

What are my employment rights?

Am I being treated fairly at work?

Where do I go for help?

GENERAL PROTECTIONS DISPUTE – TERMINATION CLAIM (21 Days)

DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

This infosheet discusses ‘General Protections Dispute’ termination claims, and is designed to help you as an employee identify your rights and to take the most appropriate action under the General Protections Dispute provisions of the Fair Work Act 2009 (Cth) (the Act).

Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees in **Tasmania** and **Queensland** only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

What action can I take?

If you have been dismissed from your job, you may be eligible to be able to make either:

- ‘Unfair Dismissal’ claim to the Fair Work Commission (FWC). Please see JobWatch’s ‘Unfair Dismissal’ infosheet for more

IF YOU HAVE NOT BEEN DISMISSED

If your employer has not terminated your employment, but has taken other unlawful ‘adverse action’ (e.g. you were demoted or not offered employment for an unlawful reason) you may still be eligible to make a General Protections Dispute claim to FWC and/or a Federal Court.

Your non-termination claim must be filed in a Federal Court within 6 years of the unlawful adverse action occurring.

information. Note: you only have **21 days** from the date that your dismissal took effect to file your claim; OR

- **‘General Protections Dispute’ termination claim** to FWC if the termination of your employment was unlawful ‘adverse action’ (see below). Note: You have **21 days** from the date your dismissal took effect to file your General Protections Dispute’ termination claim.

You **must choose** to make either an Unfair Dismissal claim or a General Protection termination claim (or another claim e.g. a discrimination complaint under the Victorian Equal Opportunity Act 2010) because you can only make one claim at a time in relation to the termination of your employment.

What are my rights?

Your employer must not take unlawful **‘adverse action’** against you (for example, terminate your employment) because or partly because of one or more of the following reasons:

- **your 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;**
- you have taken a **temporary** absence from work due to **illness or injury** in accordance with the Act’s regulations (see page 3);
- you have a **workplace right** (see definition of ‘workplace right’ page 3);
- you have exercised or not exercised a workplace right;
- you propose to or propose not to exercise a workplace right;
- to prevent you from exercising a workplace right;
- **trade union membership** or non-membership; or
- you engaged in **industrial activity**.

What is adverse action?

For the purposes of this infosheet, ‘adverse action’ means terminating your employment or dismissing you from your job.

If you have **not** been dismissed but have been;

- demoted;
- treated less favourably than other employees; or
- not offered employment for an unlawful reason;

Contact the Fair Work Ombudsman (see **‘Where to get help’** – page 11). You have **6 years** to file your claim in a federal court from the date of the unlawful adverse action if you have not been dismissed. The FWC may first hold a conference but only if your employer voluntarily agrees to attend.

‘Adverse action’ does not include an action that is authorised by a Federal law or State and Territory laws that are listed in the Act or its regulations. See JobWatch’s ‘General Protections Dispute (Non-Termination Claim)’ infosheet for more information.

Do I have grounds to make a claim?

General Protections - Discrimination

It is against the law for your employer to terminate your employment because of your **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**.

It is a defence if your employer can show that the reason for your dismissal is:

- not unlawful under any Victorian or Federal anti-discrimination law; or

- relates to the inherent requirements of your job; or
- taken by a religious institution in accordance with the doctrines of the religion.

Temporary absence from work due to illness or injury

It is against the law for your employer to terminate your employment because you are temporarily absent from work because of illness or injury.

However, this law only applies if you are **not absent for more than 3 months**, either in a single block or in separate periods, **within a 12 month period**, unless you are on paid sick leave for the duration of the absence. (You are not on paid sick leave if you are absent from work and are receiving workers' compensation payments).

To rely on this section, you must:

- provide a medical certificate or statutory declaration within either 24 hours of starting your absence or a longer period as is reasonable in the circumstances; or
- if you are covered by a workplace instrument, you must comply with the provisions in that document dealing with notice and evidence requirements for absences from work; or
- provide evidence that you are taking leave for the purpose of your illness or injury (eg. a medical certificate, or a statutory declaration) if your employer requires.

