

# Family and Domestic Violence and Employment Law

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**24 June 2021**

# Housekeeping



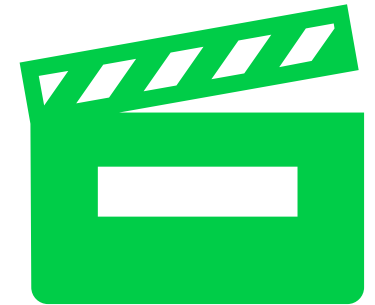
**Q&A**



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**Disclaimer - what we are discussing here today is general legal information, not legal advice!  
Always seek tailored legal advice from a lawyer about your individual situation.**

# Today's topics

- What does JobWatch do & how can we help
- FDV is a workplace issue: importance of understanding employment rights
- Leave & requests for flexible working arrangements
- Unfair dismissal
- General protections disputes
- Unlawful discrimination
- Occupational Health and Safety

# About JobWatch

Victoria's only specialist employment law community legal centre, supporting over 12,000 people every year with their rights at work.



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**Telephone  
Information Service**



**Community Legal  
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# Terminology

- We know that FDV is gendered and that the majority of people who experience it identify as women.
- Hence, we tend to use gendered language.
- However, comparable or worse statistics of FDV have been found for members within LGBTIQ+ communities (Hill et al., 2020). We need to be careful that our language does not make these communities invisible.

**Domestic violence**

## 'The worst year': domestic violence soars in Australia during Covid-19

Case numbers increase dramatically and frontline workers say support services are struggling to help those in need

- ['Heartbreaking end to a life': alleged domestic violence deaths in Australia in 2020](#)
- ['Time for action': three international students allegedly murdered amid coronavirus](#)

**Else Kennedy**

Tue 1 Dec 2020 06.00  
AEDT



**Domestic violence**

## 'Time for action': three international students allegedly murdered amid coronavirus

Vulnerable international students may be at increased risk of domestic violence during the pandemic

- ['The worst year': domestic violence soars in Australia during Covid-19](#)
- ['Heartbreaking end to a life' - alleged domestic violence deaths in Australia in 2020](#)

**Else Kennedy**

Tue 1 Dec 2020 06.00



SBS News

Subscribe

## Family violence prevention workers continue to help victim survivors during COVID-19

ABC Goulburn Murray / By Courtney Howe and Will Kendrew

Posted Wed 4 Nov 2020 at 6:30am, updated Wed 4 Nov 2020 at 5:56pm



## Three-quarters of temporary migrants reporting domestic violence during coronavirus lockdown fear for their lives



# Statistics

- 1 in 4 Australian women have experienced, since the age of 15, physical and/or sexual violence by a current or previous cohabiting partner.
- Almost 10 women a day are hospitalised after being assaulted by their spouse or partner.
- On average, 1 woman a week is killed because of violence from a current or previous partner.
- Between 55% - 70% of women who are experiencing (or have experienced) violence are in the workforce = approx 800,000 women, or around 1 in 6 female workers.
- Financial dependence on an abusive partner makes it difficult for people experiencing family violence to leave their unsafe environment.
- **Understanding employment rights and responsibilities is important for both employees and employers.**

## Sources

Our Watch

Bryant, W. and Bricknell, S. Homicide in Australia 2012-13 to 2013-14

ABS, Personal Safety, Australia, 2005 (Reissue)

# **What employment rights do employees experiencing FDV have?**



# The Fair Work Act 2009

## FAIR WORK ACT 2009 - SECT 106B Taking unpaid family and domestic violence leave

### FAIR WORK ACT 2009 - SECT 106B

#### Taking unpaid family and domestic violence leave

(2) Family and domestic violence is violent, threatening or other abusive behaviour by a close relative of an employee that:

- (a) seeks to coerce or control the employee; and
- (b) causes the employee harm or to be fearful.

