The Achilles' Heel of Unfair Dismissal Arbitration in Australian SMEs

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Objectives: Employee grievances occur in both SMEs and large organisations as a by-product of the people management practices of the company. This paper aims to report on the differences in grievance arbitration outcomes between SMEs and large organisations in relation to unfair dismissal. This knowledge provides entrepreneurs with information about SME performance at the arbitration table.

Prior Work: Researchers are investing energy into determining whether stereotypical thinking of HR for large organisations is also applicable in SMEs. This paper is built on the premise that employee dismissal (and subsequent arbitration of them) is within the domain of human resource management. Thus an examination of the differences between unfair dismissal outcomes in SMEs and larger organisations will provide further knowledge about people management practices in SMEs.

Approach: Quantitative data were collected from 384 unfair dismissal decisions made by commissioners of the Australian Industrial Relations Commission during 2004 and 2005. Descriptive statistics are presented for business sizes ranging from micro to large, with Pearson chi-square analysis performed on SMEs employing up to 100 staff.

Results: It appears that arbitration outcomes are not significantly different for SMEs employing up to 50 staff, from those of larger organisations. However, SMEs employing up to 100 staff are not performing as well at the arbitration table in comparison to larger businesses. Furthermore, the presence of a human resource expert is not significantly associated with the arbitration decision, in neither SMEs nor large firms.

Implications: SMEs up to 100 employees tend to operate without HR specialist and the informal HR practices of SMEs seem to be holding up under the scrutiny of the arbitrators in firms of less than 50 staff. However there appears to be a vulnerable business size, 50 to 100 staff, with a significantly lower number of cases determined in favour of the SME employer. It is conceived that an 'Achilles' heal' for SMEs exists for businesses of this size, whereby such businesses may not have the benefit of the arbitrators' tolerance for the informal processing of dismissals that they appear to exhibit for smaller business.

Value:
This paper contributes empirical results to the debate surrounding the need for different (or similar) models of people management for SMEs and large organisations. It also identifies an area of risk in SME people management practices. Discussing variances in HR activity between SMEs and big business helps to identify the people management practices that work best in stimulating smarter, successful small business.

Key Words:
SMEs, employee grievance; arbitration, unfair dismissal, Australia, HRM

Introduction

The year is 2005 and amid claims that 77,000 jobs would be created in the small business sector without the hindrance of unfair dismissal legislation (Harding 2002) the Australian federal government amended the Workplace Relations Act 1996. Businesses with less than 100 employees were exempted from the rigour of unfair dismissal laws which meant employees from such firms could no longer access the federal Australian Industrial Relations Commission (AIRC) with an unfair dismissal claim. Interestingly, when the UK government once considered denying people working in firms employing less than 20 staff access to unfair dismissal procedures, it was described as a 'draconian solution' (Earnshaw, Marchington & Goodman 2000, p. 65). Whilst debate as to whether the output of such a law will result in a working poor for the employees in small firms (Argy 2005; Earnshaw, Marchington & Goodman 2000) continues, this paper contains empirical evidence about unfair dismissal claims transpiring from Australian SMEs and the resultant arbitration decisions made by the AIRC, *before* the amendments took place.

The process an employer uses to dismiss an employee is scrutinised during the arbitration process. Thus generalisable value of this paper is that unfair dismissal arbitration provides an opportunity to observe the results of people management practices used in SMEs, compared with the results of termination practices used by larger organisations. The potential that SMEs and their larger organisational counterparts could vary in arbitration outcomes is premised by the literature review which places unfair dismissal within the scope of managing an organisation's human resources. Within SMEs the management of its human resources gravitates towards informal methods in comparison to formalised processes adopted by larger organisations. Consequently, informal management of dismissing employees could, for example, result in owner/managers struggling to maintain neutrality in the termination process or overlooking the provision of procedural justice to employees. Outlined below are the findings presented in this paper that provide practical information, potentially useful in policy formulation.

Policy Implications:

- Employees from SMEs file unfair dismissal claims less frequently than employees from larger organisations, even though the SME sector significantly accounts for all actively trading businesses in the country.

- There appears to be a 'vulnerable' business size, 50 to 100 staff, for not successfully defending unfair dismissal claims before an arbitration hearing. For businesses employing up to 50 staff, informal management of human resource activities related to dismissing employees does not appear to have a negative impact at the arbitration table. Whereas, for businesses employing up to 100 staff it may be the precursor to having significantly less arbitration decisions awarded in their favour compared to larger businesses.

- SMEs, in nearly all cases, are devoid of human resources specialists. However there is no significant difference in arbitration decisions between SMEs without HR specialists and larger organisations with human resource specialist(s).

