

**Colin
Biggers
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HR highlights series.

Probationary period dismissals

Leanne Dearlove & Karlana Fuata
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Recent Trends



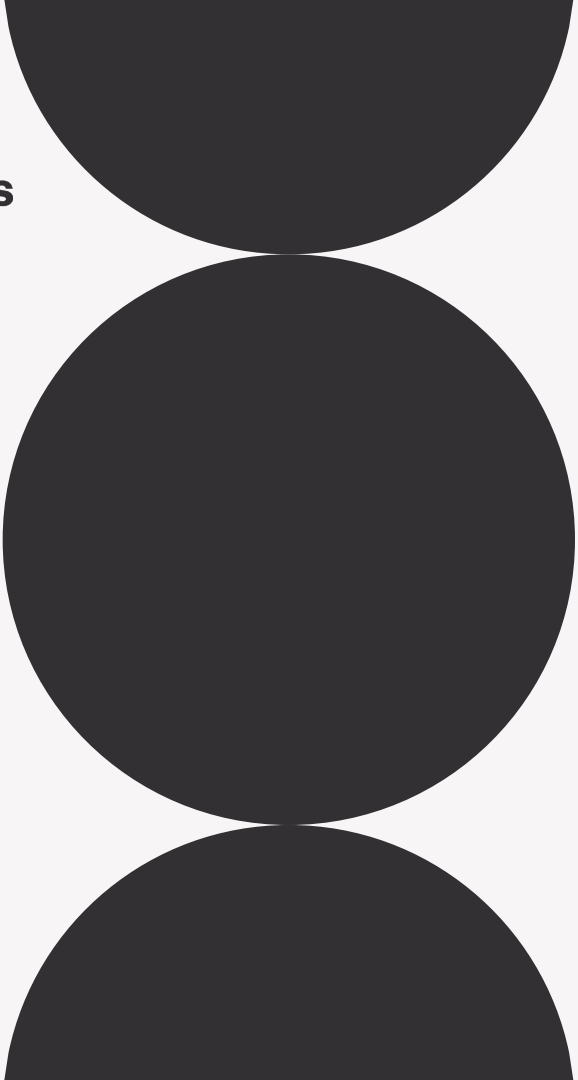
**Over 6,300 General Protection
Dismissal Applications in
2024-2025 financial year.**

+27%

Above the 5-year average.

>50,000

**Total expected Fair Work
Commission cases during the
2025-2026 financial year.**



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What is Probation?

What is Probation?

The period allows employers to assess performance, conduct, cultural fit and to decide whether the employee is suitable for the role.



Employees on probation accrue entitlements such as personal leave and annual leave.



The *Fair Work Act 2009* (Cth) does not use the term "probationary period". Instead, the Act refers to the **minimum employment period**.

Protection from Unfair Dismissal

Under section 382 of the FW Act, an employee is protected from unfair dismissal when:

- They have met the minimum employment period;
- Are covered by an enterprise agreement or an award; and
- Annual earnings are under the high-income threshold (\$183,100).



Minimum Employment Period

Section 383 of the *Fair Work Act*

- Minimum Employment Period is:
 - Small Business - 12 months
 - Not a Small Business - 6 months

Additional consideration must be given as to whether the employment period was continuous service.

Period of Employment

Under section 384 of the FW Act, an employees' period of employment is the period of continuous service the employee has completed with the employer.

Continuous service is defined under section 22 of the FW Act and excludes periods of unauthorised absence, unpaid leave and unpaid authorised absence.



Remedy - Unfair Dismissal v General Protections

- **Unfair Dismissal Application**

- Reinstatement is primary remedy
- If reinstatement is not appropriate - maximum compensation is 26 weeks or 50% of high income threshold

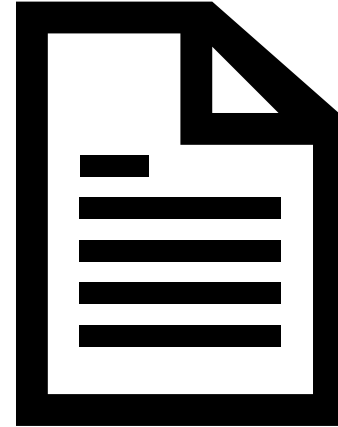
- **General Protections involving Dismissal Application**

- No cap on award of damages
- Courts can impose penalties for contraventions
- Having a contravention can impact organisations where they are reliant on funding or other competitive tender processes



General Protections Claims

- Covered under Part 3-1 of the FW Act.
- In an unfair dismissal case, the focus is on whether the dismissal was harsh, unjust or unreasonable.
- In a general protections claim involving dismissal, the concern is whether the employer took **adverse action** (i.e., termination) **for a prohibited reason**.
- Any application must be made within 21 days unless in exceptional circumstances (80% of claims lodged outside of this timeframe are denied).



Best practice



Reasons for dismissal

Under section 340 of the FW Act, an employer must not take adverse action (i.e., termination) against an employee:

- because they **have a workplace right** that they have or have not exercised, or propose to exercise; or
- to **prevent the exercise** of a workplace right.

"Just because you don't HAVE to, doesn't mean you shouldn't!"

A quote by Leanne Dearlove & Karlana Fuata

Pacheco-Hernandez v Duty Free Stores Gold Coast Pty Ltd [2018] FCCA 3734

- Ms Pacheco-Hernandez was employed as a retail supervisor at a duty-free store at Sydney Airport.
- Ms Pacheco-Hernandez was dismissed 5 months into her employment, during her probationary period.
- In the months leading up to termination, she had made multiple complaints about the treatment she received by other employees and about the lack of clarity about the duties and responsibilities of employees in her team.
- Termination occurred shortly after the complaints were made with the employer relying on the “probation” without giving any reasons for the termination.
- The termination letter did not state a reason for the termination.
- Employer was found to have contravened the General Protections provisions and ordered to pay 8 weeks' wages in compensation to Ms Pacheco-Hernandez.

