

Am I being treated fairly at work?

What are my employment rights?

Where do I go for help?

GENERAL PROTECTIONS DISPUTE (NON-TERMINATION) CLAIM

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.

Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees (including job applicants and, in certain circumstances, independent contractors in **Tasmania** and **Queensland** only.

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

Introduction

This infosheet is designed for eligible workers (including independent contractors and job applicants) who have been subjected to unlawful adverse action but, if employed as an employee, have not been dismissed.

If you were an employee and you have been dismissed, you only have **21 days** from the date your dismissal took effect to file a General Protections Dispute Termination Claim or, if eligible, an Unfair Dismissal claim at the Fair Work Commission (FWC).

See JobWatch's '*Unfair Dismissal*' and '*General Protections Dispute Termination Claim*' infosheets for more information.

© Job Watch Inc - July 2020

Employment Rights Information for Workers – Job Watch Inc is an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to workers.

Hours: Mon-Fri 9am-5pm (Wednesdays until 8:30pm) .

What action can I take?

The General Protections in the *Fair Work Act 2009* (Cth) (the Act) which commenced on 1 July 2009 make certain actions by an employer, prospective employer or principal in an independent contracting relationship specifically unlawful.

If you have been subjected to unlawful adverse action by your employer (excluding dismissal), prospective employer or principal (i.e. where you are an independent contractor or employee of an independent contractor), you may be able to file a General Protections Dispute Non-Termination claim at either the Federal Court or Federal Circuit Court ('FCC').

You have **6 years** from the date the unlawful adverse action took place (excluding dismissal) to file a claim. Alternatively, a voluntary conference can be held at the Fair Work Commission ('FWC') before filing a claim at the Federal Court or FCC if both parties agree to attend.

Whether or not you are an employee or independent contractor can sometimes be a difficult question to answer. If you are unsure whether you are an independent contractor or an employee, please call JobWatch's Telephone Information Service on 9662 1933 and/or see JobWatch's "*Independent Contracting Traps*" infosheet.

What are my rights?

Your employer or prospective employer (e.g. when you have applied for a job) must not take unlawful '**adverse action**' against you (see below for the definition of 'adverse action') because or partly because of one or more of the following prohibited 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 a **workplace right** (see definition of 'workplace right' below);
- 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?

Adverse action can be taken against you by:

- your employer/prospective employer, if you are an employee/prospective employee; or
- your principal/prospective principal, if you are an independent contractor/prospective independent contractor or employee of an independent contractor.

Employer-Employee

If you are an employee, your employer takes unlawful adverse action against you if your employer because or partly because of a prohibited reason:

- injures you in your employment (e.g. denies you a promotion because you are pregnant); or

- alters your position to your detriment (e.g. your employer changes the shift roster resulting in you having fewer shifts, or your employer changes your job to one of lower pay and/or status, i.e. demotes you, because you complained to your employer about being bullied); or
- discriminates between you and other employees of the employer (e.g. because you exercised your workplace right to take paid sick leave you were denied a bonus that was given to other comparable employees).

Prospective Employer–Prospective Employee

If you are a prospective employee, e.g. you have applied for a job, a prospective employer takes unlawful adverse action against you if the prospective employer because or partly because of a prohibited reason:

- refuses to employ you; or
- discriminates against you in the terms or conditions on which your prospective employer offers to employ you (e.g. by offering you less pay compared to other comparable employees because you are a woman).

Principal–Independent Contractor

If you are an independent contractor, a principal who has entered into a contract for services with you may have taken unlawful adverse action against you (or a person employed or engaged by you) where the principal:

- terminates the contract; or
- injures you in relation to the terms and conditions of the contract; or
- alters your position to your prejudice; or
- refuses to make use of, or agree to make use of, services offered by you; or
- refuses to supply, or agree to supply, goods or services to you.

Prospective Principal–Independent Contractor

If you are an independent contractor, a principal who proposes to enter into a contract for services with you may have taken unlawful adverse action against you (or a person employed or engaged by you) if the principal:

- refuses to engage you; or
- discriminates against you in the terms or conditions on which the principal offers to engage the independent contractor; or
- refuses to make use of, or agree to make use of, services offered by you; or
- refuses to supply, or agree to supply, goods or services to you.

If you are an independent contractor (or employee of an independent contractor), the circumstances in which you can make a General Protections claim against a principal are quite limited compared to employees' potential claims against employers because not all 'prohibited reasons' that apply to protect employees apply to protect independent contractors (or employees of independent contractors) (see below).

Grounds to make a General Protections Dispute Claim

Discrimination

It is against the law for your employer (or prospective employer) to take adverse action against you 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 (or prospective employer) can show that the reason for taking adverse action against you is:

- not unlawful under any Victorian or Federal anti-discrimination law; or
- taken because of the inherent requirements of your job; or
- taken by a religious institution in accordance with the doctrines of the religion.

This part of the General Protections does not apply to independent contractors.

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.

Some aspects of this part may also protect independent contractors (or persons employed or engaged by independent contractors) as well as employees.

It is unlawful for your employer, prospective employer or principal to take unlawful adverse action against you 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 (e.g. 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 workplace law (e.g. FWC, Fair Work Ombudsman, etc); or
- you are able to make a complaint or inquiry in relation to your employment (but not if you are an independent contractor because, if you are an independent contractor, then you are not an employee).

Example:

Jane is employed by a labour hire agency and is placed at a host business where she works as a process worker. Jane complains to her host about work health and safety issues and, because she complained, is told by the agency that the host does not want her to come back.

