

# General Protections Claims

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Workplace Relations, Employment & Safety

The *Fair Work Act 2009 (Cth)* (FW Act) prescribes that a person must not take adverse action against another because that person has or proposes to exercise a workplace right or has not exercised a workplace right. The protection extends to the exercise of a workplace right by third parties on behalf of other persons<sup>1</sup>.

In essence, the provisions protect employees, employers and independent contractors against unfair, unlawful and discriminatory conduct in the workplace.

## What is a workplace right?

A person has a workplace right if he or she:

- *has an entitlement, role or responsibility under a workplace law, Award, enterprise agreement or order of the Fair Work Commission or a Court;*
- *is able to make a complaint or inquiry in relation to their employment;*
- *is able to initiate a proceeding under a workplace law or Award or enterprise agreement<sup>2</sup>.*

An example of a person exercising a workplace right is making an enquiry or complaint about wages, work hours or discrimination.

A person takes adverse action against another if they dismiss, refuse to employ, discriminate or injure that person in their employment for example by refusing to pay overtime, demoting or reducing their hours of work<sup>3</sup>. There are further examples of adverse action in s342 of the FW Act.

## What is a general protections claim?

A person who has exercised, or intends to exercise, a workplace right and who has been the recipient of adverse action is entitled to bring a general protections claim.

The claim can be brought by any person including a contractor or a prospective employee however most general protections claims involve employers and employees.

## Case Study 1

Chloe has not been receiving pay slips from her employer and raises this issue with the Fair Work Ombudsman. Soon after, her hours are reduced. Chloe believes her hours have been reduced because of her complaint to the Fair Work Ombudsman.

One of the options available to Zoe is to apply to a court for an order seeking her hours be restored. The employer could also be fined and ordered to pay compensation to Zoe.



## Case Study 2

John is a health and safety representative in the workplace. He raises an issue about a health and safety concern in the workplace. This results in SafeWork SA attending the workplace. Several months later, John is made redundant.

John might choose to bring a claim before a court alleging that one of the reasons he was selected for redundancy was because of his involvement as a health and safety representative and because of a complaint he made to SafeWork SA. A court will assume this was one of the reasons for the action unless the employer can prove otherwise. If John's claim is successful, he could be reinstated or paid compensation.

## Other protections

The FW Act also provides protection to employees from:

*discrimination*<sup>4</sup>;

*dismissal due to temporary absence (injury or illness)*<sup>5</sup>;

*coercion in respect of workplace rights*<sup>6</sup>;

*undue influence or pressure in certain situations*<sup>7</sup>;

*misrepresentations about an employee's workplace rights*<sup>8</sup>;

*sham arrangements*<sup>9</sup>.

## Proof and Damages

All of the claims in Part 3-1 of the FW Act are general protections claims and as such the burden of proof rests with the person alleged to have taken the adverse action. In other words the action will be presumed to have occurred unless the employer/person proves otherwise<sup>10</sup>. The reason for the action need only be **one of the reasons** for the action for the claim to succeed. In other words, if there are multiple reasons for an action taken by an employer and just one of those reasons is unlawful then the employer will have contravened the adverse action provisions.

Accordingly employers must give consideration to whether an employee has exercised a workplace right and this is one of the reasons for taking an adverse action against, or terminating, an employee. Unlike a claim for unfair dismissal remedy, a person is entitled to bring the general protections claim regardless of whether they are or were an employee and do not need to have served a minimum employment period. The only requirement is that the claim is brought within 21 days in circumstances where a dismissal occurs<sup>11</sup>.

The provisions are particularly powerful because the scope for damages to be awarded is far broader than that which exists for unfair dismissal claims. Damages can be awarded for hurt feelings and distress. The amount of damages which can be awarded is uncapped.

To ensure that you do not breach the general protections provisions referred to in this Fact Sheet, you should seek legal advice prior to taking any action which could be construed as *adverse* action including a decision to terminate the employee, reduce hours of work, or refuse employment.

*For further information regarding termination please see our Fact Sheet entitled Unfair Dismissal Remedy or contact Jodie Bradbrook on (08) 8227 2829.*

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### Endnotes

1. s340(1) FW Act
2. s341
3. s342
4. s351
5. s352
6. s348
7. s344
8. s345
9. s357
10. s361
11. s366(1)

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*This Fact Sheet is provided for information purposes and does not constitute legal advice. If you require legal advice regarding your particular circumstances please contact Jodie Bradbrook.*