Australia's Small Business Exemption from Unfair Dismissal Regulations

Latest figures from the Australian Bureau of Statistics (2007) reveal that 89% of employing businesses in Australia engage up to 19 staff. Prior to the amendments, the Australian Chamber of Commerce along with industry groups and peak employer bodies lobbied the federal government extensively about the costs of unfair dismissal provisions to small firms and their subsequent reluctance to hire staff (Sheldon & Thornthwaite 1999). The lobbying was effective, and motivated with concern that unfair dismissal regulation may be preventing small business from hiring staff (Harding 2002; Harris 2002; IRM Letter 2005; Ridout 2005), the federal government exempted small businesses from unfair dismissal laws. Challenges raised by protestors to the government's logic centred on suggestions of the nature that simply

exempting small businesses from dismissal laws would offer little in efficiency gains, demoralise employees working in small businesses and decrease their standard of living (Argy 2005; Heap & Pegg 2005; IRM Letter 2005; Norton 2005). Waring & De Ruyter (1999) described the belief that unfair dismissal laws deter growth in small business as an 'urban myth' by arguing that employment data revealed strong job growth in small business despite the introduction of dismissal laws in the Industrial Relations Reform Act 1993.

Regardless of the debate and controversy, Australia's industrial relations amendments operationalised in 2006. The impact of these amendments is broad, but pertinent to this paper is that businesses with 100 or less employees could no longer be pursued by an aggrieved employee through the Australian Industrial Relations Commission (AIRC) with an unfair dismissal claim. The boon for these sized businesses is that they can alter their establishment numbers with little regulatory hindrance.

To appreciate the SME landscape in Australia, the Australian Bureau of Statistics' (2002) definition of 'small business' includes: firstly, 'non-employing' businesses which involve simply the sole proprietor or partners without employees; secondly, 'micro' businesses which employ less than 5 people; and thirdly, 'small' businesses employing 5 to 19 individual members of staff. The ABS also defines medium business as those businesses employing between 20 and 199 people, with large business accounting for any business employing over 200 staff. The Government's legislative reforms exempting businesses with less than 100 employees extend into the country's definition of medium businesses (20 to 199 staff). In line with these definitions, Table I details the composition of actively trading businesses in Australia.

Table I Australian Businesses by Number of Employees (as at 30 June 2006)

Number of Employees	**Number of Businesses**	
Non Employing businesses (no employees)	1,156,326	(58.9%)
Micro business (less than 5 people)	494,196	(25.2%)
Small business (5 to 19 employees)	227,373	(11.5%)
Medium business (20 to 199 employees)	80,215	(4.1%)
Large business (200+ employees)	5,797	(.3%)
Total number of Employing Businesses	1,963,907	(100.0%)

(*Adapted from:* Australian Bureau of Statistics 2007)

Table I clearly demonstrates that 99.7% of all Australian businesses are staffed by less than 200 people. Figures were not obtainable on the number of people employed in each of these business divisions, however the numbers supplied in Table II indicate that exempting employees in businesses of up to 20 staff alone from unfair dismissal, results in over three million people having no form of redress via the AIRC.

Table II Number of Persons Employed within Australian Small Business

Type of Business	**Number of persons employed**	
Large & Medium (20 or more employees)	5,305,096	(62%)
Small (less than 20 employees)	3,259,404	(38%)
Total number of persons employed in Australia	8,564,500	(100%)

(*Adapted from*: Australian Bureau of Statistics 2003)

In terms of the number of unfair dismissal claims made by aggrieved employees, Table III provides statistics on the number of unfair dismissal cases heard by the AIRC, (excluding appeals) prior to the enactment of the legislative amendments that restrict employees from businesses with less than 100 employees from seeking recourse through the Commission.

Table III History of Unfair Dismissal Arbitration Decisions by the AIRC

Type of Decision	*99/00*	*00/01*	*01/02*	*02/03*	*03/04*	*04/05*	*05/06*	**7 Year Total**
Order for payment to dismissed employee	121	96	96	81	84	69	52	**599** (34.9%)
Order to reinstate dismissed employee	27	42	47	24	22	18	17	**197** (11.5%)
Application dismissed on merits of employer's case	196	142	148	136	117	115	55	**909** (52.9%)
Other (eg breach found but no order)	2	11	0	0	0	0	0	**13** (.7%)
Total Arbitrations determined	**346**	**291**	**291**	**241**	**223**	**202**	**124**	**1,718** (100%)

(Adapted from: Australian Industrial Relations Commission 2005, p. 16, 2006b, p. 15)

The statistics in Table III reflect that whilst decisions favourable to the employer combine to equal 53.6% which is just over the majority, the remaining 46.4% reflect decisions that supported claims from aggrieved employees. It is worth noting that the AIRC is the country's federal commission, with Australia also possessing individual state industrial commissions that can hear unfair dismissal claims within their jurisdiction.