# Unpaid FDV Leave

- All employees (FT, PT, casual) are entitled to 5 days of unpaid FDV leave in a 12 month period.
- The entitlement arises as soon as the employee commences their employment.
- The entitlement is unpaid, however some enterprise agreements may provide paid FDV (NB: FWC currently reviewing entitlements to paid FDV leave in certain modern awards).

# Unpaid FDV Leave: Requirements

## **Employees are entitled to FDV leave if:**

They are experiencing FDV; and they need to do something to deal with the impact of FDV (e.g. attend urgent court hearing, access police services, relocate); and it is impracticable for the employee to do that thing outside their ordinary hours of work.

## **Notice and evidence requirements:**

Notice must be given to the employer as soon as practicable (this can be after the leave is taken). Notice must also advise of the expected period of leave. Employee must provide employer with evidence that would satisfy a reasonable person that the employee is entitled to FDV leave (e.g. court documents, IVO).

## **Confidentiality:**

Employers have an obligation to ensure the notice or evidence given by the employee taking FDV leave is treated confidentially, as far as is reasonably practicable.

# Personal / Carers Leave

- All employees (except casuals) are entitled to a total of 10 days of paid personal/carer's leave for each year of service.
- This leave accrues progressively during a year of service (ie, it is not immediately available upon commencement of the job).
- The notice and evidence requirements are the same for unpaid family and domestic violence leave.
- Eligible employees are able to take this leave if:
  - They are experiencing FDV – if they are not fit for work because of a personal illness or injury; or
  - A member of employee's immediate family/household is experiencing FDV – if the person requires care/support because of a personal illness/injury or an unexpected emergency
    - *NB: Casual workers can access 2 days of unpaid carer's leave for this reason.*

# Case Study: Jean Misses Work



Jean tells you that she is currently working but she is worried she'll lose her part-time job. She has been experiencing family violence and because of this she sometimes doesn't attend her set shifts. Her employer has recently given her a formal warning due to these absences.

# Flexible Working Arrangements

- An employee may request flexible working arrangements on the ground that they are:
  - experiencing violence from a member of their family or
  - they need to provide care/support to a member of their immediate family or household who requires care or support because they are experiencing violence from a member of their family.
- Examples of changes in working arrangements include **changes in hours of work, changes in patterns of work and changes in location of work.**

# Flexible Working Arrangements: Requirements

## Employment type:

- FT/PT employees: At least 12 months continuous service with employer immediately before making request
- Casual employees: must be a long term casual immediately before making the request. A long term casual is a casual worker who has been employed on a regular and systematic basis for at least 12 months

## Formalities:

- The request must be in writing
- The employer must then respond in writing within 21 days, stating if they accept/refuse and with reasons if they refuse

# If Flexible Working Arrangements Are Refused

- An employer can only refuse a request for flexible working arrangements on 'reasonable business grounds'.
- If an employee has had their request for flexible working arrangements refused, they can:
  1. **Complain** to the Fair Work Ombudsman
  2. **Complain** to their Union
  3. **If they have not been fired:** trigger the dispute mechanism clause under their award or enterprise agreement; and/or consider lodging a general protection (non-termination) claim within 6 years of the incident
  4. **If they have been fired:** consider lodging an unfair dismissal or general protections (termination) application within 21 days of the dismissal



# Case Study: How We Assisted Suniti

Suniti was employed on a full-time basis. 6 months into her employment, Suniti started experiencing domestic violence. **Her abusive partner began contacting Suniti's workplace and threatening her.** As a result, **Suniti missed 2 days' work** while she arranged an IVO.

Suniti's employer expressed dissatisfaction with her inability to separate her personal issues from work. Suniti didn't attend work the next day in order to seek medical attention for her distress, and **her employer issued her with a written warning in relation to the absences.**

Suniti was forced to flee her home later that month and was unprepared to come into work the next day. Her employer then requested a face-to-face meeting. Suniti responded to the request by asking about her entitlement to domestic violence leave and flexible working arrangements. **Her employer denied that she had any entitlements. Suniti was dismissed the next day.**

JobWatch assisted Suniti with a **General Protections (Termination) claim**. We argued that Suniti was dismissed because she exercised her workplace right to take unpaid family and domestic violence leave and requested flexible working arrangements. The matter settled out of court.