JobWatch recommends that you immediately inform your employer of your absence and provide a medical certificate to your employer within 24 hours of starting your absence or as soon as possible thereafter.

Workplace rights

Workplace rights can be broadly described as your employment rights and entitlements and your ability to exercise and enforce those rights and entitlements.

It is unlawful for your employer to terminate your employment because:

- you have a workplace right;
- you have or have not exercised a workplace right;
- you propose or propose not to exercise a workplace right; or
- to prevent you from exercising a workplace right.

You have a **'workplace right'** if:

- you are entitled to the benefit of a workplace law, workplace instrument or order made by an industrial body (eg. you have rights under an Award, Enterprise Agreement or the Act);
- you are able to initiate, or participate in a process or proceedings under a workplace law or workplace instrument such as, for example, a conference held by FWC or court proceeding under a workplace law etc;
- you are able to make a complaint or inquiry to an external body which has powers to seek compliance with that employment law (e.g. Fair Work Commission, Fair Work Ombudsman, etc); or
- you are able to make a complaint or inquiry in relation to your employment.

It is against the law for your employer to dismiss you because or partly because you made a complaint or inquiry to your employer about your employment.

If you think you will lose your job if you make a complaint to your employer, get advice first (see **'Where to get help'** on page 11).

Industrial activities

It is against the law for your employer to dismiss you because:

- you are or were a union member or officer;
- you engaged or proposed to engage in "industrial activity"; or

- you did not engage or proposed not to engage in “industrial activity”.

“**Industrial activity**” includes if you:

- join or not join a union;
- pay union fees;
- ask to be represented by a union; and
- take part in industrial action.

Multiple reasons for action and reverse onus of proof

You should also note that:

- it is presumed that the reason for the termination of your employment is an **unlawful** reason unless your former employer can prove otherwise (known as reverse onus of proof); and

For information on how to make a General Protections Dispute termination claim see page 7

- it is still unlawful even if only **part** of the reason for the termination of your employment was unlawful. However, the unlawful reason must have been a substantial and operative reason for the adverse action.

In other words, to successfully defend your claim, your former employer has to prove that you were dismissed for a reason that does not include an unlawful reason.

What other rights do I have?

Coercion

Your employer, or fellow employee, must not coerce you to exercise (or not) or propose to exercise (or not) a workplace right, or exercise a workplace right in a particular way or take action, or threaten to take action, with the intention to coerce you to engage in industrial activity (e.g. to join or not join a union).

Undue influence or pressure

Your employer must not subject you to undue influence or pressure to:

- make or not make an agreement or arrangement under the National Employment Standards;
- make or not make an agreement or arrangement under a term of a modern award/enterprise agreement;
- agree to, or terminate, an individual flexibility arrangement;
- accept a guarantee of annual earnings; or
- agree, or not agree to a deduction from your wages.

Misrepresentation

Your employer, or fellow employee, must not knowingly or recklessly make a false or misleading representation about:

- your workplace rights;
- the exercise of, or effect of the exercise of your workplace rights;
- your obligation to engage in industrial activity;
- your obligation to disclose whether you, or a third person, is or is not a member of a union; or
- your obligation to disclose whether you, or a third person, are or are not engaged in industrial activity.

Your employer must not induce you to join or not join a union, or to resign from union membership.

If any of the above things happen to you, you can contact the Fair Work Ombudsman or obtain legal advice about filing your claim in a Federal Court.

If you have not been dismissed, you have up to 6 years from the date the unlawful conduct occurred to file your claim in a Federal Court.

Constructive Dismissal

If you think you have no option but to leave your employment because of your employer's conduct, you may still be able to make a General Protections Dispute termination claim so long as the termination of your employment was at the initiative of your employer and was for a reason or reasons that included an unlawful reason.

You should seek legal advice about this before leaving your employment as it is a very technical area of law and FWC or a Federal Court may not agree that you were forced to leave your employment.

(See also JobWatch's 'Constructive Dismissal' infosheet).

Can I make more than one claim?

You **cannot** make a General Protections Dispute termination claim and an unfair dismissal claim at the same time. You have to choose one or the other.