Unfair Dismissal Arbitration: A Human Resource Management Related Event

Unfair dismissal frequently occurs at the junction of two human resource management practices: discipline and grievance. Discipline and grievance, it is suggested, account for a high majority of industrial relations matters in the workplace and before tribunals (Earnshaw, Marchington & Goodman 2000; Hook et al. 1996) Discipline is defined by Hook et al. (1996, p. 21) as:

> *'some action taken against an individual who fails to conform to the rules of an organization of which he is a member'.*

This means disciplinary action is initiated by the employer where for example, the employer might furnish a tardy employee with written advice to improve their performance. Whereas, the same authors suggest a grievance is:

> *'a matter submitted by a worker in respect of any measure or situation which directly affects, or may affect the conditions of employment in the undertaking, when that measure or situation appears contrary to the provisions of an applicable collective agreement or a contract of employment, to workrules, or laws or regulations, or to the custom or usage of the occupation'* (Hook et al. 1996, p. 21).

Grievances are initiated by employees as individuals, collectively, or by union representatives to legitimately protest any aspect of their employment relationship in which they believe management has acted inappropriately (Nurse & Devonish 2007). Formal grievance mechanisms generally include a right of appeal throughout each stage of the process to the extent to where the employee can seek arbitration from a third party. Arbitration is the final

avenue for resolving a dispute after the failure of mediation or conciliation processes (Bemmels 1990). These third parties exist in the form of courts, industrial tribunals, commissions or government identified advisory bodies, with authority to determine whether a fair process was administered by the employer in processing the discipline and/or dismissal (Rollinson et al. 1996).

The unfair dismissal nexus occurs when the disciplinary process has induced the need to terminate the employee's contract and the employee invokes a grievance. This occurs outside the organisation's formal grievance procedures, because the ex-employee now exists outside the jurisdiction of the organisation's rules and regulations. Dalton and Todor (1985), Bemmels (1991b) and Klass, Mohony and Wheeler (2005) specifically include in their explanations and research into grievance activity, employee initiated appeals against their termination of employment within the scope of an organisation's grievance processes, regardless of the finer point that the dismissed employee no longer attends the workplace. There are frequent exceptions to unfair dismissal occurring outside the disciplinary/grievance junction, such as where employees are made redundant or terminated whilst on probationary employment. Disciplinary action would not necessarily precede such dismissals, but these dismissals still occur within the scope of the organisation's human resource management activities.

The Informal Nature of Human Resource Management in SMEs

One of the identifiable concerns commonly threaded throughout the research on human resource management in SMEs is that they engage in informal practices which expose them to risks such as high turnover and litigation for reasons such as discrimination, safety breaches or unfair dismissal. However, Kotey & Slade (2005) suggest that the limited level of resources available to small businesses impedes their ability to implement formalised HR practices. Formalised HR practises are described as those which are reflected in standardised policies and procedures and documentation (Kotey & Slade 2005). Marlow and Patton (2002, p. 537) state that it is 'traditional to dismiss smaller firms as miniature larger organisations'. Consequently, mainstream HR literature tends to not isolate SMEs as an important contextual difference for the HRM model (Hornsby & Kuratko 2003; Jameson 2000; Wilkinson 1999; Woodhams & Lupton 2006). The literature suggests that as firm size increases, HR becomes more formalised (Kotey & Slade 2005; Kuratko & Hodgetts 2004; Mazzarol 2003; Wagner 1998). However, the results of Golhar & Deshpande (1997) found little difference between HR practices of large firms and small firms. This finding could be as a result of the definition of a small firm used in this study which extended to 500 employees and was the broadest definition size in all the studies reviewed.

Antecedents that might produce differences in unfair dismissal arbitration between SME's and large organisations

Research into determining whether employees within SMEs have the same working conditions as those in larger organisations is heavily premised by consistent findings that informal HR management practices prevail in SMEs. Discussions about human resource management practices and quality of life for SME workers commonly wander into the 'happy ship' versus 'bleak house' scenarios (Atkinson & Curtis 2004; Head & Lucas 2004; Matlay 2002; Wilkinson 1999; Woodhams & Lupton 2006). The 'happy ship' theme contends that SMEs are family oriented and harmonious workplaces where conflict is seen as unnecessary. Alternatively, the 'bleak house' research suggest that employees in SMEs are subject to authoritarian management, work longer hours, have less training and lower union representation than employees in large firms (Parker 2000). Whilst attempts to generally characterise HRM in SMEs remains unresolved, Wilkinson (1999) and Pratten and Lovatt (2005) suggest that it is generally accepted that small businesses lack resources and the presence of HR specialists to guide them in the technical aspects of managing employees. Pratten and Lovatt (2005) further contend that some 'stretched' SME owners ignore regulations if they see them as a threat to the business efficiency, increasing the potential for court or tribunal cases.