"We are not legally obligated to give an explanation if we do not wish to do so..."



- The Area Manager

Providing vs Proving the reason for dismissal



1. Who is the decision-maker?

The decision-maker/s must be identifiable and should have the authority to make the decision.



2. What does the decision-maker have to say?

The decision-maker/s must be able to say what the reason for the termination was.



3. What does everything and everyone else have to say?

Contradictory evidence about the reason for the termination is unlikely to successfully reverse the presumption that the action was taken for an unlawful reason.

Giving Notice

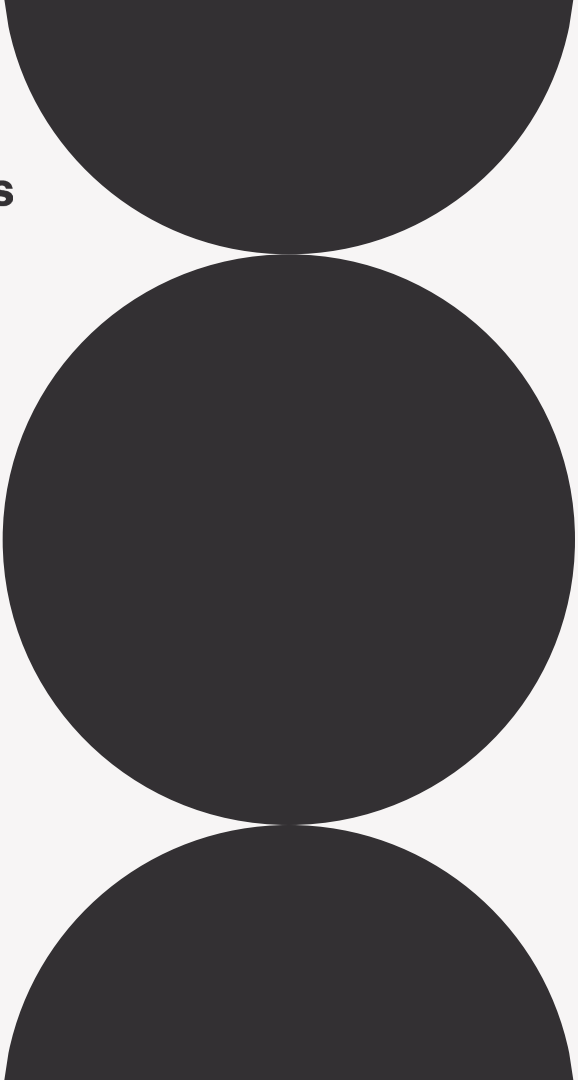
- Notice must be given in writing.
- Entitlement to notice under:
 - *Fair Work Act 2009* (Cth);
 - Modern Award;
 - Enterprise Agreement;
 - Employment Agreement.
- Consider:
 - How much notice is required.
 - When do final entitlements need to be paid.

Recent case

An Operations Manager was terminated within their 6-month probationary period and subsequently made a general protections claim for adverse action against him making complaints.

The key findings were:

- The termination occurred during the six-month probationary period which had not yet expired at the time of dismissal.
- The employer gave credible evidence about the events leading up to the termination which gave reasonable grounds to terminate.
- The reasons provided at the time of termination, were consistent with what the documents and other staff had to say about the employee's conduct in the workplace.
- The employee's role had work health and safety responsibilities and therefore, the complaints and inquiries he asserted to have raised were not in relation to his employment and were not the exercise of a workplace right.



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Case Examples

***Werner v St Michael's Association* [2020] FCA 1074**

- Ms Werner was employed as a chef and food safety trainer for St Michael's Association.
- The Association had concerns about Ms Werner's performance and extended her probationary period.
- Ms Werner was eventually terminated due to her performance not improving.
- The FWC found that despite the probationary period being extended, Ms Werner had met the minimum employment period.
- Ms Werner was protected from unfair dismissal.
- The FWC found that there was no valid reason for termination.
- Ms Werner was awarded 8 weeks' compensation.

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

- Australian Federation of Islamic Councils was a small business employer. Mr Dabboussy was employed as the CEO and was terminated 7 hours prior to meeting the minimum employment period.
- Mr Dabboussy had made various complaints and enquires in his capacity as CEO, following the decision to stand him down to investigate allegations of sexual harassment made against him by a prospective employee.
- The Court found that Mr Dabboussy did not have a strong claim for general protections in relation to him making a complaint, however, the Court did make a finding that the decision of the executive committee to hastily meet and terminate Mr Dabboussy prior to the investigations being finalised had strong inference that such actions were for the purpose of denying him the opportunity to make a claim for unfair dismissal.
- As such, an interim order was made for reinstatement.

Wijaya v Matthews Brothers Engineering Pty Ltd [2026] FCA 138

- General Protections involving Dismissal Application.
- Did not resolve at Fair Work Commission - proceeded to Court.
- Matthews Brothers made an application that the proceedings be summarily dismissed.
- National Judicial Registrar Edwards dismissed the proceedings.
- Mr Wijaya made an application to have that decision reviewed.
- Justice McElwaine agreed with the Registrar.
- Found that the pleadings did not disclose a reasonable cause of action and the pleaded claim was manifestly hopeless.

Key Takeaways

- Don't rush a termination simply because an employee is about to meet the minimum employment period.
- Follow a proper and reasonable process.
- Provide the employee with proper reasons for the termination - avoid vague reasons.
- Raise performance issues as they arise - don't wait until the end of the minimum employment period before raising concerns.
- If an employee has raised a complaint - finalise the complaint before considering termination.



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Thank you.

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