However, there are some limited exceptions to this rule:

- If you make an **unfair dismissal claim**, you can later make a General Protections Dispute termination claim if:
 - you discontinue your unfair dismissal claim; or
 - your unfair dismissal claim failed because you were not eligible to make the claim (except if FWC was satisfied that you were dismissed because of a genuine redundancy).
- If you make a **General Protections Dispute termination claim**, you can later make an unfair dismissal claim if:
 - you discontinue your General Protections Dispute termination claim; or
 - your General Protections Dispute termination claim failed because you were not eligible to make the claim; or
 - your General Protections Dispute termination claim has not resulted in FWC issuing a certificate stating that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful; and
 - you are eligible to make an unfair dismissal claim (see JobWatch's 'Unfair Dismissal' infosheet).

Remember time limits: You only have 21 days from date of your dismissal to file an unfair dismissal claim or General Protections Dispute termination claim at FWC.

It is **important to note that**, by the time you decide to change claims you may be out of time to file the new claim (i.e. **21 days** will probably have passed since the date of your dismissal). If this is the case, you should obtain legal advice before discontinuing your first claim because FWC may not allow you an extension of time to file your new claim.

You should also think about what remedy you want (see page 7)

Eligibility - Can I make a claim to FWC?

You must be an employee

Workers engaged as independent contractors (sometimes called sub-contractors) are generally not entitled to make a General Protections Dispute termination claim.

In some circumstances workers who are called independent contractors are legally recognised to be employees. If you are unaware of your employment status, or you are unsure whether you are a genuine independent contractor or not, you should get advice as soon as possible.

If you are a genuine independent contractor and your principal terminates your contract for an unlawful reason or for reasons that include an unlawful reason within the meaning of the Act or takes other unlawful adverse action against you in breach of the Act, then you may be eligible to make a General Protections Dispute – non-termination claim at a Federal Court. You have 6 years from the date of the unlawful adverse action to file this claim (see ‘Where to get help’ on page 10). See JobWatch’s ‘General Protections Dispute (Non-Termination) Claim’ infosheet for more information.

Termination must be at the initiative of your employer

If you think you have no option but to leave your employment because of your employer’s conduct, you should obtain legal advice before doing so because this is a very technical area of law and FWC or a Federal Court may not agree that the termination of your employment was at the initiative of your employer.

See JobWatch’s
‘Constructive Dismissal’
infosheet.

You must make your claim within the 21 day time limit

The 21 day time limit is a strict time limit. If you think you may have a claim, you should get advice as quickly as possible or file your claim and then get the relevant advice.

A General Protections Dispute termination claim must be filed at FWC within 21 days from when the termination of your employment took effect.

FWC may only grant an extension of time to file your claim if there are exceptional circumstances. If you are already out of time, you could consider filing your claim as soon as possible and then obtaining advice about the likelihood of being granted an extension of time before your matter proceeds further.

How do I make a claim?

Application form

The application form for General Protections Dispute termination claim is called a ‘General Protections Application Involving Dismissal’ (Form F8). It is available from the Fair Work Commission.

Fair Work Commission

Level 4,
11 Exhibition Street
Melbourne 3000
(GPO Box 1994)

Tel: 1300 799 675
Fax: (03) 9655 0401
Website: www.fwc.gov.au

Filing your claim

You need to file your claim with FWC. FWC will give a copy of your claim form to your former employer. You can file your claim with FWC on-line, by post or fax or by personally delivering it to FWC. You should be aware that FWC is not able to provide you with legal advice. FWC will notify your former employer of your claim.

If you need assistance completing the application form, you may contact:

- JobWatch’s telephone information service;
- your union (if you are a member);
- a lawyer; or
- FWC.

File your General Protections
Dispute Termination claim at
FWC within the 21 day
deadline.

Make sure you file your claim within the 21 day deadline, even if you have not yet received legal advice.

Fees

A \$70.60 filing fee is required to be paid with your claim.

This fee is refundable if you discontinue your application at least 2 days before a conference.

What if I can't afford the fee?

The filing fee may be waived by FWC if you can show that it would cause you "serious financial hardship". To be eligible, you must file a 'Fee Waiver Application Form' with FWC. This form is available from FWC or its website.