Based on their research of small establishments in the UK hotel industry, Head and Lucas (2004) submit that tribunals (or equivalent bodies in various countries) are important for employees in SMEs because small businesses are more likely to be absent of a grievance procedure during disciplinary action or in times of organisational adjustments and restructures. The premise of their suggestion is that SME employees subject to disciplinary action are more likely approached in an informal manner, which may not incorporate an opportunity for the employees to defend accusations. In essence, lack of formal disciplinary procedures where the owner/manager holds the locus of control for HR related decisions (Harris 2002; Matlay 2002) raises the 'possibility of arbitrary management practice' with potential to be 'detected' by the arbitrators (Head & Lucas 2004, p. 697/705).

Informal HR practices in terms of dealing with dismissal can be illustrated by the employer 'having a quiet word' with the employee in question (Earnshaw, Marchington & Goodman 2000, p. 70) in the belief that informal discussions best facilitate this type of communication within the business (Matlay 2002). An indicator of the success of this approach is provided by Earnshaw, Marchington and Goodman (2000, p. 67) in their investigation into dismissal arbitration in small business which found that 'employers won more cases than they lost'. The context of the study was SMEs within the transport and communication, hotels and catering, and engineering industries in the UK. Furthermore, the study found that in nearly every instance where the SME employer lost a case, it was not because of the reason they dismissed the employee, but for the way in which they actioned it. For example, an employee in question may not have been given an opportunity to respond to an accusation as part of the disciplinary process; the employer may not have conducted a sound investigation; denied the employee representation; or entered the disciplinary meeting with a predetermined stance to terminate the employee's contract. The potential result of SMEs relying on informal HR practices could be that they risk denying employees 'procedural justice' when dealing with a problem employee or processing redundancies.

Another precursor to the challenge of managing dismissal in SMEs noted by MacMahon and Murphy (1999), Earnshaw, Marchington and Goodman (2000) and Marlow and Patton (2002), is that the close proximity in which the owner/manager and employees work fosters sociable relationships between them. These authors further contend that in the event that the owner/manager needs to discipline or terminate an employee, they are ultimately compromised in maintaining the 'personal distance' and unbiased opinion required to objectively manage the process. Earnshaw, Marchington and Goodman (2000, p. 71) note the concern that arbitrators 'may not understand how small firms operate and do not give sufficient weight to size and administrative resources when making a decision [and] will not understand the challenge of remaining unbiased for a small business manager'.

Several reasons have been developed through the preceding literature review as a basis for suspecting differences in arbitration outcomes between SMEs and larger businesses. In a summary statement: unfair dismissal arbitration is a by-product of any firm's HR management practices and whilst the dismissal process in large organisations is prescriptive, formal and overseen by HR experts, in SMEs it is generally managed informally which may result in arbitrary decisions and neglecting procedural justice. To adequately address the interests of this paper, borne of the literature review are two exploratory research questions. These are presented below, along with their related hypotheses.

Question One:
Are there differences between arbitration outcomes between SME's and larger organisations?

H_1: The number of unfair dismissal claims *lodged* with the AIRC vary (beyond random chance) between SMEs and larger organisations

H_2: Unfair dismissal arbitration decisions vary between SMEs and larger organisations

Question Two:
Are different arbitration outcomes received when an HR expert is present?

H_3: Unfair dismissal arbitration decisions vary between organisations with HR expertise and those without HR expertise.

H_4: Unfair dismissal arbitration decisions vary between large organisations with HR experts and small businesses without an HR expert.

Methodology

This quantitative research relies on unobtrusive measures to collect information from AIRC arbitration decisions which are documented as a matter of public record and available on the AIRC website. Unobtrusive measures have the advantage of reducing bias during the collection of data because there is no direct intrusion by either the researcher or a measurement instrument (Trochim 2005). This study uses 'secondary analysis' to analyse factual, explicit data from the AIRC decisions. Secondary analysis is similar to a content analysis in that it makes use of existing sources of data, however in secondary analysis, one analyses quantitative data rather than the textual details examined in a content analysis (Trochim 2005).

