**General Protections Webinar**

**22 November 2016 - NOTES TO DISTRIBUTE**

General Protections provide a range of overarching protections to people in the workplace, from the pre-employment process, throughout employment and at the point of dismissal. They coexist with other protections provided by both the Fair Work Act and other employment law legislation.

The General Protections provisions offer employees a range of benefits including:

1. A less complicated option for bringing discrimination actions and an alternative to bringing victimisation proceedings;
2. Better remedies than unfair dismissal actions;
3. A reverse onus of proof for some tricky elements;
4. A more friendly costs rule than a human right actions;

Unlike unfair dismissal, you do not have to have been employed for any minimum qualifying period to be covered by the general protections provisions; they cover all of employment.

If you have a client considering unfair dismissal, bullying or any sort of discrimination action in relation to their workplace, you should always turn your mind to the general protections provisions and whether they might offer an alternative option.

Additionally, if you have a client who is exercising any other rights at work I think it’s important that they understand how their right is protected and what their options are if some sort of adverse consequence befalls them for exercising that right.

*So, what are the general protections*?

You will find the general protections provision in Part 3-1 of the Fair Work Act 2009. Section 336[[1]](#footnote-1) sets out the objects of the Part which include:

* To protect workplace rights
* To protect freedom of association for both employees and employers
* To provide protection from workplace discrimination
* To offer relief for people adversely affected by contraventions of the Part

In addition to the protections laid out in the Objects, there are also protections against sham contracting, certain misrepresentations and a specific protection against dismissing for temporary absence for illness or injury.

**A protection against adverse action for exercising a workplace right**

Section 340[[2]](#footnote-2) protects a person from adverse action being taken against them because they have a workplace right, have exercised a workplace right, or might exercise workplace right. There are three critical elements to a section 340 action:

1. ‘Adverse action’
2. Is taken ‘because of’
3. A prohibited reason (relating to a workplace right)

*Adverse action*

Adverse action is laid out in a table in section 342. It is important to note that section 340 uses the words ‘person’ not employee because it applies to other players in the workplace too, not just employees. The adverse action table in section 342 tells us what sorts of adverse action are prohibited depending on who you are in the workplace. I’m only going to deal with item 1[[3]](#footnote-3) on the table which is the circumstances in which employees are protected. An employer takes adverse action against an employee if they:

1. Dismiss the employee
2. Injures the employee in their employment
3. Alters the employee’s position to their prejudice
4. Discrimination between the employee and other employees of the employer

Adverse action is not always unlawful. It will only be unlawful if it occurs because of a prohibited reason.

*Because of*

‘Because of’ asks us to look for reason for the adverse action. Very often a protected right, such as making a complaint, is intertwined with an employee engaging in other conduct for which that employee is otherwise being disciplined. Section 360[[4]](#footnote-4) says that where there are multiple reasons for adverse action, it will be covered if the reasons include the prohibited reason.

We have had High Court guidance on this point. The decision in *Board of* *Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32* says that the prohibited reason must be a substantive and operative reason for the adverse action. In that case the High Court found for an employer that had taken adverse action against someone for his conduct during his union activity (which is protected activity).  It was found that the protection for union activity did not extend to all conduct during the exercise of that activity.  In this case, offensive comments about the employer were found to be sufficient grounds to take action against the employee even though they were made in union correspondence.

While we’re taking about ‘because of’ it’s useful to note that there is a partial reversed onus of proof. Your employee client does not actually need to prove the ‘because of’ component because the employer has the obligation of proving the opposite; that the real reason for the adverse action was not a prohibited reason.

*A prohibited reason*

Section 341[[5]](#footnote-5) defines workplace right. A person has a protected workplace right if they:

* are entitled to the benefit of a workplace law or instrument;
* are able to initiate or participate in a process or proceedings under a workplace law or instrument; or
* make a complaint or inquiry in relation to their employment.

