

GENERAL PROTECTIONS AND DISCRIMINATION CLAIMS

In broad terms, the General Protections prevent employers from taking 'adverse action' against someone (including refusing to employ or dismissing someone) because of that person's workplace rights or industrial activities, or on the basis of certain protected attributes (including race, sex, age and disability). They also prohibit the dismissal of an employee in order to engage the employee as an independent contractor to perform the same work.

The [Fair Work Act 2009 \(Cth\)](#) also makes significant changes to the unfair dismissal regime, restoring access for the overwhelming majority of Australian employees. A number of other pieces of legislation also cover discrimination areas and provide access for claims, such as Equal Opportunity and Work Cover legislation.

What is protected by the General Protections?

Workplace Rights See Fair Work Act s. 340-345

The first set of General Protections of the FW Act relates to certain workplace rights. 'Workplace rights' has a broad definition and includes:

- > being able to initiate or participate in proceedings under a workplace law or instrument; having an entitlement, role or responsibility under a workplace law (including the WR Act and State industrial legislation) or a workplace instrument; and/or
- > being able to make a complaint or inquiry in relation to the employee's employment.

The workplace rights protections prohibit taking 'adverse action' against a person because they have a workplace right, or because they do (or do not) exercise their workplace right.

Industrial Activities See Fair Work Act s. 346

The FW Act protects a person from adverse action in relation to industrial activities. These General Protections preserve the right of a person (whether they be an employer, employee or independent contractor) to be a member of, or not be a member of, an industrial association like a trade union or employer association. These General Protections also protect an employer, employee or independent contractor's right to participate, or not participate, in lawful industrial activity.

Discrimination See Fair Work Act s. 351

The FW Act makes it unlawful for an employer to take adverse action against a person who is an employee, former employee or prospective employee because of because of their:

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| > race | > family or carer's responsibilities |
| > colour | > pregnancy |
| > sex | > religion |
| > sexual preference | > political opinion |
| > age | > national extraction |
| > physical or mental disability | > social origin |
| > marital status | |

Other Protections

Part 3-1, Division 4 of the FW Act also sets out a number of other protections including:

- > protection from dismissal where an employee is temporarily absent from work due to injury or illness
- > protection from an industrial association demanding a bargaining fee

- > protection from discrimination related to the employee being covered by, or not covered by, a particular type of industrial instrument
- > protection from coercion in relation to employment.

What 'Unlawful Actions' do the General Protections Protect Against?

The General Protections protect against a range of actions in relation to employment. These include:

A Person Taking 'Adverse Action' Against Another

Adverse action is action that is unlawful if it is taken for a particular reason(s). The FW Act defines a number of actions as adverse action including doing, threatening, or organising any of the following:

- > an employer dismissing an employee, injuring them in their employment, altering their position to their detriment, or discriminating between them and other employees
- > an employer refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers
- > a principal terminating a contract with an independent contractor, injuring them or altering their position to their detriment, refusing to use their services or to supply goods and services to them, or discriminating against them in the terms and conditions the principal offers to engage them on
- > an employee or independent contractor taking industrial action against their employer or principal
- > an industrial association, or an officer or member of an industrial association, organising or taking industrial action against a person, or taking action that is detrimental to an employee or independent contractor
- > an industrial association imposing a penalty of any kind on a member.

The FW Act prohibits a person from taking adverse action against another person because that person:

- > has a workplace right
- > has or has not used a workplace right
- > proposes to, or proposes not to, use a workplace right
- > does or does not belong to a trade union
- > engages (or does not engage) in industrial activity.

The following actions do not constitute adverse action:

- > action that is authorised by or under the FW Act or any other Commonwealth law
- > an employer standing down an employee who is engaged in **protected** industrial action
- > an employer standing down an employee who is employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

Coercion

Under the FW Act it is unlawful for a person to organise or take action (or threaten to organise or take action) with the intent to coerce another person or third party to:

- > use or not use a workplace right, or use it in a particular way
- > take part in industrial activity
- > employ or not employ a particular person

- > engage or not engage a particular independent contractor
- > allocate or not allocate certain duties or responsibilities to a particular employee or independent contractor
- > give a particular employee or independent contractor certain duties and responsibilities.

Misrepresentations

A person must not knowingly or recklessly make a false or misleading representation about:

- > the workplace rights of another person
- > the use, or the effect of the use, of a workplace right by another person
- > another person's obligation to take part in industrial activity
- > another person's obligation to tell anyone whether they, or a third person is or is not an officer or member of an industrial association or is or is not taking part in industrial activity.

Undue Influence or Pressure

Undue influence or pressure is when an employer exerts significant or inappropriate pressure on an employee to modify or alter their conditions of employment. It is unlawful for an employer to force or try to force an employee to:

- > make or not make an agreement or arrangement under the National Employment Standards
- > make or not make an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement
- > agree to, or terminate, an individual flexibility arrangement under an enterprise agreement or modern award
- > accept a guarantee of annual earnings
- > agree or not agree to a deduction from amounts payable to the employee in relation to the performance of work.

Employers should be aware that undue influence, pressure or coercive behaviour can be unlawful even if it does not succeed in making the person take or not take the action.

Example: Rachel is employed in a night fill position. The ladder she uses at work to stock the shelves is missing a rung which makes it dangerous for her to climb. Rachel raises this issue with her employer

Shortly after making the complaint Rachel is informed there is no more work for her, and that unfortunately her position has been selected for redundancy. Rachel does not believe that is the actual reason. She thinks her employment was terminated because her employer considers her a "trouble-maker" who makes complaints.