The data was accessed by initially printing a list of all decisions made by the AIRC between the 1st January 2004 and 31st December 2005 (this list contained over 2,000 entries). From this list, 505 decisions were identified as being related to termination of employment or dismissal. These decisions were viewed online to determine whether they matched the criteria outlined in the 'target data' section. This process yielded 384 relevant decisions which were printed and reviewed for information on the size of the business, the presence of HR expertise and the arbitration decision.

Secondly, each business was checked on the Australian Business Who's Who database as a further avenue for identifying and/or confirming medium and large businesses and the presence of an HR expert. This database was helpful in confirming business sizes with employee counts included for organisations contained in its database. It is also standard for the data base to list the CEO and other prominent positions within a company. Quite frequently this includes the name of the organisation's human resources specialist. The raw data were entered into SPSS for collation and preparation of descriptive statistics. Excel worksheets developed by Levine et al. (2008) were used for calculating chi-square tests of difference using 2x2 contingency tables.

Target Data and Data Delimitations

This research focuses on the first round arbitration decisions made by a single commissioner over an unfair dismissal claim. To find out information about people unsuccessfully attempting to access the Commission's services, included in the collection were unfair dismissal claims that were rejected by the commissioner for being outside jurisdiction of the AIRC. Specifically, these were cases where the commissioner found the employee was a trainee, apprentice, short term casual or on probation and employees who, believing they had been dismissed, had in fact surrendered their employment contract through a resignation.

Decisions that were discarded included appeals made against arbitration decisions, which are heard by a Full Bench. Also excluded were 'out of time' cases. This means that an employer has successfully argued that the grievant lodged the application for an unfair dismissal hearing more than 21 days after the termination took place (Australian Industrial Relations Commission 2006a). This study did not capture 'out of time' applications because there is limited detail in the decisions regarding the actual dismissals to enable accurate data capture. Finally, cases that involved non-award employees or high income earners were also discarded, for example, in 2006 the total annual remuneration package was capped at $98,200 (Australian Industrial Relations Commission 2006a). It is noted that there were limited occurrences of this nature and once again, the decisions contain only scant details

Findings

In essence, the research presented in this paper seeks to determine whether arbitration decisions in SME's differ from larger organisations, given the difference in their approaches to HRM. This section reports the study's findings in relation to the two exploratory questions entertaining the notion of differences between arbitration lodgements and outcomes in SME's and larger organisations and the association of HR expertise with these decisions.

Question One:

Are there differences between arbitration outcomes between SME's and larger organisations?

It is worth recounting that the data analysed for this study pertains to the final two years that all employees, regardless of employer size, had access to the AIRC with their dismissal claims which was 2004 and 2005. Table IV represents the data that was collected from this period on the number of employees that firstly, commenced unfair dismissal proceedings with the AIRC (that is, lodgements) and secondly, pursued unfair dismissal proceedings through to an arbitration decision with the AIRC, by employer size.

Table IV Descriptive Data on Unfair Dismissal Lodgements and Decisions by Business Size

Number of Employees in the Business	*Unfair Dismissal Claims Lodged at the AIRC by Aggrieved Employees**	*Unfair Dismissal Claims Arbitrated by the AIRC (within jurisdiction only)*		
		In favour of the employee	**In favour of the employer**	**Total Arbitration Decisions**
10 or less	12	4	6	10
11 to 25	13	2	10	12
26 to 50	27	19	5	24
51 to 100	29	16	2	18
≤ 100 staff subtotal	*81 (35.7%)*	*41 (22.9%)*	*23 (12.8%)*	*64 (35.8%)*
101 to 200	25	10	11	21
201 to 500	21	7	5	12
501 to 1,000	18	4	9	13
1,001 to 10,000	44	13	25	38
Over 10,000	37	15	16	31
> 100 staff subtotal	*145 (64.3%)*	*49 (27.4%)*	*66 (36.9%)*	*115 (64.2%)*
Total:	**226** (100%)	**90** (50.3%)	**89** (49.7%)	**179** (100%)

***** *384 decisions were examined in total for the study. Inability to accurately determine information on employer size resulted in missing data for 158 cases. The missing data occurred randomly.*

Table IV statistics are not overly removed from the AIRC figures presented in Table II in that arbitration decisions in favour of the employee or the employer are close to being equally distributed (that is, 50.3% and 49.7% in this study compared to 46.4% and 53.6% AIRC statistics). Table III also closely reflects Chelliah and D'Netto (2006) findings that 50.6% of arbitration cases in Australia are in favour of employees. Another study by Head and Lucas (2004) found 60% of arbitrations favoured the employee in UK firms of less than 50 employees. Whereas these Australian statistics suggest 52% of the arbitrations were found in favour of the employee from firms of less than 50 staff.

