

Navigating General Protections Claims

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ClubsNSW Workplace Relations & Human Resources Conference

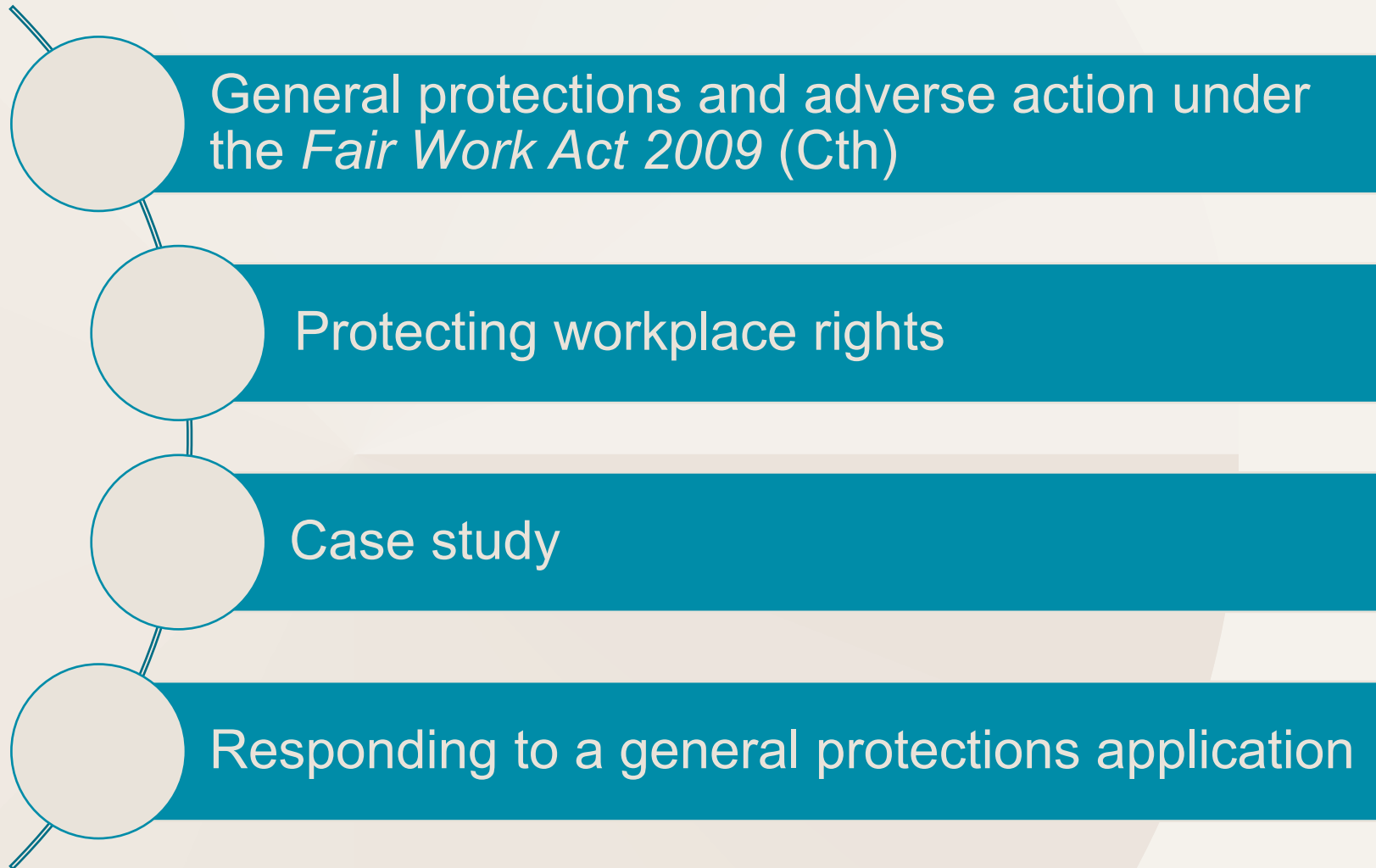
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Acknowledgement of Country

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Gadens acknowledges the Traditional Custodians of the land on which we work, and pay our respects to Elders past and present.

