

Unfair Dismissal - v - General Protections

Upon termination, an employee may lodge an application to the Fair Work Commission (**FWC**) for either Unfair Dismissal or General Protections involving dismissal. It is vital to understand the difference between these two causes of action and the eligibility criteria behind each claim. Although both involve dismissal, the requirements differ significantly including the jurisdiction and onus of proof.



Jurisdiction

Unfair Dismissal: In order to lodge an unfair dismissal claim, the employee must either be permanent or a long-term casual with regular and systematic employment. Employees need to have completed a minimum of 6 months continuous service (12 month for [small business employers](#)) and earn less than the high-income threshold or be covered under an enterprise agreement or modern award. The high-income threshold is currently \$158,500 and is subject to change upon the commencement of each financial year.

General Protections: All employees, regardless of their length of service, coverage under an enterprise agreement or award, or remuneration rate, fall within the General Protections provisions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). This extends to potential employees (applicants), employees of recruitment or labour hire companies, and independent contractors.

Onus

Unfair dismissal: The onus of proof rests with the employee to establish that dismissal was harsh, unjust, or unreasonable. Of course, if the dismissal relates to alleged misconduct, the FWC must find on the balance of probabilities that the conduct occurred, the evidentiary onus of which lies with the employer. The employee must otherwise demonstrate the employer's breach of the Fair Work Act in dismissing the employee.

General Protections: A reverse onus of proof applies to General Protections proceedings, in which the employer must establish that the dismissal did not occur as a result of the reason alleged by the employee. The court will presume that the dismissal occurred in direct response to the employee's exercise or proposal to exercise a workplace right, unless otherwise disproved. The reverse onus of proof will not apply to applications for an interim injunction.

Legal elements

Unfair Dismissal: The basis of an unfair dismissal claim is that the termination was harsh, unjust, or unreasonable. In determining whether a dismissal was harsh, unjust, or unreasonable, the FWC will take into account a variety of factors contained in section 387 of the Fair Work Act such as whether there was a valid reason for the dismissal related to the employee's capacity or conduct, whether the employee was provided with an adequate opportunity to respond, and other factors related to procedural fairness and natural justice.

General Protections: The basis of a General Protections claim involving dismissal is whether an employee was terminated as a result of exercising, or proposing to exercise, a workplace right or simply because they had a workplace right. Workplace right is broadly defined under the Fair Work Act and includes an employee's entitlement to the benefit of a workplace law or workplace instrument, or the ability to make a complaint or inquiry in relation to their employment.

If you are seeking to make an unfair dismissal or general protections claim but unsure as to whether you may be eligible, Susan Moriarty & Associates are more than happy to assist and provide you with representation throughout your claim. Contact us today to speak with one of our employment lawyers about your claim.



Advantages

Unfair Dismissal: The advantage of lodging an Unfair Dismissal Application is that the test of establishing unfairness is an objective one. In other words, it matters little what an employer thought about the fairness of the dismissal, it is whether or not from a factual standpoint the dismissal was objectively unfair. The disadvantage of lodging an Unfair Dismissal Application is that if you are not reinstated or re-employed and damages alone are awarded, such damages cannot exceed 6 months' which is the statutory maximum. As well, an employee cannot seek damages for hurt and humiliation, or distress, or psychiatric injury occasioned by the dismissal. There has only been one case to date in which the Queensland Industrial Relations Commission awarded damages to an employee who had been assaulted by her employer before being dismissed.

General Protections: The advantage of lodging a GPA is that an employee can seek damages for actual economic loss as well as reinstatement, as well as damages for loss of opportunity (for promotion), for mental distress and interest thereon, as well the payment of financial penalties imposed by the court. The disadvantage is that because of the test by the High Court in Barclay, the test of 'adverse action' is subjective with the consequence that if an employer states that they did not take into account the existence or exercise or proposed exercise of workplace rights by the employee in taking adverse action against them – and they are credible – the employee's claim will be dismissed.

Our Advice,

As an employee who has been dismissed, you do have a number of rights to pursue reinstatement or compensation for proven loss. Which option is in your best interests will turn on the particular facts of the dismissal. When we have established the facts in taking instructions from you, we will be in a position to guide you to make the best decision designed to give you the very best outcome.

FAIR WORK ACT 2009 - SECT 23

Meaning of small business employer

- (1) A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.
- (2) For the purpose of calculating the number of employees employed by the employer at a particular time:
 - (a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and
 - (b) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer.
- (3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.
- (4) To avoid doubt, in determining whether a national system employer is a small business employer at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):
 - (a) the employee who is being dismissed or whose employment is being terminated; and
 - (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.