appears sufficient.

Conciliation

91ZD. The conciliation commissioner to whom an application is allocated must endeavour, by all means the commissioner considers proper and necessary, to settle the applicant's claim by conciliation.

Arbitration

91ZE. (1) When, in the opinion of a conciliation commissioner attempting conciliation, all reasonable attempts to settle the claim by conciliation have been made but have been unsuccessful, the commissioner is to determine the claim by making an order under this Division.

SCHEDULE 1—AMENDMENT OF INDUSTRIAL ARBITRATION ACT 1940—*continued*

(2) Nothing in this section prevents further conciliation from being attempted, or the parties from settling the claim, at any time before an order is made determining the claim.

Matters to be considered

91ZF. In determining a claim, a conciliation commissioner ~~may~~, if appropriate take into account:

- (a) whether a reason for the dismissal or threatened dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to re-employ: and
- (b) if any such reason was given—its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment; and
- (c) whether a warning of unsatisfactory performance was given before the dismissal or threat of dismissal: and
- (d) the nature of the duties of the applicant immediately before the dismissal or when the threat was made and, if the applicant sought but was refused reinstatement or re-employment, the likely nature of those duties if the applicant were to be reinstated or re-employed; and
- (e) whether or not the applicant requested reinstatement or re-employment with the employer, and
- (f) such other matters as the commissioner considers relevant.

Orders for reinstatement, re-employment or lost wages

91ZG. (1) A conciliation commissioner may determine a claim relating to dismissal by ordering the employer:

- (a) to reinstate the applicant in his or her former position on terms not less favourable to the applicant than those that would have been applicable if the applicant had not been dismissed; and
- (b) if the commissioner thinks fit, to pay to the applicant, within a specified time, an amount stated in the order that does not exceed the remuneration the applicant

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ACT 1940—*continued***

would, but for being dismissed, have received before being reinstated in accordance with the order.

(2) If the applicant has been dismissed and, when determining the claim, the conciliation commissioner considers that it would be impracticable to reinstate the applicant, the commissioner may order the employer:

- (a) to re-employ the applicant, on terms and conditions determined by the commissioner, in another position that the employer has available and that, in the commissioner's opinion, is suitable; and
- (b) if the commissioner thinks fit, to pay to the applicant, within a specified time, an amount stated in the order that does not exceed the remuneration the applicant would, but for being dismissed, have received before being re-employed in accordance with the order.

(3) If the applicant has been dismissed and, in determining the claim, the conciliation commissioner considers that it would be impracticable to make an order for reinstatement or re-employment, the commissioner may order the employer to pay to the applicant, within a specified time, an amount of compensation not exceeding 6 months' remuneration of the applicant at the average rate received over the period of 6 months immediately before being dismissed.

(4) In determining a claim relating to a threat of dismissal, a conciliation commissioner may order the employer not to dismiss the employee in accordance with that threat.

(5) When assessing any compensation payable, the conciliation commissioner is to take into account whether the applicant made a reasonable attempt to find alternative employment and the remuneration that would have been payable if the applicant had succeeded in obtaining alternative employment.

Effect of reinstatement or re-employment

91ZH. (1) If a conciliation commissioner makes an order requiring the reinstatement or re-employment of an applicant, the commissioner may also order that the period of employment of the applicant with the employer is taken not to have been broken by the dismissal.

(2) Any such order has effect according to its tenor.

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Costs

91ZI. A conciliation commissioner may make an order for the payment of costs if it appears to the commissioner to be just to do so and assess the amount of the costs, but only if:

- (a) the commissioner dismisses the application on the ground that it is frivolous or vexatious and makes the order against the applicant; or
- (b) the commissioner makes the order against a party whom the commissioner considers to have unreasonably failed to agree to a settlement of the claim.

Limit on appeals

91ZJ. (1) An appeal lies to the commission constituted by a single member from any decision of a conciliation commissioner under this Division.

(2) The provisions of Parts 2 and 3 apply for the purposes of any such appeal, but no further appeal lies to the commission in court session.

Enforcement of orders

91ZK. An order under this Division requiring the reinstatement or re-employment of a person, or requiring an employer not to dismiss an employee, is enforceable as if it were an award.