Workplace rights are found in a variety of workplace laws and instruments such as anti-discrimination legislation, workers compensation legislation, the Fair Work Act itself and various other locations. There is a specific right to make a complaint or enquiry in relation to employment both within the workplace and to an appropriate body. This is one area in which the general protections overlap with other legislation.

The sorts of workplace rights that can be difficult to exercise and where we often get enquiries about general protections breaches include:

* Making a work cover claim
* Complaining about bullying, sexual harassment or other mistreatment by co-workers (particularly if the co-worker is a supervisor)
* Enquiring about wages, particularly if there has been an underpayment
* Taking maternity leave and trying to exercise the return to work guarantee
* Asking for flexible or part time hours because of caring responsibilities, disability or age
* Asking for adjustments to the workplace because of a disability.

*Discrimination*

The main protection against discrimination is found in section 351[[6]](#footnote-6). Most of us in the CLC sector have a bit of handle on discrimination under the Anti-Discrimination Act and the various pieces of Commonwealth Human Rights legislation. Section 351 is altogether less complicated. It means pretty well what it says it means.

*An employer must not take adverse action against an employee or a prospective employee because of the person’s 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.*

Unlike ADA discrimination which asks us to compare treatment between the person with a particular attribute and another (often hypothetical) person without the attribute, section 351 uses the same phrases we have already talked about in relation to workplace rights. An employer must not take ‘adverse action’, ‘because of’, one of the attributes on that list.

Subsection (2) of section 351 imports the exceptions and defences to discrimination found in the other various jurisdictions. It does not import the definitions of discrimination.

Standard defences to discrimination include that the person, for reason of disability usually, could not perform the inherent requirements of the job and/or that there are occupational health and safety reasons for the discrimination.

You may have noticed that this is not the only reference to discrimination in the general protections provisions. In fact, there are two sorts of prohibited discrimination in the Fair Work Act. As well as being a ­reason for adverse action, discrimination can also be the adverse action. In that later sense the discrimination being prohibited is ‘*discriminating between the employee and other employees of the employer*’ which is more similar to the traditional comparison style direct discrimination. Because the discrimination provision in section 351 is fairly neat, easy to use and comprehensive it is rarely necessary to argue discrimination as the adverse action.

*Dismissed for temporary absence for illness or injury*

Section 352[[7]](#footnote-7) provides that an employer must not dismiss an employee because the employee is temporarily absent from work because of their own illness or injury.  This protection exists when a worker has given their employer a medical certificate (normally within 24 hours of the start of their absence) and only for temporary absences.  An absence is temporary if it involves no more than three months unpaid sick leave in any twelve month period[[8]](#footnote-8).

It is important to note that general protections actions can be argued in the alternative. In a lot of cases, dismissal in contravention of section 352 will also involve issues of discrimination and the exercise of workplace rights. It is an advantage of the general protections regime that it can bundle together a range of breaches of the workplace law. Other jurisdictions like unfair dismissal and traditional discrimination jurisdictions tend to isolate causes of action which can mean multiple concurrent proceedings relating to different parts of the employment relationship. Note that it is not perfect though – one major issue for us is there is no general protections provision for sexual harassment (although you are protected when you make a complaint about sexual harassment) so concurrent proceedings are not always avoidable, but for the sort of things that section 352 covers you will almost always be arguing 352 together with some other breach.

*Remedies*

Orders that can be made by the Federal Circuit Court in relation to General Protections are:

1. Compensation (no limit);
2. Reinstatement (more likely in cases involving a large organisation);
3. Compensation for pain and suffering;
4. Payment of unpaid entitlements;
5. Interest (not in relation to a penalty); and
6. Pecuniary penalties (up to $51,000 per breach for companies and $10,200 for individuals)

Usually if a matter is settled prior to Court proceedings issuing the claimant would forgo any pecuniary penalty since that is really a matter for the Court, but nonetheless the amounts in compensation can be quite high in some general protections cases especially because it is possible to obtain compensation for the hurt and humiliation associated with the breach.