It can also be calculated from Table IV that workers from SMEs of up to 100 employees account for 35.7% of all cases *lodged* with the AIRC (and 46.8% of all cases when the SME threshold is increased to 200 employees). Claims lodged refer to applications filed with the AIRC with regard to unfair dismissal by aggrieved employees and included in these figures are cases which are later determined to be out of the commission's jurisdictional powers. The first issue to be considered in the analysis is whether employees from SMEs lodge unfair dismissal claims more often than employees from larger firms, given the high proportion of Australians working in SMEs.

H_1: The number of unfair dismissal claims lodged with the AIRC vary (beyond random chance) between SMEs and larger organisations

Table V: Observations on Unfair Dismissal Claims Lodged at the AIRC by Aggrieved Employees

	≤ 100 employees	*> 100 employees*	**Total**
Number of Cases	81	145	226

$X^2 = 18.1239$, df=1, critical value=3.84, $p<.05$ (reject H_0)

The Chi-square one-dimensional, goodness-of-fit test indicates that there is a significant difference in the proportion of cases filed by SME employees and their larger organisational counterparts. The post-hoc analysis of the frequency in the two cells in Table V suggest that it is larger organisations that have a significantly higher frequency of unfair dismissal claims filed with the AIRC even though they account for less than 5% of Australian employers (see Table I).

However, even though a claim is lodged, there are many instances when it is not within the AIRC's jurisdiction to hear the case. Under Australia's Workplace Relations Act 1996, the following types of employees (grievants) are excluded from AIRC arbitration services in terms of seeking relief for an alleged unfair dismissal during the time this data was collected: fixed term or specified task employees; probationary employees; casuals engaged for less than 12 months; trainees; seasonal workers (Australian Industrial Relations Commission 2006a). This is not to say that these employees do not still attempt to access the AIRC, and when this occurs the AIRC process is to dismiss the grievant's case for lack of jurisdiction. Insufficient observations occurred to enable reliable testing of whether SMEs might be in a situation where they are different from larger organisations in terms of employees seeking refuge through the AIRC regardless of the 'legitimacy' of their claim. Count data revealed that only 17 employees from SMEs and 30 employees from organisations over 100 staff lodged claims that were found to be outside the AIRC's jurisdiction.

Moving to those cases which were within jurisdiction and pursued by the aggrieved employee to an arbitration decision; the data in Table IV indicates that 22.9% of all decisions made by the AIRC were in favour of the employees from organisations that employ up to 100 staff. On the other side of the arbitration table, 12.9% of the decisions which upheld the merits of the employer's case occurred in businesses with employee numbers of less than 100. Thus the third hypothesis addresses the issue of the whether arbitration decisions differ between SMEs and larger organisations. This test was run twice, with a variation in the size definition for SME. Table VI reflects businesses employing no more than 50 employees, and Table VII shows observations for when the size threshold is increased to 100 employees. The limited number of observations for classifications of smaller businesses sizes, eg, less than 20 employees, prevented reliable testing of such classifications.

H_2: Unfair dismissal arbitration decisions vary between SMEs and larger organisations

Table VI: Observations on Unfair Dismissal Arbitration Decisions where SME size is ≤ 50 employees

	≤ 50 employees	*> 50 employees*	**Total**
In favour of the employee	25	65	90 (50.3%)
In favour of the employer	21	68	89 (49.7%)
Total	46	133	179 (100.0%)

X^2 = .4099, df=1, critical value=3.84, p>0.05 (do not reject H_0)

Table VII: Observations on Unfair Dismissal Arbitration Decisions where SME size is ≤ 100 employees

	≤ 100 employees	*> 100 employees*	**Total**
In favour of the employee	41	49	90 (50.3%)
In favour of the employer	23	66	89 (49.7%)
Total	64	115	179 (100.0%)

X^2 = 7.5702, df=1, critical value = 3.84, p<0.05 (reject H_0), *p*-value=.0059

The first Chi-square test of independence (Table VI) reveals that the arbitration decisions for businesses employing 50 or less staff are no different from larger organisations (that is, the variance is explained by random chance). The second test (Table VII) reveals a different story. Arbitration decisions are likely to be different between businesses employing up to 100 people, compared to larger sized organisations (that is, the variance is beyond random chance). The p-value of .0059 suggests that there is only a .59% chance of observing sample proportions the same or more different than the actual difference which provides further confidence in the test. Post-hoc analysis of the cells in Table VII would indicate that larger organisations (employing over 100 staff) are more likely to get a decision in favour of the employer than businesses with less than 100 staff, and the least likely occurrence is that of a favourable decision to an SME employer of less than 100 employees.

