

What are my employment rights?

Am I being treated fairly at work?

Where do I go for help?

# RACE DISCRIMINATION

## 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 employees only. If you are not a Victorian employee, you should obtain specialist legal advice about your case as soon as possible.

This infosheet discusses State and Commonwealth anti-discrimination laws, 'General Protections Dispute' termination and non-termination claims as well as unfair dismissal. It is designed to help you as an employee identify your rights and to take the most appropriate action if you believe you have been discriminated against because of your race.

## Who can use this infosheet?

This infosheet is designed for Victorian employees only.

If you are a **Victorian** employee, you can use this infosheet unless you are or 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 an essential services employee, you may still have rights under State and Commonwealth anti-discrimination laws (see below) and/or the unlawful termination provisions in the *Fair Work Act 2009* (Cth) (**21 day time limit**) so you should obtain legal advice regarding your situation as soon as possible.

## What action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred, you may be able to make either:

- an '**Unfair Dismissal**' claim to the Fair Work Commission (FWC). Please see JobWatch's 'Unfair Dismissal' infosheet for more information. Note: you only have **21 days** from the date that your dismissal took effect to file your claim and strict eligibility requirements apply;
- a **State or Commonwealth 'discrimination complaint'** to Victorian Civil and Administrative Tribunal **12 months** or Australian Human Rights Commission **6 months** from the date of the discriminatory conduct; or

- a **‘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. If other unlawful ‘adverse action’ was taken against you but you were not dismissed, you have **6 years** to file a ‘General Protections Dispute’ non-termination claim at the Federal Circuit Court or Federal Court of Australia from the date of the unlawful ‘adverse action’ taking place.

Generally, you **must choose** to make either an Unfair Dismissal, discrimination complaint or a General Protections Dispute claim because you can only make one claim at a time in relation to the same conduct. Sometimes, it may be possible to file a claim about a dismissal and a claim about conduct that occurred prior to that dismissal. Either way, you should call JobWatch for tailored legal information or obtain legal advice about your specific situation as soon as possible – see ‘Where to get help’ at the end of this infosheet.

## **Race discrimination – *Equal Opportunity Act 2010 (Vic)***

The Victorian *Equal Opportunity Act 2010 (EO Act)* makes it unlawful to discriminate against a person because of certain **attributes**, including **race**, in the area of employment, which covers employees and independent contractors.

### **What is meant by the term ‘race’?**

The EO Act defines **race** to include:

- (a) colour;
- (b) descent or ancestry;
- (c) nationality or national origin;
- (d) ethnicity or ethnic origin;
- (e) if 2 or more distinct races are collectively referred to as a race—
  - (i) each of those distinct races;
  - (ii) that collective race.

### **When are employees protected against discrimination?**

Employees (including independent contractors) are protected from discrimination at all stages of employment, including:

- recruitment, including how positions are advertised and how interviews are conducted;
- being offered unfair terms and conditions of employment;
- being denied training opportunities, promotion, transfers, performance pay or other employment-related benefits; and/or
- being unlawfully dismissed or demoted.

### **What is discrimination?**

Discrimination means **direct** or **indirect** discrimination on the basis of an attribute including a characteristic that a person with that attribute generally has or that is generally imputed to a person with that attribute.

### **Direct discrimination**

Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably substantially because of that attribute.

For example, an employer refuses to employ a person because of their race.

### **Indirect discrimination**

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—

- (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- (b) that is not reasonable.

For example, an advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of their race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.

In determining whether or not a person discriminates, the person's motive is irrelevant.

### **Will my employer be liable for discrimination?**

If a person engages in discriminatory conduct during their employment then the employer is vicariously liable for the discriminatory conduct unless the employer took reasonable precautions to prevent their employee from engaging in discriminatory conduct.

It is also unlawful to victimise a person meaning, for example, dismissing or threatening to dismiss an employee because they made a complaint about discrimination.

Exceptions and exemptions may apply – see ‘Where to get help’.

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## **How to make a complaint - EO Act – 12 months**

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is an independent body with responsibilities under the EO Act including complaint handling.

If a complaint of discrimination is made to VEOHRC, VEOHRC will assist the parties to try reach a voluntary settlement usually by conducting a conciliation. It is not mandatory to file a complaint at VEOHRC and your employer or prospective employer can choose not to engage in the process.

If the VEOHRC conciliation is unsuccessful or you choose not to file a complaint at VEOHRC, you have **12 months** from the date of the discriminatory conduct to file a complaint at the Victorian Civil and Administrative Tribunal (VCAT). VCAT has the power to hear and determine your complaint and award you compensation if your complaint is successful.

See ‘Where to get help’.

If you file a complaint with VEOHRC or VCAT, you cannot then change to the Commonwealth jurisdiction (see below).

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## ***Racial Discrimination Act 1975 (Cth)***

The *Racial Discrimination Act 1975* (RD Act) also makes race discrimination unlawful in the area of employment which covers all types employment relationships, including Commonwealth Government employees, state government employees and private sector employees as well as independent contractors.