# Unfair Dismissal and FDV

- An unfair dismissal claim is a claim that a dismissal was harsh, unjust or unreasonable and was not a case of genuine redundancy.
- The Fair Work Commission considers a number of factors when deciding unfair dismissal cases, such as whether there was a valid reason for the dismissal and whether adequate warning was provided.
- In recent years, FDV has been considered a relevant factor when determining whether an employee's dismissal was harsh, unjust or unreasonable.

**Eligibility: Employees must meet the 'minimum employment period'**

FT/PT: 1 year for small business employers or 6 months for other employers

Casual: Same as above, however must be employed on a regular and systematic basis where there was a reasonable expectation of continuing employment

# How we assisted Leyla

- Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd [2015] FWC 4864, Fair Work Commission, 23 July 2015
  - Employee was a full-time architectural draftsman. She worked for the same employer and in the same open-plan office as her partner
  - Following FDV being perpetrated against her by her partner, an Intervention Order was issued against the Applicant's partner
  - The IVO allowed her to continue to work in the same office as her partner, however she was dismissed when her employer decided she couldn't work in the same office as her partner. Her partner remained employed.
- Held:** The FWC found that the IVO was not a valid reason for her dismissal relating to her capacity to perform her role. Her dismissal was found to be unfair.

# More examples of UD matters

## King v D.C Lee & LJ Lyons [2016] FWC 1664

- Employee was a solicitor at a law firm.
- During her employment she experienced FDV by an ex-partner. This meant that she needed to attend numerous court hearings during work hours.
- Employee was dismissed for misconduct when she failed to inform the Partners of the firm that she would not be back in the office at a particular time when a FDV trial was delayed.
- Due to shame over the FDV, she had not disclosed the reason for her lateness.

**Held:** The FWC found that despite breaching her obligations to her employers, the dismissal was nonetheless unfair. It was also relevant that she demonstrated a continued preparedness to take on work whilst she was waiting for the delayed FDV hearing.

# More examples

## Meyer v BMS Retail Group Ltd [2018] FWC 7315

- Applicant was employed as a retail worker, and was dismissed due to frequent lateness and leaving the store during shifts without notifying management.
- The Applicant cited FDV as the reason for her behaviour.

**Held:** the FWC found that this did not provide an adequate excuse for her behaviour, and that there was a valid reason for her dismissal relating to her conduct (and that her dismissal was not unfair).

- It was relevant that her employer went to '*extraordinary lengths over an extended period of time*' with her FDV issues, and were 'tolerant' and 'supportive' of these personal issues.
- This included organizing and paying for her to attend counselling, being flexible in allowing her time off work and allowing her to bring her daughter to work.

# More examples

## Manos v Transport Workers' Union of Australia [2020] FWC 5252

- Applicant had been working as an industrial administrator for over 14 years when her position was suddenly made redundant with no notice or consultation.
- During the last three months of her employment she needed to attend hearings relating to FDV. She kept her employer informed about this.

**Held:** FDV contributed to the finding that her dismissal was unfair (harsh and unreasonable).

# Case Study: How We Assisted Sally

**Sally worked for a business that was owned and run by her ex-husband's family.**

One day, Sally's ex-husband refused to return the children after their weekend visit. Sally went to the police, who suggested she contact her ex-husband's parents to ask them to persuade him to return the children. She contacted her in-laws, but the conversation ended in an argument.