Jane may be able to make a General Protections Non-Termination claim against the host business.

Industrial activities

It is against the law for your employer, prospective employer or principal to take adverse action against 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 do 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 adverse action has been done for an **unlawful** reason unless your employer, prospective employer or principal can prove otherwise (known as reverse onus of proof); and
- it is still unlawful even if only **part** of the reason for the adverse action was unlawful. However, the unlawful reason must have been a **substantial and operative reason** for the adverse action.

In other words, an employer will be able to defend against your General Protections claim where they are able to prove that the unlawful reason, whilst one of the reasons for taking adverse action against you, was not a substantial and operative reason for taking adverse action.

What other rights do I have?

Misrepresenting employment as independent contracting arrangement

It is unlawful for an employer that employs, or proposes to employ, a person to represent to that person that the contract of employment under which the person is, or would be, employed by the employer is an independent contracting arrangement.

Dismissing to engage as independent contractor

It is unlawful for an employer to dismiss, or threaten to dismiss, a person who:

- (a) is an employee of the employer; and
- (b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work as an independent contractor.

Misrepresentation to engage as independent contractor

It is unlawful for an employer that employs, or has at any time employed, a person to perform particular work to make a statement that the employer knows is false in order to persuade or influence the person to become an independent contractor doing the same, or substantially the same, work for the employer.

How do I make a claim?

Court Claim

You can file a claim at either the Federal Court or FCC within **6 years** of the unlawful (non-termination) adverse action occurring. A small fee will be payable upon filing or you can apply for a fee waiver due to financial hardship. You can enquire about this with the Court registry and/or check the following websites for further details:

- http://www.federalcircuitcourt.gov.au/html/fees_general.html
- <http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees>

The relevant forms for a claim in the FCC are 'Form 4 – Claim under the Fair Work Act 2009 alleging contravention of a general protection' which must also be accompanied by the Fair Work Division Application Form.

You should also consider whether your claim is just against your employer/prospective employer/principal or whether other people involved should also be added as accessories, e.g. the person that made the decision to take adverse action.

For this and other reasons, you should obtain legal advice before filing your claim at court.

Voluntary conference at FWC

A voluntary conference at FWC can be held to attempt to resolve the matter if both parties (e.g. you and your employer) agree to attend. To apply for a conference, you have to fill out an application form (Form F8C — General Protections Application Not Involving Dismissal), pay the filing fee (currently \$74.50) and file the application to FWC either online, by post, fax or personal delivery to FWC (Level 4, 11 Exhibition Street, Melbourne 3000). The form is available on the FWC's website. You can also apply for a fee waiver at FWC (see below).

The conference generally takes place within a few weeks of the application being filed, provided your employer, prospective employer or principal agrees to attend (as the conference is voluntary).

If a settlement is not reached at the conference, you may proceed with your claim at either the Federal Court or FCC if you are still within the 6 year time limit (mentioned above). If you do nothing after the conference, your claim will lapse. If you decide to proceed to court, you should obtain legal advice before filing a claim.

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 application form.

WHAT HAPPENS AT A CONFERENCE

The purpose of the Conference is to bring you and your employer, prospective employer or principal together to try and resolve the matter without going 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 you receive an offer of settlement, you should obtain 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.

REPRESENTATION BY A LAWYER AT A CONFERENCE

Lawyers play a limited role at FWC conferences. Lawyers are not able to represent a person before the Commission without the Commission's permission. However, if or when you file your claim in the Federal Court or the FCC, you are entitled to be represented by a lawyer.

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 run by the Law Institute of Victoria will provide you with an initial consultation of up to 30 minutes free of charge.

SELF-REPRESENTATION

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 and/or circumstances.

You should explain why you think the adverse action you have suffered is unlawful, taking into account the grounds of your claim.

Your employer, prospective employer or principal 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 employer, prospective employer or principal have agreed to settle your claim; and
- in return for compensation, you will not take any further action against your employer, prospective employer or principal in the future over any and all matters arising out of or related to circumstances of your claim.

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, prospective employer or principal, 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 your claim; and
- you have received the settlement monies (if any); and
- the funds (if any) have been cleared.

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

IF NO SETTLEMENT IS REACHED AT A CONFERENCE

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

- to discontinue your application by filing a ‘Notice of Discontinuance’ form (Form 50) with FWC; or
- to proceed to have your claim heard at the FCC or the Federal Court.

COURT HEARING

A claim to the Federal Court or FCC must be made within **6 years** of the unlawful (non-termination) adverse action occurring.

Representing yourself at the Federal Court or FCC is much more complicated than representing yourself at a FWC conference 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 the Federal Court or FCC or at least obtain legal advice before trying to represent yourself.

In terms of remedies, the Federal Court and the FCC have powers to make any order deemed fit which usually includes financial compensation.

COSTS

Generally, each party pays its own legal costs. However, in some circumstances, the FWC, FCC or Federal Court may make an “order for costs” against one of the parties.

This can only happen in limited circumstances including if FWC, Federal Court or FCC 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 CLAIM

In addition to filing your claim at FWC for a voluntary conciliation conference, you can also file a 'Request for Assistance – Workplace Dispute' form with the Fair Work Ombudsman. The Fair Work Ombudsman has discretion to investigate your complaint and take your matter to court.

Where to get help

For further information regarding the General Protections, you may wish to contact the relevant organisations below:

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 <i>(Telephone interpreters available for non-English speakers.)</i>	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

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