### **What is meant by the term ‘race’?**

Under the RD Act, race means race, colour, descent or national or ethnic origin.

### When are employees protected against discrimination?

The RD Act covers situations where, because of your race, you have been:

- refused employment;
- dismissed;
- denied a promotion, transfer or other employment-related benefits;
- given less favourable terms or conditions of employment;
- denied equal access to training opportunities;
- selected for redundancy; and/or
- harassed.

### What is discrimination?

Similar to the EO Act, the RD Act uses the concepts of direct and indirect discrimination to define what is unlawful discrimination.

### Will my employer be liable for discrimination?

If a person engages in discriminatory conduct during their employment then the employer is vicariously liable for the discriminatory conduct unless the employer took all reasonable steps to prevent their employee from engaging in discriminatory conduct.

#### Case study: Example of race discrimination and victimisation/unlawful adverse action

A Chinese man, working as a labourer in construction, claimed that his co-workers used offensive language, such as 'gook' and 'slope', in his presence.

He made a complaint to the company director which led to his co-workers refusing to work with him. This led to him being made a casual, and eventually, not being offered any more work by his boss.

Exceptions and exemptions may apply – see 'Where to get help'.

## How to make a complaint – RD Act – 6 months

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The Australian Human Rights Commission (AHRC) oversees the RD Act and other Commonwealth anti-discrimination laws. To start a complaint, it is mandatory to first file a complaint with the AHRC which will conduct a conciliation to try to settle the dispute by agreement. It is mandatory for the parties to attend the AHRC conciliation.

You have **6 months** from the date of the discriminatory conduct to file your complaint at the AHRC.

If your complaint is not settled at the AHRC conciliation, the AHRC will terminate your complaint and you then have 60 days from the date your complaint is terminated to file an application in the Federal Circuit Court or Federal Court of Australia.

The Federal Circuit Court and the Federal Court of Australia have power to hear and determine your claim and award you compensation if your claim is successful.

## General Protections Dispute claims - What are my rights?

Under the *Fair Work Act 2009* (Cth) (FW Act), your employer or prospective employer must not take unlawful **'adverse action'** against you (for example, by terminating your employment, demoting you or refusing to employ you) because or partly because of your **race, national extraction and/or social origin** so long as that reason was the substantial and operative reason for the unlawful adverse action.

Note: the meaning of **race, national extraction and social origin** is not defined in the FW Act but is likely to have a similar meaning to that in the EO Act and/or the RD Act.

### What is adverse action?

'Adverse action' by an employer or prospective employer against an employee or prospective employee means:

- (a) dismissing the employee;
- (b) injuring the employee in his or her employment;
- (c) altering the position of the employee to the employee's prejudice;
- (d) discriminating between the employee and other employees of the employer;
- (e) refusing to employ the prospective employee; and/or
- (f) discriminating against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.

## Do I have grounds to make a claim?

### General Protections - Discrimination

You can only make this claim if you are or were an employee or prospective employee.

It is against the law for your employer to take unlawful 'adverse action' against you because of your **race, national extraction and/or social**.

It is a defence if your employer can show that the reason for the 'adverse action' is:

- not unlawful under any applicable Victorian or Commonwealth 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.

### Multiple reasons for action and reverse onus of proof

You should also note that:

- it is presumed that the reason for the 'adverse action' is an **unlawful** reason unless your employer or former employer can prove otherwise (known as reverse onus of proof); and
- 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 employer or former employer has to prove that the 'adverse action' it took against you was taken for a reason or reasons that do not include an unlawful reason.

**If you have been dismissed, you only have 21 days from the date your dismissal took effect to file a General Protections Dispute termination claim at the Fair Work Commission (FWC).**

**If you have not been dismissed but other unlawful 'adverse action' has been taken against you, you have up to 6 years from the date the unlawful 'adverse action' occurred to file your claim in**

the Federal Circuit Court or Federal Court of Australia. A voluntary conference is available first at FWC but it is not mandatory for the parties to attend.

## 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 an Unfair Dismissal or General Protections Dispute termination claim so long as the termination of your employment was at the initiative of your employer and, if claiming General Protections, 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).

## General Protections Dispute – Termination claim

### 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](http://www.fwc.gov.au)

There is a small filing fee (indexed annually) but this can be waived if you are suffering financial hardship.

## Further information

Depending on your specific situation, you should also see JobWatch's other relevant infosheets being:

'Unfair Dismissal';

'General Protections Dispute' Termination claims;

'General Protections Dispute' Non-termination claims; and

'Constructive Dismissal'.

These infosheets are available at [www.jobwatch.org.au](http://www.jobwatch.org.au)

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

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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
Victorian Civil and Administrative Tribunal	1300 018 228
Legal Referral Service (Law Institute of Victoria)	9607 9311
ACTU Worker Information line (for referral to a union)	1300 362 223
Australian Human Rights Commission	1300 656 419
JobWatch	Metro: 9662 1933
<i>(Telephone interpreters available for non-English speakers)</i>	Rural: 1800 331 617
	<a href="http://www.jobwatch.org.au">www.jobwatch.org.au</a>

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.