Question Two:

Are different arbitration outcomes received when an HR expert is present?

Initially the descriptive statistics for this data are presented in Table VIII. As can be expected based on the formal versus the informal nature of HR in large and small businesses, very few SMEs of less than 100 staff had access to a human resource specialist whilst executing the dismissal of employees (just four out of 52 cases and in all four cases, the decision was awarded to the employee). Whereas very few large organisations are absent of an HR expert during the dismissal process (seven out of 111 cases).

Table VIII Descriptive Data on Unfair Dismissal Decisions and the Presence of an HR Expert, by Business Size

Number of Employees in the Business	*No HR Expertise*		*HR Expertise*		*Total Arbitration Decisions**
	In favour of the employee	**In favour of the employer**	**In favour of the employee**	**In favour of the employer**	
10 or less	3	6	1	0	10
11 to 25	2	10	0	0	12
26 to 50	17	5	2	0	24
51 to 100	3	2	1	0	6
≤ 100 staff subtotal	*25 (15.3%)*	*23 (14.1%)*	*4 (2.5%)*	*0 (0%)*	*52 (31.9%)*
101 to 200	2	2	8	8	20
201 to 500	1	1	5	3	10
501 to 1,000	0	0	4	9	13
1,001 to 10,000	0	1	13	24	38
Over 10,000	0	0	14	16	30
> 100 staff subtotal	*3 (1.8%)*	*4 (2.5%)*	*44 (27%)*	*60 (36.8%)*	*111 (68.1%)*
Total:	**28** *(17.1%)*	**27** *(16.6%)*	**48** *(29.5%)*	**60** *(36.8%)*	**163** *(100%)*

** 179 decisions were examined for this aspect of the study. Inability to accurately determine the availability of HR expertise resulted in missing data for 16 cases.*

The very low number of observations of small businesses with HR experts (four occasions) and larger businesses without HR experts (seven occasions) restricts the appropriate use of a chi-square test to determine whether SMEs have different arbitration results compared to larger firms depending on the involvement or not of a HR expert in the interaction. However the data did enable two hypotheses to be tested regarding arbitration decisions, the availability of HR expertise and business size. The initial hypothesis generally explores HR expertise and arbitration decisions regardless of employer size, and is stated as:

H_3: Unfair dismissal arbitration decisions vary between organisations with HR expertise and those without HR expertise.

Table IX: Observations on Unfair Dismissal Arbitration Decisions and Presence of HR Expertise

	HR Expert	*No HR Expert*	**Total**
In favour of the employee	28	48	76 (46.6%)
In favour of the employer	27	60	87 (53.4%)
Total	55	108	163 (100%)

$X^2 = .6120$, df=1, critical value=3.84, $p>0.05$ (do not reject H_0)

A post-hoc analysis of Table IX suggests that the most frequent arbitration outcome is found in favour of the employer where there is no HR specialist. However the rejection of the null hypothesis in the chi-square test suggests that this is attributable to nothing more than random chance. Therefore, no evidence was found to support the suggestion that the presence of a human resource specialist in the organisation increases the expectation of a different arbitration outcome compared to an organisation without such expertise.

In order to compare the arbitration performance of small businesses that do not have HR people with large organisations that do employ HR specialists, the following hypothesis is tested:

H_4: Unfair dismissal arbitration decisions vary between large organisations with HR experts and small businesses without an HR expert.

Table X: Observations on Unfair Dismissal Arbitration Decisions in Large business with HR Experts and Small businesses without HR Experts

	Large businesses (>100 employees) with *HR experts*	*Small businesses (≤100 employees)* without *HR experts*	**Total**
In favour of the employee	44	25	69 (45.4%)
In favour of the employer	60	23	83 (54.6%)
Total	104	48	152 (100%)

$X^2 = 1.2661$, df=1, critical value=3.84, $p>0.05$ (do not reject H_0)

The results of Table X indicate there is no significant difference in the arbitration decisions between SMEs without HR experts and large firms with HR experts. This suggests that the presence of a human resource expert is not associated with the arbitration decision. Thus neither large business nor small business have an advantage or disadvantage in terms of their HR expertise at the arbitration table. However, this finding may be moderated by the legislative requirement that commissioners need to consider the size of a business and the availability of human resource expertise in determining their decision (*Workplace Relations and other Legislation Amendment Act* 1996).

