

UNFAIR DISMISSAL, GENERAL PROTECTIONS AND UNLAWFUL TERMINATION

There are a number of claims an employee can bring following their dismissal

Those actions include unfair dismissal, general protections and unlawful termination. There are also claims an employee can bring which are indirectly associated with dismissal, including underpayment, breach of contract, and discrimination.

In some instances, an employee can bring a claim during their employment and/or prior to their dismissal. This article will focus on three common employee claims, which are unfair dismissal, general protections and unlawful termination.

Employer Assist actively encourages AAAA members to understand their rights and obligations when it comes to dismissing an employee. This article will outline and clarify the main differences between the various claims an employee could lodge under the FWA.

What is unfair dismissal?

Unfair Dismissal can arise where an employee's employment is dismissed in a way which is 'harsh, unjust or unreasonable.'

The FWA outlines the relevant considerations that the Commission considers when determining whether dismissal was 'harsh, unjust or unreasonable', including:

- Whether there was a valid reason for the dismissal related to the employee's capacity or conduct;
- Whether the employee was notified of that reason;
- Whether the employee was given an opportunity to respond;
- Any unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to the dismissal;



- Whether the dismissal related to unsatisfactory performance by the employee;
- Whether the employee has been warned about that unsatisfactory performance before the dismissal;
- The degree to which the size of the employer's business would be likely to impact on the procedures following in effecting the dismissal;
- The degree to which the absence of dedicated HR personnel would be likely to impact on the procedures followed in effecting the dismissal; and
- Any other matters that the Commission considers relevant.

What are general protections?

An employee may bring a claim for general protections where an employer takes adverse action against the employee because they have exercised or seek to exercise a 'workplace right.' A common misconception is that adverse action means dismissal. However, it may also include discrimination or the alteration of an employee's position.

It is important to note that adverse action can be taken even where there is no dismissal. In addition, a person has a 'workplace' right where:

- they are entitled to the benefit of, or have a role or responsibility under, a workplace law, workplace instrument, or order made by an industrial body;
- they are able to initiate, or participate in, a process or proceedings under a workplace law or workplace action; or
- they are able to make a complaint or inquiry (to a relevant body).

For example, an employee who has their employment dismissed because they exercised a workplace right (for example, taking personal leave or annual leave) would be able to make a claim for general protections. If an employee is entitled to commence both an unfair dismissal and/or general protections claim, they will not be able to commence both and can only choose one.

What is unlawful termination?

Unlawful termination arises where an employer dismisses an employee's employment unlawfully.

This can arise where the employee is dismissed following a temporary absence from work because of illness or injury, where they have a trade union



membership, or where they are discriminated on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

It is important to consider that there is an overlap between general protections and unlawful termination. Further to the example above, an employee who has their employment dismissed following a temporary absence where they used personal or annual leave would be entitled to consider both a general protections and/or unlawful termination claim.

However, under the FWA, general protections are only available to employees who work for National System Employers (NSEs), whereas unlawful termination is available to employees who work for any employer. Also, if an employee is entitled to bring a claim for general protections, they will not be allowed to bring a claim for unlawful termination.

Most (if not all) AAAA members are NSEs and therefore where an employee is entitled to bring a general protections and unlawful termination claim, they will commence the general protections claim.

Need Assistance?

Employer Assist provides advice on all issues relating to unfair dismissal, general protections and unlawful termination, and can assist you with navigating your rights and obligations as an employer.

Please contact Employer Assist on 1300 735 306 or aaaa@employerassist.com.au if you require any assistance.