Effect of availability of other remedies

91ZL. A conciliation commissioner must reject an application relating to the dismissal, or threatened dismissal, of a person who is an employee if:

- (a) another Act or a statutory instrument provides for redress to the person, or for the holding of an inquiry, in relation to the dismissal or threatened dismissal; and
- (b) the person has commenced proceedings under the other Act or instrument or has not lodged with the application under this Act a written undertaking not to proceed under the other Act or instrument.

Effect of other Acts, contracts, awards and agreements

91ZM. (1) Subject to section 91ZL, this Division has effect in relation to the dismissal, or threatened dismissal, of a person who is an employee despite:

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- (a) the provisions of any other Act with respect to conditions of termination of, or dismissal from, employment; and
- (b) anything in a contract of service, or an award or agreement, that relates, or at any time related, to the employment of the person.

(2) The concurrence of each party to an enterprise agreement is not required for the exercise of any function of the commission or a conciliation commissioner that is conferred by or arises from the enactment of this Division.

Disposal of wider questions, disputes or difficulties

91ZN. (1) If a conciliation commissioner dealing with a claim under this Division becomes aware that the claim arises out of, or has given or is likely to give rise to, a question, dispute or difficulty involving an industrial matter concerning persons other than the parties to the claim (whether or not also concerning the parties to the claim), the commissioner must immediately notify the Resident of the commission accordingly.

(2) A conciliation commissioner who has so notified the Resident of the commission must not deal with the claim any further until directed to do so by the President.

(3) If the President of the commission so directs, the conciliation commissioner may deal with the question, dispute or difficulty under Division 2 of Part 3.

PART 2—CONSEQUENTIAL AMENDMENTS**(1) Section 5 (Definitions):**

In the definition of “**Industrial matters**” in section 5 (1), after paragraph (c), insert:

(c1) the dismissal or threatened dismissal of an employee in any industry or the refusal to employ a former employee, or to reinstate a former employee in employment, in any industry;

(2) Section 20 (Original jurisdiction):

From section 20 (1D), omit “section 20A excepted”, insert instead “Division 3 of Part 8B (relating to unfair dismissal) excepted”.

*Industrial Arbitration (Unfair Dismissal) Amendment 1991***SCHEDULE 1—AMENDMENT OF INDUSTRIAL ARBITRATION ACT 1940—*continued*****(3) Section 20A (Awards relating to dismissal of employees):**

Omit the section.

(4) Section 25 (Compulsory conferences):

After section 25 (4), insert:

(4A) Without affecting the generality of subsection (4), if the question, dispute or difficulty relates to the dismissal or threatened dismissal of an employee, a conciliation commissioner may deal with the dismissal or threatened dismissal under Division 3 of Part 8B as if it were the subject of a claim duly made under that Division.

(5) Section 80 (Legal representation):

After section 80 (2), insert:

(2A) In proceedings before a conciliation commissioner under Division 3 of Part 8B (relating to unfair dismissal) no party is, except by the consent of the conciliation commissioner, to be represented by a barrister or solicitor or by a person who has qualified for admission as a barrister or solicitor, despite subsection (2).

(6) Section 119 (Enforcement of certain orders):

(a) From section 119 (1), omit “is made under section 25AA, 88F (2), 92, 92B, 93, 95, 98 or 118, that any person, union or association shall pay the amount of any money due, such”, insert instead “to which this section applies is made for the payment of money by any person, union or association, the”.

(b) At the end of section 119, insert:

(3) This section applies:

(a) to orders made under section 25AA, 88F (2), 92, 92B, 93, 95, 98 or 118, for the payment of money due; and

(b) to orders referred to in Division 3 of Part 8B (relating to unfair dismissal) for the payment of money other than costs.

(7) Section 123 (Orders for costs):

In section 123 (2), after “commission”, insert “, a conciliation commissioner”.

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**SCHEDULE 1—AMENDMENT OF INDUSTRIAL ARBITRATION
ACT 1940—*continued*****(8) Schedule 6 (Savings and transitional provisions):**

At the end of Schedule 6, insert:

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Saving of awards under s. 20A

6. An award made under section 20A and in force immediately before the repeal of that section by the Industrial Arbitration (Unfair Dismissal) Amendment Act 1991 has the same effect as it would have had if that section had not been repealed.

*[Minister's second reading speech made in—
Legislative Assembly on 21 March 1991
Legislative Council on 16 April 1991]*