Under the FW Act Rachel has a 'workplace right' because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder. She has suffered an 'adverse action' in that her employment has been terminated. However, in order to prove her claim, the decision-maker must be satisfied that causation is present, which means she suffered the adverse action **because of** her exercising her workplace right.

If the employer is able to prove the redundancy had nothing to do with the complaint made by the employee (for example, the redundancy was due to economic considerations) the employer would be able to successfully defend the action. Examples of documents which might assist in this defence would be documents showing how unprofitable or unviable the night-stacking operation was, showing a number of other night fill employees were also made redundant and/or evidence product stacking was now to be performed during the day which was cheaper (no night time penalties).

The General Protections Claim Process

There are two different types of general protections disputes which can arise; dismissal related, and non-dismissal related.

General Protections dismissal related claims must be lodged with the Fair Work Commission (FWC) within 21 days of termination, although extensions of time are available. Where the alleged contravention involves dismissal, the FWC will hold a conciliation conference in order to try to negotiate a resolution. The conference is informal and private, and will be guided by a Fair Work Commissioner. This conference will usually be held over the phone. If the Commissioner is satisfied all reasonable attempts to resolve the matter have been, or are likely to be, unsuccessful the FWC must advise the parties accordingly.

If the matter remains unresolved after the conference, the party who applied to the FWC to deal with the dispute may make a General Protections court application within 21 days. The matter will then proceed to either the Federal Court or the Federal Magistrates Court.

Where the alleged contravention does not involve dismissal the claimant can lodge a General Protections claim within 6 years of the adverse action. The FWC will convene an optional private conference to deal with the dispute. If one or both parties do not agree to participate in the conference, the applicant can make an application to the Federal Circuit Court. The Federal Court has the power to enforce general protections laws.

Interaction between General Protections Claims and State Discrimination Claims

Australia has a range of State and Federal anti-discrimination statutes covering a range of grounds such as sex, colour, race, religion, trade union membership and disability; including the *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth) and the *Equal Opportunity Act 2010* (Vic). The provisions prohibit both direct and indirect discrimination in a range of public activities, including employment, education, accommodation, union membership and the provision of goods and services.

It is too early to know how much employees will use the General Protections to make claims under the FW Act instead of the state anti-discrimination tribunals; however an employee can now use a government department to make a claim on their behalf. This might happen when the employee 'doesn't want to make a fuss' or otherwise advance a claim against their employer.

As many of the grounds under state legislation are also covered under the FW Act, claims were previously often made under state legislation because it was usually a quicker, cheaper and easier process. It is likely that the General Protections claims will change this, with an applicant employee now having a government body to run their action for free, who can bring the claim on their behalf and not retain any of the awarded judgement (if successful) in legal fees.

Therefore, we believe it is inevitable the FW Act will become the dominant vehicle in which employees make rights-based claims against employers.

Frequently Asked Questions

Who holds the burden of proof in a general protections claim?

The general protections jurisdiction is a 'reverse onus' jurisdiction. This means instead of the applicant proving a breach has or is occurring, the respondent must prove that a breach has not, or is not, occurring. This 'disproving' can often be very difficult for employer respondents.

Is there a compensation limit for a General Protections claim?

No. Unlike Unfair Dismissal claims, where there is a compensation limit, General Protections Claims compensation amount is unlimited.

What are the Remedies for Breaching a Workplace Right?

The remedies for a breach of the General Protections are set out in Part 4-1 of the FW Act. The court may make orders:

- > granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
- > awarding compensation for loss a person has suffered because of the contravention; or
- > reinstating a person to their position.

The Court may also issue penalties of up to 60 penalty units to individuals and 300 penalty units to corporations. The value of one penalty unit under the *Crimes Act 1914* (Cth) has increased to \$222 pursuant to the *Notice of Indexation of the Penalty Unit Amount* dated 14 May 2020.

Is there a time limit for when an employee is eligible to make a General Protections Claim application?

An application to deal with general protections dismissal dispute, i.e. when an employee is claiming they have had their employment terminated due to a prohibited reason, must be lodged within 21 calendar days from when the dismissal took effect. As with Unfair Dismissal, the Commission may grant an extension of time if exceptional circumstances as to why the application was not lodged within the time frame can be proved.

An application to deal with any other general protections dispute which does not involve a dismissal can be lodged up to six years from the day the alleged contravention occurred.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service.

The General Protection provisions within the FW Act significantly increase the recourse available to employees who believe their 'workplace rights' have been infringed. Managing the performance, conduct, and termination of your employees effectively in compliance with these new statutory and regulatory requirements is more important now than it has been in the past.

Under the FW Act employers will have to contend with a range of new employee entitlements and the expanded investigative and enforcement capacities of the FWO. Disputes around termination may also arise with reference to workplace rights, which will require careful management and investigation.

Representation at the Fair Work Commission Conferences and Hearings

The Victorian Chamber of Commerce and Industry's Workplace Relations Consultants are highly experienced and can provide employers with easy-to-follow guidance and advice, as well as skilful representation at both Conferences and Hearings.

Coaching your Managers to Manage Outcomes at the Fair Work Commission

Our Workplace Relations Consultants can coach your staff prior to attending a FWC conference or hearing. Training packages can be tailored to your specific requirements.

Training your Front Line Managers

We can re-train your supervisors and front-line managers to ensure your business is compliant with the new requirements of procedural fairness under the FW Act. Training can be tailored to your specific requirements, including managing any provisions relating to consultation and dispute resolution that apply to your workplace.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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