Overview



General protections and adverse action under the *Fair Work Act 2009* (Cth)

General Protections – Part 3-1 of the *Fair Work Act 2009* (Cth)



A person must not take **adverse action** against another person **because** the other person:

- has a **workplace right** (i.e. employee is able to make a complaint or inquiry to a person or body in relation to their employment)
- has (or has not) exercised a workplace right, or
- proposes (or proposes not to) exercise a workplace right; or

To prevent the person exercising a workplace right.



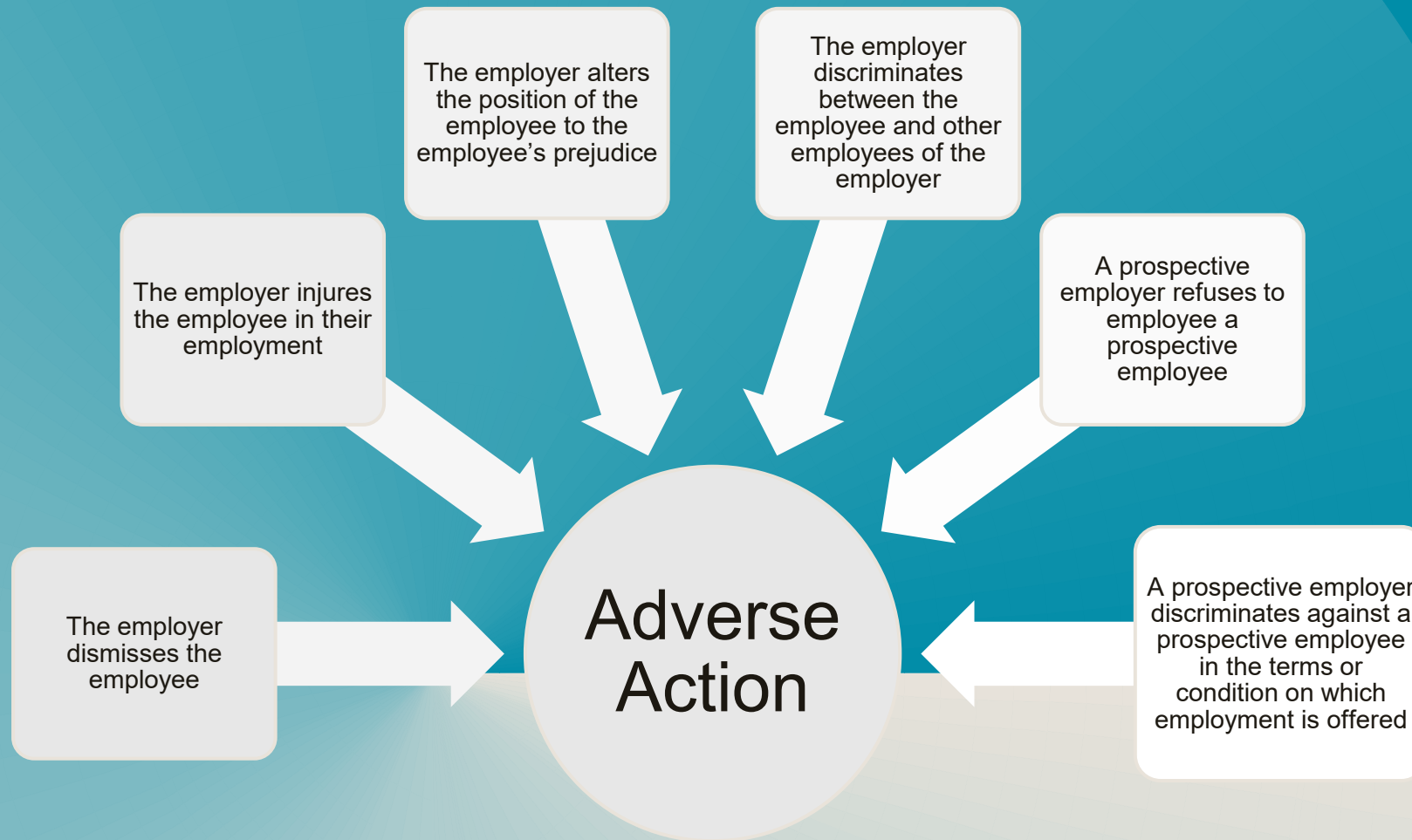
An employer **must not dismiss** an employee because the employee is **temporarily absent from work** because of illness or injury.