In contrast, successful unfair dismissal actions can never result in more than six months of the employee’s ordinary wages and/or reinstatement due to a cap on compensation for those matters.

Costs are usually unavailable, except in vexatious and unreasonable circumstances.

*Process*

There are different processes for breaches occurring during employment and general protections – dismissal actions. If you are arguing both types of breach in the one action, you will need to comply with the dismissal process with its various restrictions.

For dismissal actions applicants must first lodge in the Fair Work Commission. Proceedings must be lodged within 21 days of the dismissal taking effect. This is the same time limit as unfair dismissal proceedings.

Once in the Fair Work Commission there will be a conciliation conference. If there is any issue of jurisdiction that may also be dealt with. The conciliation conferences in the Fair Work Commission are highly effective at resolving disputes. They also publish a register of conciliation outcomes which is really handy to refer to get an idea about what you might agree to at that stage.

If you have not been through conciliation in the Fair Work Commission be prepared for a sharper and more robust process than you might be used to from the ADCQ or the AHRC. Typically conferences will be on the phone. Conciliators can be pretty forward in this jurisdiction and this can be confronting for self-represented people as well as some representatives. The Fair Work Commission might list three conferences in a day for a conciliator and they will expect matters to be in and out in under 90minutes most of the time.

If the matter resolves at that point, the Commission can draft the settlement agreement. Parties can alternatively agree to draft the settlement agreement themselves and that might be a better option in some cases if you are representing your client in that process.

If the matter does not settle at conciliation a certificate will issue saying that the Fair Work Commission could not resolve the dispute by agreement. The certificate gives the applicant just 14 days to lodge proceedings in the Federal Circuit Court in relation to the matter.

Non-dismissal actions can go directly to the Federal Circuit Court although in practice most people start in the Fair Work Commission as a less confrontational option. If a non-dismissal matter goes to the Fair Work Commission and does not resolve the Fair Work Commission’s involvement simply ends – there is no certificate issued. The person can go on to the Federal Circuit Court at any time.

The time limit for non-dismissal general protections matters is not stated in the Fair Work Act. We take it, therefore, to be six years which is the usual time limit for contract disputes. This makes it somewhat longer than other types of similar actions – discrimination under the ADA for example has a time limit of 12 months. It is not necessary to still be employed to bring the non-dismissal action. It can be brought well after employment is ended and so long as there is nothing about the actual end of employment in the claim, the 21 day initial time limit and the 14 Federal Circuit Court time limit will not apply.

*Choice of jurisdiction*

You cannot argue both of unfair dismissal and a dismissal in breach of the general protections. You must make a choice. The 21-day time limit generally makes it very hard to change proceedings later on (there are only limited circumstances in which a transfer of jurisdiction will be entertained in the FWC so changing is normally a case of withdrawing one before lodging the other). This makes the decision which way to go at the outset is really important. If you are across unfair dismissal actions you will probably recognise that most general protections breaches resulting in dismissal will also be unfair due to the very wide definition of ‘unfair’ in the Fair Work Act. The reverse is not always the case but in almost all general protections – dismissal matters your client will have to decide whether to do the extra work and take the risk of a general protections case for potentially unlimited damages, or go with the much easier but often vastly less lucrative unfair dismissal option.

Another area in which choice of jurisdiction is important is in discrimination matters. If someone is dismissed for a discriminatory reason they might have all four of unfair dismissal, general protections, an anti-discrimination matter under the ADA, and discrimination under one of the Commonwealth Human Rights Acts. All of those jurisdictions naturally prohibit a person from bringing an action that is dealt with elsewhere so starting correctly is essential.

Briefly, the factors that might influence a client’s choice of jurisdiction are:

1. How well the client’s facts fit the law (is it not completely clear why the decision to dismiss was taken? would unfair dismissal be a safer option?)
2. The available remedy range
3. The risk of an adverse costs award if unsuccessful (or if represented, the availability of costs if successful)
4. Would the reverse onus help at all?
5. How might the client fare in the conciliation conference process (do they need the care and attention of the ADCQ?)
6. The time limit (have any of the options already expired)
7. Eligibility criteria (the general protections have broader coverage than unfair dismissal with no minimum qualifying period)
8. Whether all the client’s problems can be collected together in a single legal action

There is a table prepared by Legal Aid Queensland, which gives you more information about each relevant consideration which will be circulated.