This form must be filed at the same time or soon after you file your General Protections Dispute claim form.

What happens next?

Before FWC can consider your application, it must decide whether you are eligible to make a claim by considering relevant matters including:

- whether your claim was made within the time limit (21 days);
- whether you have paid the required application fee (or whether the application fee has been waived); and
- whether you were terminated at the initiative of your former employer.

FWC convenes a conference between the parties and a member of FWC within a few weeks to try and resolve the matter by agreement between the parties.

If you are eligible to make a General Protections Dispute termination claim, FWC **must** conduct a Conference to deal with the matter.

If your former employer does not challenge that you are eligible to make a General Protections Dispute termination claim, the Conference takes place a few weeks after you have filed your application.

Usually FWC will allocate a date for the Conference within 3-5 weeks of receiving the application. FWC will advise you or your representative of the Conference date.

What happens at a Conference?

The purpose of the Conference is to bring you and your former employer together to try and resolve the matter without going all the way to a formal hearing in Court.

The Conference is facilitated by a member of FWC. The FWC member **does not** make a decision about who is right and wrong. The role of the FWC member is to assist the parties to come to an agreement to settle the claim.

You can agree to settle your claim at any time, even before the Conference. If your former employer makes you an offer of settlement, it is always advisable to get independent legal advice so that you are satisfied that the offer is reasonable given the merits of your case.

Interpreters may be provided free of charge in some circumstances. Contact FWC for more information (see 'Where to get help' on page 11).

What remedy do I want?

Once you have established that you are eligible to make a General Protections Dispute termination claim, you should think about what you are seeking to resolve your claim. A Federal Court can make any order it considers appropriate if it is satisfied that an employer has engaged in unlawful adverse action by terminating your employment.

This means you can seek, for example, **reinstatement** to your position, **compensation** instead of reinstatement or a **combination of both**. JobWatch recommends that you obtain legal advice about what remedy you are likely to receive, if any.

You can also seek that your former employer pays a penalty to the Commonwealth Government, a particular organization or yourself for breaching the law.

Do I need a lawyer?

There is a limited role for lawyers at FWC.

If you are entitled to, or obtain the permission of FWC to be represented by a lawyer, you should consider:

- how much your representative's fees will be;
- when they need to be paid; and
- to what stage are they prepared to take your claim.

Generally, you will have to pay your own legal costs regardless of the result of your case. Some Employment Law Firms offer a "no-win-no-fee" arrangement which often means you don't have to pay all of your lawyer's fee if you are not successful with your claim.

Law firms participating in the Legal Referral Service will usually provide you with an initial consultation of up to 30 minutes free of charge (see 'Where to get help' on page 11).

Representing yourself?

It is important to be prepared for the conference. The FWC member will ask you to outline your claim briefly and state what remedy you are seeking.

Write down a brief chronology of the relevant events and summarise the key details of your employment.

Write a chronology. Summarise key meetings and events and put them in date order.

You should explain why you think the termination of your employment was unlawful 'adverse action' taking into account the grounds of your claim.

Your former employer will also be given an opportunity to put forward their side of the case. Discussion will then normally occur with a view to reaching a settlement if possible.

If a settlement is reached

If you have settled your claim, you may be asked to sign a document called a "Release Agreement", "Settlement Agreement", "Deed of Release", "Terms of Settlement" or something similar.

These are legal documents that usually state that:

- you and your former employer have agreed to settle your claim; and
- in return for reinstatement and/or compensation, you will not take any further action against your employer in the future over any and all matters arising out of the employment.

Releases often have complicated legal language in them and can be difficult to understand.

If you have any doubts about signing one of these documents or if you think you may have other claims against your employer, you should obtain legal advice before you sign or otherwise agree to settle your claim.

Discontinuing your matter

You should file a "Notice of Discontinuance" form (Form 50) with FWC once:

- you have settled for an amount of compensation and/or reinstatement; and
- you have received the settlement monies; and
- the funds have been cleared.

You must give a copy of this form to your former employer as soon as reasonably practicable after it is lodged with FWC.