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 preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

General Protections – Part 3-1 of the *Fair Work Act 2009* (Cth)

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Threatening to take any of the above actions also constitutes adverse action.

General protections under the Fair Work Act

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- The general protections legislation covers:
 - Current employees, including permanent (full time or part time) and casual employees, and employees on a fixed-term contract
 - Prospective employees (such as job applicants)
 - Independent contractors (general protection no dismissal claim only)

Protecting workplace rights

What is a workplace right

- An employee has a workplace right if they:
 - Have an entitlement, role or responsibility under a workplace law, workplace instrument or an order of an industrial body;
 - Are able to initiate, or participate in a process or proceedings under a workplace law or workplace instrument
 - Are able to make a complaint or inquiry to seek compliance with a workplace law or instrument, or in relation to their employment

Examples of workplace rights

The right to an entitlement under the NES, such as an entitlement to personal/carer's leave

The right to request a flexible working arrangement

The right to make a workers compensation claim if injured in the course of employment

The right to participate in enterprise agreement negotiations

The right to make a complaint in relation to employment, for example a complaint regarding underpayment, or a complaint regarding the behaviour of an employee's supervisor

Workplace laws and workplace instruments

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- **Workplace law** includes the FW Act, or any other Commonwealth, state or territory law that regulates the employment relationship, such as WHS legislation
- **Workplace instrument** includes a modern award or enterprise agreement
 - **A contract of employment is not a workplace instrument**; *Barnett v Territory Insurance Office* [2011] FCA 968; Similarly, a services contract is not a workplace instrument; *BUWA Transport Pty Ltd v Cleanaway Waste Management Ltd (No 2)* [2025] FedCFamC2G 846.
 - Purely contractual rights are not workplace rights
 - However, making an enquiry or a complaint about the terms of an employment contract or related to a contract of employment could be the exercise of a workplace right
- **Order made by an industrial body** includes an order made by the FWC, or a court or commission performing or exercising functions and powers under an industrial law

Case study: Dismissal before completion of the minimum employment period

Dabboussy v Australian Federation of Islamic Councils [2024] FCA 1074

Case study: Dismissal before completion of the minimum employment period

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Dabboussy v Australian Federation of Islamic Councils [2024] FCA 1074

Background

- Mr Dabboussy was employed in the role of CEO at AFIC from 4 September 2023 to 3 September 2024
- Mr Dabboussy was stood down whilst an investigation was conducted regarding allegations of sexual harassment made against him by a prospective employee
- On 2 September 2024, AFIC's Executive Council held an emergency meeting at 8:30pm and held that the allegations were substantiated on the balance of probabilities based on the draft findings from the investigation
- Mr Dabboussy's employment was subsequently terminated on 3 September 2024, the day before he would have completed the minimum employment period and had an entitlement to bring an unfair dismissal claim
- Mr Dabboussy claimed that AFIC contravened the general protections provisions by terminating his employment to prevent him from being able to access the unfair dismissal jurisdiction
- Mr Dabboussy sought an interlocutory order for reinstatement on the basis that he had a prima facie case that AFIC had breached the general protections