**Sally made a post to a private social media account referring to her argument with her ex in-laws. She deleted the post a few days later, but her employer found out and summarily dismissed her.**

With JobWatch's assistance, Sally lodged an **unfair dismissal application**. We argued that there was no valid reason for the dismissal as the posts were not related to her duties and were made on a personal account outside of work hours. We also argued that she had not been given sufficient warning or the opportunity to respond. **The matter settled at conciliation.**

# General Protections – Adverse Action

- It's unlawful for employer to take **adverse action** against an employee because they have (or have exercised) a **workplace right**
- **Adverse action:** e.g. dismissal, demotion or altering a worker's hours etc.
- **Workplace right:** Broadly described as an employment entitlement and the ability to exercise and enforce that entitlement. This includes the right to make a complaint or inquiry

## Eligibility

This claim can be made by employees, prospective employees and independent contractors.



# General Protections – Temporary Absence From Work Due To Illness/Injury

- It is unlawful for an employer to dismiss an employee because of their temporary absence from work due to illness/injury
- However: An absence must not extend for more than 3 months, **and** total absences within 12 month period must not add to more than 3 months, **unless** the employee is on paid personal/carer's leave for the duration of the absence

## Case Study

Scott is dismissed while taking 3 weeks' off work to recover from injuries sustained during a FDV incident. Scott provided a medical certificate to the employer immediately after the incident and there is no other apparent reason for the dismissal.

# Unfair Dismissal / General Protections – Extension of Time

**! Strict 21-day time limits apply for both unfair dismissal & General Protections (involving Dismissal) applications.**

- In both case, the application must be lodged with the FWC.
- Extensions of time are only granted in exceptional circumstances.
- In recent years, the FWC has shown a preparedness to consider FDV as an exceptional circumstance justifying an extension of time, however it depends on the facts

# Examples of decisions re extension of time

## Covalciuc v Philmac Pty Ltd [2019] FWC 7263

- Employee was employed on a series of fixed term contracts as a Procurement Officer. She claimed that after she raised a bullying complaint she was told that her contract would not be renewed
- The Applicant lodged her GPDT application 787 days out of time
- She argued that bullying and harassment in the workplace led to various mental health crises following her dismissal and which required urgent care
- She also raised a marriage breakdown and experience of FDV, but did not rely on it

**Held:** The FWC accepted that the Applicant had experienced a '*difficult time*' but there was a lack of evidence supporting her claims.

They also found that she had a weak case for GPDT based on the evidence.

# More examples

## Liam Wilson v Quatius Logistics Pty Ltd [2020] FWC 3110

- Ee was employed as a warehouse assistant for 5 years before being dismissed
- The Applicant lodged his UD application 13-days late
- There was evidence that he had unsuccessfully attempted to make a UD application that was only 2 days late
- There was also evidence that he had been sick after he was dismissed, and that the FDV he was experiencing had escalated during COVID-19

**Held:** The FWC noted that the Applicant was suffering from severe depression and anxiety, nightmares and regular panic attacks linked to a history of repeated FDV, and that this had escalated due to the COVID-19 public health stay at home orders. This was one (of several factors) that weighed in favour of additional time being granted.

# Case Study: Jean has now been dismissed



Jean comes back to you and explains that 5 weeks ago she was dismissed from her job, where she had been working for 3 years on a part-time basis. Jean says she was fired shortly after she told her boss that her absences from work were due to family violence, and that she was going to need to access the FDV unpaid leave to organise alternative accommodation.

Jean says that after she was dismissed, she needed to apply for government assistance, attend job interviews and attend a hearing for her IVO. She became overwhelmed and anxious. Her doctor provided her with heavy medication which made it difficult for Jean to think clearly.