What if a settlement cannot be reached at a conference?

If a settlement is not reached at a conference, your options are to:

- not continue with your application by filing a 'Notice of Discontinuance' form (Form 50) with FWC;
- allow the FWC to arbitrate the dispute by filing a 'Notice of agreement for consent arbitration of a general protections dispute' (Form 8B) or
- proceed to have your claim heard at the Federal Circuit Court of Australia or the Federal Court.

If the FWC is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, FWC must issue a certificate stating that. You have 14 days from the date of this certificate to file your claim in a Federal Court or to agree with the other party and notify FWC of the agreement to a consent arbitration. If FWC considers that your claim would not have a reasonable prospect of success, it must advise the parties at the time of issuing the certificate.

A claim to a Federal Court must be made within 14 days after the FWC certificate is issued.

Consent Arbitration

From 1 January 2014, FWC will have power to deal with general protections disputes involving a dismissal through arbitration but only with the consent of both parties.

Arbitration is an alternative to making an application to the Federal Circuit Court of Australia or Federal Court.

To hear a general protections dispute involving a dismissal, both parties must:

- consent to having the FWC arbitrate the dispute; and
- ensure that the FWC is notified of the consent arbitration within 14 days of a certificate being issued.

The FWC can make the following orders in arbitration:

- Order an employee be reinstated;
- Order a payment of compensation;
- Make an order for any remuneration lost; and
- Maintain the continuity of a person's employment.

The FWC must be notified of the parties' agreement to consent arbitration within 14 days after the FWC certificate is issued.

Arbitration may be a good option for employees who need/wish to represent themselves and wish to avoid the legal technicalities of the court but be aware that fewer remedies are available at the FWC.

Warning: If you intend to apply for a consent arbitration at the FWC, you should also be prepared to file your claim in a Federal Court within the 14 days time limit just in case the Respondent fails to consent to the FWC arbitration or fails to respond at all.

Court hearing

A claim to a Federal Court must be made within 14 days after the FWC certificate is issued.

Representing yourself at a Federal Court is much more complicated than representing yourself at a FWC conference or FWC arbitration because you will have to comply with strict rules of evidence and procedure. It is recommended that you engage a lawyer to represent you at a Federal Court or at least obtain legal advice before trying to represent yourself. Unlike arbitrations, the Federal Court and the Federal Circuit Court of Australia have powers to make any order deemed fit.

Costs

Generally, each party pays its own legal costs. However in some circumstances, FWC may, on application within 14 days after FWC finishes dealing with the dispute, make an “order for costs” against one of the parties.

This can only happen in limited circumstances including if FWC (or a Federal Court) is satisfied that one of the parties:

- made the claim vexatiously or without reasonable cause; or
- a party’s unreasonable act or omission caused the other party to incur the costs.

If you are in doubt about the strength of your claim, you should obtain independent legal advice before or shortly after filing your claim. As an applicant, you run the risk of incurring a liability for costs from the moment you make your claim.

Fair Work Ombudsman’s claim

In addition to filing your claim at FWC within the **21 day** time limit, you can also file a ‘Workplace Complaint Form - Discrimination’ with the Fair Work Ombudsman (see ‘**Where to get help**’ below). The Fair Work Ombudsman has discretion to investigate your complaint and take your matter to court. Nevertheless, you should still file your General Protections Dispute termination claim within the **21 day** time limit because the Fair Work Ombudsman may not be able to assist you within that timeframe or at all.

If you are unsure about any information in this infosheet, it is important to obtain legal advice as soon as possible

Where to get help

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission Helpline	1300 799 675
Victorian Equal Opportunity & Human Rights Commission	1300 292 153
Anti-Discrimination Commission Queensland	1300 130 670
Equal Opportunity Tasmania	1300 130 670
Australian Human Rights Commission	1300 656 419
JobWatch (Telephone interpreters available for non-English speakers.)	Metro: 9662 1933 Rural: 1800 331 617 www.jobwatch.org.au
ACTU Worker Information line (for referral to a union):	1300 362 223
Legal Referral Service (Law Institute of Victoria)	9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	6234 4133