



Bailiwick Legal.

Brian Liao

Bailiwick Legal – Legal Practitioner

WA Shearing Industry Association

Unfair Dimissal v General Protections Claims
The differences and how to avoid such claims.

Disclaimer

The information presented is a summary and overview of the matters discussed.

This presentation does not constitute legal advice and you should seek legal or other professional advice before acting or relying on any of the content.

Bailiwick Legal.

Overview

What we will cover today:

1. National Workplace Relations Laws
2. What is an Unfair Dismissal
3. What is a General Protections Claim
4. The difference between the two
5. How to protect yourself from either



National Workplace Relations Laws

- Australia's national workplace relations system created by the *Fair Work Act 2009* (**the Act**)
- Difference between a “national system employer/employee” and an “employer/employee”
- “National system employer” is a constitutional corporation, for e.g. a proprietary limited business (Pty Ltd)

Unfair Dismissal

- Have to be dismissed; not available for genuine redundancy
- Protects an employee against a termination that was harsh, unjust OR unreasonable
- Section 387 of the Act provides criteria for “harsh, unjust or unreasonable”
 - Valid reason
 - Notification of that reason
 - Given opportunity to respond
 - Refusal to allow support person
 - Warned of unsatisfactory performance before dismissal
 - Size of employing enterprise/ absence of dedicated human resource management and its impact on procedures affecting dismissal
 - ANY other relevant matters

Unfair Dismissal

- Onus on the applicant to establish dismissal was harsh, unjust or unreasonable
- Employees have to be National System Employees
 - Completed at least 6 months of continuous service (12 months for a small business employer)
 - Earn less than the high-income threshold of \$148, 700
 - Not a casual worker, unless engaged on a regular and systemic basis
- Damages capped at \$74,340
- 21 days for employee to file application
- Employers have 7 days to file a response on receiving the application
- Conciliation at the Commission, followed by arbitration by member of the Commission

Unfair Dismissal

State Legislation - Industrial Relations Act 1979

- Section 23A - Commissioner may make an order if it determines the dismissal was “harsh, oppressive or unfair.”
- Employees:
 - Have 28 days for application to be filed with the WA Industrial Relations Commission
 - Need to earn less than \$166, 680.00
- Employers have 21 days to file a response after receiving application
- Conciliation will be attempted until exhausted, then arbitration at the Commission

General Protections

- Only applicable in the National System
- Protects against adverse action taken by either an employer or employee because of a workplace right or other protected reasons.
- Examples of workplace rights include, but are not limited to:
 - workplace benefits under a contract of employment
 - taking part in industrial action
 - making a complaint or inquiry in relation to
 - the employment
 - safety
- Other protections reasons include discrimination or temporary absences due to illness or injury.

General Protections

- Adverse actions include, but are not limited to:
 - Dismissal of an employee
 - Demotion or altering of an employee's position
 - Discrimination between employees and/or prospective employees
 - Refusing to employ a prospective employee
 - Termination of a contract between a principal and contractor
 - Refusing , or discriminating during, the supply goods or services to a contractor
 - Refusing, or discriminating during, the engagement of a contractor
- In alleging an adverse action was taken against them, the employee must identify the workplace right and demonstrate they exercised or proposed to exercise that right.
- Onus falls on the employer to prove that the workplace right was not one of the reasons *in the mind of the decision maker* for the adverse action.

General Protections

- Employee has 21 days to file application with the Commission
- If conciliation fails at the Commission, employee has 14 days to file application at the Federal Circuit Court or Federal Court for hearing before a judge.
- No upper cap as to damages claimable, including damages for non-economic loss, such as hurt, humiliation and distress.
- Pecuniary penalties also apply under the Act

What Are The Differences?

Feature	Unfair Dimissal	General Protections
Who is protected	<ul style="list-style-type: none">- For FWA, National System Employees- Employed at least 6 months (12 for SBE)- For IRA, any employee- FWA/IRA: earn less than an upper salary cap.	<ul style="list-style-type: none">- National System Employees and Employers- Irrespective of length of service- Irrespective of remuneration
Legal issues in dispute	Was the termination of the employee's employment harsh, unjust or unreasonable?	Was the adverse action taken for a protected reason?
Onus of proof	Employee has to prove the termination was harsh, unjust or unreasonable.	Employee has to establish adverse action was due to exercise of a protected reason. Employer has to prove dismissal did not take place for a protected reason.

What Are The Differences?

Feature	Unfair Dimissal	General Protections
Process	<ul style="list-style-type: none">- Conciliation at the Commission- Arbitration by a member of the Commission	<ul style="list-style-type: none">- Conciliation at the Commission- Application heard at Federal Circuit Court or Federal Court- Parties may agree for application to be heard by the Commission instead of the Courts
Potential Orders	<ul style="list-style-type: none">- Reinstatement and compensation for lost wages- Compensation capped at 6 months pay	<ul style="list-style-type: none">- Reinstatement and compensation for lost wages- Compensation uncapped- Compensation for hurt, humiliation and distress- Penalties under the Act

How to Protect Yourself

Unfair Dismissal

- Make any allegations of misconduct or under-performance clear to the employee
- Allow the employee to respond to any allegations
- Performance manage the employee so there is a chance to improve
- Notify the employee that a failure to improve will result in dismissal
- Allow the employee a support person in any discussions related to dismissal
- Make sure termination is proportionate and not harsh
- Have appropriate policies in place and follow them
- Record all interactions with employees as well as records of performance management

How to Protect Yourself

General Protections

- Have a valid reason for termination of the employment and ensure the employer is able to provide an explanation
- Keep any documentary proof regarding reason why the employee was terminated
- Ensure the person taking the adverse action is not involved in the process involving the workplace right or complaint
- Comply with any business policies, procedures or practices when taking an adverse action (be consistent)

Questions?



Brian Liao
Bailiwick Legal - Practitioner
brian@bailiwicklegal.com.au
+618 9321 5451

BailiwickLegal.