# Discrimination: FDV still not a protected attribute!

- We have both State and Cth legislation that protects employees and contractors from discrimination based on a *protected attribute*
- Discrimination means:
  - A person is treated less favourably than other workers because of the protected attribute or
  - The employer wants to impose a condition or practice that is unreasonable and has the effect of disadvantaging people with a protected attribute
- Protected attributes include: sex, age, race, disability etc **BUT** being a victim of FDV is not a protected attribute
- Therefore, if an employee wants to argue that they were discriminated against on the basis of FDV they have to try to link the FDV to another protected attribute, such as sex

# Case Studies

## Wright v Callum Vacheron, Wallace Bishop and Anor [2018] QIRC 007

- Applicant (hired through a labour hire agency) called her boss to explain she would be taking sick leave due to FDV. She later texted him saying she would be at work the next day
- Although she did not receive a response from her boss, she went to work the next morning
- Later that day, she was told by her boss that she was no longer needed as they couldn't afford to pay her. He also sent an email to her employment agency explaining that she had 'too many personal problems'
- Applicant claimed that her dismissal after failing to attend work due to a FDV incident was sex discrimination, because women are more prone to FDV than men

**Finding:** QIRC rejected this argument on the basis that women are not the only victims of FDV nor are the majority of women victims of FDV. They also rejected the notion that being a victim of FDV is a characteristic that women generally have

# Workplace Health and Safety Laws

- Under occupational health and safety laws, an employer must, as far as is reasonably practicable, provide and maintain a safe working environment for workers
- This duty extends to all workers, including independent contractors
- Where injuries from family and domestic violence arise out of or in the course of employment, it may be available to the worker to claim workers' compensation
- We normally refer these clients and callers to WorkSafe – they investigate claims and have the power to prosecute employers



# FDV In The Workplace

- FDV increased during lockdown and as people were required to work from home or were stood down
- In claiming compensation for workplace injuries, the biggest hurdle is that workers must show that their injury arose out of or in the course of employment in order to be entitled to compensation
- A recent decision of the NSW Supreme Court indicates that in *some circumstances*, an employer can be held responsible for FDV perpetrated against an employee working from home

# Example

## Workers Compensation

### ***Workers Compensation Nominal Insurer v Hill*** [\[2020\] NSWCA 54](#)

**Decision date:** 31 March 2020

Basten JA, Payne JA, Simpson AJA

In 2010 Michel Carroll was killed by her de facto partner Steven Hill. Both were employed by a family company, S L Hill & Associates, which operated from the family home. The attack by Hill was inspired by paranoid delusions and, having been charged with murder, he was found not guilty on the ground of mental illness. At the time of her death, Ms Carroll had two dependent children. The children made claims for workers compensation. S L & Hill Associates has been deregistered and the claims were resisted by the Workers Compensation Nominal Insurer.

In 2018 an Arbitrator at the Workers Compensation Commission determined that Ms Carroll had died as a result of injury arising out of and in the course of her employment and ordered payments in favour of the two children. In 2019 the Insurer lodged an appeal. The appeal was dealt with without an oral hearing and was dismissed by the Deputy President of the Commission. The Insurer brought an appeal challenging this decision, challenging certain findings of fact relating to whether Ms Carroll's injury arose in the course of her employment, and whether her employment was a substantial contributing factor to her injury.

#### **Held:**

- Appeal dismissed: [59]. There was no legal error by the Deputy President in rejecting the appeal: [58].
- The line between preferring a different result and identifying error is not easy to draw. If, on an appeal by way of rehearing, the court asked whether the findings of fact were “open” to the trial judge, that might demonstrate an unduly limited understanding of the court’s function; however, that language is not out of place in determining an appeal against a decision of the Commission constituted by an Arbitrator: [20].
- It could not be said that there was no evidence capable of supporting the findings that Ms Carroll was “actually performing employment-related duties” and was “on call” at the time of her death: [43]-[44]; nor that there was no evidence to support the finding that there was a causal connection between the attack upon Ms Carroll and her employment: [49].
- The Deputy President was satisfied that Ms Carroll’s employment was a substantial contributing factor to her injury within the meaning of the *Workers Compensation Act 1987* (NSW): [55]. The matters she identified in determining this were appropriate: [51].

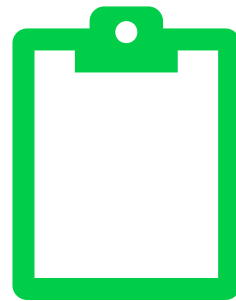
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