Case study: Dismissal before completion of the minimum employment period

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Dabboussy v Australian Federation of Islamic Councils [2024] FCA 1074

Decision

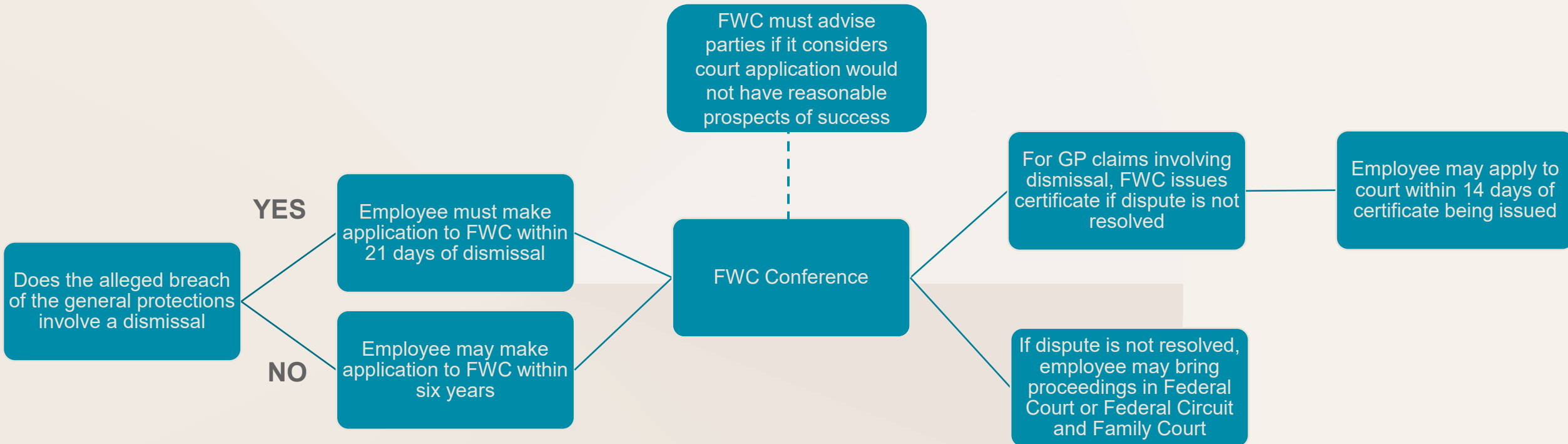
- The Court found that Mr Dabboussy had a strong prima facie case that the timing of his dismissal was intended to deny him the opportunity to make a claim for unfair dismissal, and that this was a '*substantial and operative reason*' for his dismissal
- The evidence strongly suggested that AFIC had acted in haste by convening an emergency meeting to consider terminating Mr Dabboussy's employment before it was even provided with the investigator's final report.
- The Court found there was a strong inference that the meeting had been convened to facilitate the termination of Mr Dabboussy's employment before 4 September 2024, on which date he was entitled to protection from unfair dismissal.
- The Court noted that adverse action can be taken to prevent the exercise of a workplace right even where the employee does not yet have the workplace right; *Qantas Airways Limited v Transport Workers Union of Australia* [2023] HCA 27. The fact that Mr Dabboussy did not have the right to protection from unfair dismissal at the time of his dismissal does not prevent AFIC's conduct from constituting adverse action.
- In ordering reinstatement, the Court considered the financial impact of his dismissal, noting that Mr Dabboussy was not paid any amount on termination and may be forced to sell his family home, as well as the personal impact, noting his age, employment history in not-for-profit organisations and the nature of the misconduct allegations, may make it difficult for him to seek alternative employment. The Court considered that Mr Dabboussy may be stood down or permitted to work from home during the interim period.