Conclusions

Aggrieved employees from businesses consisting of up to 100 staff appear to be less vigilant at lodging unfair dismissal claims, than those employed by larger organisations, despite the much higher proportion of SME operations in Australia. One explanation might be the higher incidence of union presence in larger organisations (Cullinane 2001; McCracken & Sanderson 2004; Parker 2000) resulting in employees being more aware of their appeal rights. Perhaps in concert with this is the close proximity of the working relationships within small business and the networks formed amongst workers, suppliers and customers (Kinnie et al. 1999). This proximity might breed reluctance from dismissed employees to pursue an arbitration claim for fear of severing social support or employment prospects from various stakeholders through which they interacted during the term of their employment.

SMEs employing less than 50 staff who find themselves before an arbitration hearing can be comforted by the evidence suggesting that informal management of the process, as generally adopted by small firms, serves just as well as formal management process used by larger organisations, in the eyes of arbitrators. This is inline with Earnshaw, Marchington and Goodman's (2000, p. 73) suggestion that informal approaches by SME owners in dealing with discipline should not result in the assumption that employees will be 'worse off'. However, unfortunately for SMEs employing between 50 and 100 staff, the research suggests they are not fairing as well at the arbitration table as larger organisations. For this size business, the use of informal processes may be leaving them vulnerable to making mistakes in administering their dismissals. Mistakes which are being noticed by the arbitrators (Head & Lucas 2004). It appears that this is a crucial size where, perhaps the empathy of the arbitrator for the limited HR expertise and resources that exist in smaller businesses, gives way to expectations that formality should be adopted, similar to those in larger organisations. Not indifferent to this study is Harris' (2002) suggestion that 100 employees was that the 'critical threshold' for

appointing a HR specialist in a movement towards formalising HR management. In terms of unfair dismissal, it may be that businesses of over 50 employees could benefit from implementing formal discipline and grievance processes, providing arbitrators with indications that the business has approached the dismissal with neutrality and procedural fairness in mind.

Small businesses generally operate without guidance from HR specialists. This study revealed that the availability of a human resource specialist appears to be neither associated with arbitration outcomes in general, nor when comparing outcomes between small business without HR experts and large business that do have them. This supports the finding that businesses below 50 employees, generally without HR specialists onboard, are performing as well at the arbitration table as bigger businesses. This finding also indicates that a legislative requirement for arbitrators to include in their deliberations the availability of HR expertise and business size is occurring in practice. It is not considered though that this finding devalues the role of HR experts as one would anticipate that arbitrators may not be as tolerant of miscarriages of justice by larger organisations that had not appointed human resource specialists. Such a hypothesis proves difficult to test however, with few large businesses void of a HR specialist.

It is noted that the suggestion of a lack of association between HR expertise and arbitration outcome is paradoxical to the earlier finding in this study that businesses between 50 and 100 employees without HR support are unsuccessfully defending their dismissal activity in comparison to the successful defences given by larger businesses privy to HR support. If one considers the suggestion that HR expertise is not associated with the decision, then this paradox suggests other variables, not associated with HR expertise, are present in arbitration hearings for businesses between 50 and 100 employees that are resulting in significantly lower successful defences. For instance, it may be that businesses between 50 and 100 staff are likely to have supervisors or line managers involved in the dismissal process which, combined with informal HR practices, could increase the scope for a problematic dismissal. A number of research papers have been conducted on antecedents in arbitration that have considered variables such as gender effects (Bemmels 1990, 1991a; Knight & Latreille 2001), arbitrator rationale (Bemmels 1991b) and management, cultural and environmental aspects (Dalton & Todor 1985; Klass, Brown & Heneman III 1998; Klass & Dell'omo 1997; Rollinson et al. 1996). The net effect of this research is the recognition that the development of an explanatory model of employee grievance and arbitration processes is proving a challenge, with a 'piece meal' approach being taken to investigate various parts of the grievance process.

Finally, within the Australian legislative context, the finding that businesses employing between 50 and 100 employees are vulnerable at the arbitration table, bears additional significance. With the aim of improving job growth, it registered on the government's radar as a business size that could benefit from being freed of unfair dismissal regulations. By making the exemption as high as a 100 employee threshold, the government incorporated those businesses which are more likely, according to this study, to experience a tougher time at the arbitration table in comparison to larger business counterparts. Thus, it provides some statistical support that the exemption may encourage job growth in SMEs *if* the government's rhetoric is correct that unfair dismissal regulations hinder job growth in small businesses. The obvious downside to this regulation is the existence of a large percentage of employees who have been void of a process to appeal situations where they consider dismissal injustice has occurred, the impacts of which are worthy of further investigation.

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