Bridget Burton

Caxton Legal Centre

1. SECT 336 - Objects of this Part

                (1)  The objects of this Part are as follows:

                        (a)  to protect workplace rights;

                        (b)  to protect freedom of association by ensuring that persons are:

                                 (i)  free to become, or not become, members of industrial associations; and

                                (ii)  free to be represented, or not represented, by industrial associations; and

                               (iii)  free to participate, or not participate, in lawful industrial activities;

                        (c)  to provide protection from workplace discrimination;

                        (d)  to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

                (2)  The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise). [↑](#footnote-ref-1)
2. SECT 340 Protection

                (1)  A person must not take adverse action against another person:

                        (a)  because the other person:

                                 (i)  has a workplace right; or

                                (ii)  has, or has not, exercised a workplace right; or

                               (iii)  proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

                        (b)  to prevent the exercise of a workplace right by the other person.

   Note:          This subsection is a civil remedy provision (see Part 4-1).

                (2)  A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

   Note:          This subsection is a civil remedy provision (see Part 4-1). [↑](#footnote-ref-2)
3. | **Meaning of *adverse action*** | | |
   | --- | --- | --- |
   | **Item** | **Column 1**  ***Adverse action*is taken by ...** | **Column 2**  **if ...** |
   | 1 | an employer against an employee | the employer:  (a) dismisses the employee; or  (b) injures the employee in his or her employment; or  (c)  alters the position of the employee to the employee's prejudice; or  (d) discriminates between the [employee and](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s768bc.html#employee_a) other employees of the employer. |

   [↑](#footnote-ref-3)
4. **SECT 360**

   **Multiple reasons for action**

                      For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason [↑](#footnote-ref-4)
5. **SECT 341 - Meaning of workplace right**

   Meaning of **workplace right**

                (1)  A person has a ***workplace right***if the person:

                        (a)  is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

                        (b)  is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

                        (c)  is able to make a complaint or inquiry:

                                 (i)  to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

                                (ii)  if the person is an employee--in relation to his or her employment. [↑](#footnote-ref-5)
6. **SECT 351 - Discrimination**

                (1)  An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's 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.

   Note:          This subsection is a civil remedy provision (see Part 4-1).

                (2)  However, subsection (1) does not apply to action that is:

                        (a)  not unlawful under any anti-discrimination law in force in the place where the action is taken; or

                        (b)  taken because of the inherent requirements of the particular position concerned; or

                        (c)  if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:

                                 (i)  in good faith; and

                                (ii)  to avoid injury to the religious susceptibilities of adherents of that religion or creed. [↑](#footnote-ref-6)
7. **SECT 352 - Temporary absence--illness or injury**

                      An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. [↑](#footnote-ref-7)
8. **REG 3.01 - Temporary absence--illness or injury**

                (1)  For section 352 of the Act, this regulation prescribes kinds of illness or injury.

   Note:          Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

                (2)  A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

                        (a)  24 hours after the commencement of the absence; or

                        (b)  such longer period as is reasonable in the circumstances.

   Note:          The Act defines ***medical certificate***in section 12.

                (3)  A prescribed kind of illness or injury exists if the employee:

                        (a)  is required by the terms of a workplace instrument:

                                 (i)  to notify the employer of an absence from work; and

                                (ii)  to substantiate the reason for the absence; and

                        (b)  complies with those terms.

                (4)  A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

   Note:          Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

                (5)  An illness or injury is not a prescribed kind of illness or injury if:

                        (a)  either:

                                 (i)  the employee's absence extends for more than 3 months; or

                                (ii)  the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and

                        (b)  the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.

                (6)  In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation. [↑](#footnote-ref-8)