Responding to a general protections application

Process, reverse onus of proof and remedies

General protections application process

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Reverse onus of proof

- The employee must establish the objective facts on the balance of probabilities, meaning that:
 - They held, exercised or proposed to exercise a workplace right; and
 - Adverse action was taken because of the workplace right.
- Once these issues are established, the onus shifts to the employer to prove that the reason for taking the action was not because of the applicant's workplace right.
- The Court **presumes** that the adverse action was taken for the prohibited reason unless the employer proves otherwise
- To rebut this presumption, the employer must prove that the prohibited reason was not a **substantial or operative reason** for taking the action
- To displace the presumption, direct testimony given by the decision-maker/s is generally required to identify the actual or operative reason for taking the action; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500

- The general protections are **civil remedy provisions**.
- Contravening the general protections exposes an employer to civil remedies including:
 - A declaration that the general protections provisions have been breached;
 - An injunction to prevent, stop or remedy the effects of the breach;
 - Reinstatement
 - Compensation for economic and non-economic loss that a person has suffered because of the breach;
 - This is the most common remedy for general protection claims
 - There is no cap on the amount of compensation that may be ordered in the general protections jurisdiction (unlike unfair dismissal)
 - Pecuniary penalties; or
 - Maximum penalties up to \$19,800 for individuals and \$99,000 for a body corporate for **each contravention**
 - Higher penalties can be imposed for “serious contraventions”, where a person knowingly contravened the civil remedy provision, or was reckless as to whether it would be contravened, up to \$198,000 for individuals and \$999,000 for a body corporate
 - Paid to the person making the application, generally the employee
 - Any other order the Court considers appropriate

- A person who is ‘involved’ in a contravention of a civil remedy provision is taken to have contravened that provision; s 550 FW Act
- A person is involved in a contravention of a civil remedy provision as an accessory if the person has:
 - Aided, abetted, counselled or procured the contravention
 - Induced the contravention, whether by threats or promises or otherwise
 - Been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention
 - Conspired with others to effect the contravention

United Workers’ Union v Bervar Pty Ltd (No 2) [2023] FedCFamC2G 251

- In *UWU v Bervar Pty Ltd* [2022] FedCFamC2G 418, the Court held that Mr Blewett, the HR Manager, was involved in the employer’s contravention of the general protections provisions
- Mr Blewett’s conduct fell short of that expected of an experienced HR Manager including:
 - He incorrectly assumed that the employee’s husband had authority to speak on her behalf, and did not directly speak with the employee
 - He did not sufficiently investigate the employee’s complaints regarding bullying and harassment
 - He terminated the employee’s employment as he was concerned that the employee would initiate proceedings against the employer
- The Court ordered that Bervar should pay a penalty of \$37,800 and Mr Blewett should pay a penalty of \$7,560

Case study: remedies for contravention of the general protections

Han v St Basil's Homes (No 2) [2025] FCA 448

The Court found that St Basil's engaged in two contraventions when it terminated Ms Han's employment:

- 1) Because Ms Han had exercised her workplace right to make complaints about conduct that had occurred in the workplace, i.e regarding her increased workload, lack of assistance from team leader, and feeling targeted by another worker – contravention of s 340 FW Act; and
- 2) Because of Ms Han's race, finding that St Basil's (through the conduct of it's General Manager) preferred workers of a different race – contravention of s 351 FW Act.

Compensation for contravening the general protections provisions	Pecuniary penalties for contravening the general protections provisions to be paid to Ms Han
<ul style="list-style-type: none">• \$175,000 for past economic loss• \$61,559.62 for future economic loss• \$75,000 for general damages• \$10,000 for future out of pocket expenses	<ul style="list-style-type: none">• \$15,000 for contravention of s 340(1) FW Act• \$45,000 for contravention of s 351(1) FW Act

Considerations when responding to a general protections claim

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What is the employee asking for?

The decision maker/s?

Who are the respondents?

What was the reason for the adverse action?

What are the risks for the business?

Questions?

Key contacts



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