

General Protections Dispute - Termination (21 Days to file a claim)

JobWatch
Employment Rights Legal Centre

This Fact Sheet 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).

A General Protections Dispute - Termination claim does not apply to independent contractors unless you're in a sham contracting arrangement. If you think this is you or if you are unsure, seek further assistance from JobWatch, your union, or a lawyer. See JobWatch's 'Independent Contracting Traps' Fact Sheet for more information.

What action can I take?

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

- an unfair dismissal claim to the Fair Work Commission (FWC); or
- a General Protections Dispute - Termination (GPD-T) claim to the FWC if the termination of your employment was unlawful 'adverse action'.

You must choose to make either an unfair dismissal claim or a GPD-T 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, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, breastfeeding, 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;
- you have a workplace right;
- 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.

You have **21 days** to file your claim in the FWC from the date of the unlawful adverse action. The FWC may hold a conference to try and resolve the matter. 'Adverse action' does not include an action that is authorised by a state or federal law that is listed in the Act or its regulations.

Note: You have 21 days from the date your dismissal took effect to file your unfair dismissal or General Protections Dispute - Termination claim.

Disclaimer

This Fact Sheet 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 Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

JobWatch
www.jobwatch.org.au

Melbourne metro: (03) 9662 1933
Qld, Tas and regional Vic: 1800 331 617

Mon-Fri 9am-5pm
and until 8:30pm on Wed
(all times in AEDT)

What is adverse action? (cont.)

If you have not been dismissed but have been demoted, treated less favourably than other employees, or not offered employment for an unlawful reason, you may be able to make a General Protections Dispute – Non-Termination (GPD-NT) claim. For further assistance, contact JobWatch, your union or a lawyer.

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, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, breastfeeding, 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 state 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 three 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.

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 (e.g. a medical certificate or a statutory declaration) if your employer requires.

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 (e.g. you have rights under an Award, Enterprise Agreement or the Act);

See JobWatch's 'General Protections Dispute - Non-Termination claim' Fact Sheet for more information.

Note: 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 - Non-Termination claim within 6 years of the unlawful adverse action occurring.

Note: You are not on paid sick leave if you are absent from work and are receiving workers' compensation payments.

Note: 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 (cont.)

- you are able to initiate, or participate in a process or proceedings under a workplace law or workplace instrument such as a conference held by the 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. the FWC, Fair Work Ombudsman (FWO), etc); or
- you are able to make a complaint or inquiry in relation to your employment.

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'.

Multiple reasons for action and reverse onus of proof

You should note that if you believe that your employer has taken adverse action *because of* one or more of the protected reasons and you state that in your claim:

- 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
- 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.

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, or 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.

Note: If you think you will lose your job if you make a complaint to your employer, seek further assistance from JobWatch, your union or a lawyer first.

'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.

Note: If any of these things happen to you, you can seek further assistance from JobWatch, your union or a lawyer.

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

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

Can I make more than one claim?

You cannot make a GPD-T claim and an unfair dismissal claim at the same time. You have to choose one or the other. However, you do have the option of changing a GPD-T claim to an unfair dismissal claim (and vice versa), as long as it is within **21 days** since your dismissal.

If you decide to change claims more than **21 days** since the date of your dismissal, you should obtain legal advice before discontinuing your first claim. It can be difficult, because the FWC may not allow an extension of time to file your new claim.

Eligibility - Can I make a claim to the FWC?

You must be an employee

Workers engaged as independent contractors (sometimes called sub-contractors) are generally not entitled to make a GPD-T claim. In some circumstances workers who are called independent contractors are legally recognised to be employees.

If you are a genuine independent contractor and your contract is terminated 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. You have **6 years** from the date of the unlawful adverse action to file this claim.

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 ('Constructive Dismissal'), you should obtain legal advice before doing so because this is a very technical area of law and the FWC or a federal court may not agree that the termination of your employment was at the initiative of your employer. You should seek further assistance from JobWatch, your union, or a lawyer.

You must make your claim within the 21 day time limit

A GPD-T claim must be filed at the FWC within **21 days** from when the termination of your employment took effect. The 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 GPD-T claim is called a 'General Protections Application Involving Dismissal' (Form F8). It is available from the FWC. If you need assistance completing the application form, you may contact your union, a lawyer, or the FWC.

Make sure you file your claim with the FWC **before** the **21 day** deadline, even if you have not yet received legal advice. You can do this online, by post or fax, email or phone, or by personally delivering it to the FWC. The FWC will notify your former employer of your claim and give them a copy of your claim form.

See JobWatch's 'Unfair Dismissal' Fact Sheet for more information.

Note: 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.

See JobWatch's 'General Protections Dispute - Non-Termination claim' Fact Sheet for more information.

See JobWatch's 'Constructive Dismissal' Fact Sheet for more information.

Note: Seek legal advice before leaving your employment as Constructive Dismissal is a very technical area of law and the FWC or a federal court may not agree that you were forced to leave your employment.

Fair Work Commission
P: 1300 799 675
W: fwc.gov.au

Application form (cont.)

A small filing fee is required to be paid with your claim. This fee may be refunded if you discontinue your application at least **2 days** before a conference. Depending on your circumstances, it may be possible to apply for a waiver of the filing fee.

What happens next?

When you make an application to the FWC for a GPD-T claim, the FWC will usually list your matter for a conciliation conference. This will usually be held within 3-5 weeks of the FWC receiving your application.

If your employer thinks the FWC does not have the power to deal with your application (e.g. because you lodged your application out of time or because you were not dismissed), it should indicate this on its response form. The FWC will then decide whether to conciliate the matter or deal with any jurisdictional issues first. To decide whether you are eligible to make a claim, the FWC may conduct a jurisdictional hearing or it may decide this 'on the papers' (i.e. based on the written submissions of both parties).

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 conciliator of the FWC. The conciliator does not make a decision about who is right or wrong. Their role 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.

What remedy do I want?

Once you have established that you are eligible to make a GPD-T 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. Generally this includes one or a combination of compensation for lost wages, compensation for non-economic loss and reinstatement.

This means you can seek, for example, reinstatement to your position, compensation instead of reinstatement or a combination of both. You can also seek that your former employer pays a penalty to the Commonwealth Government, a particular organisation or you for breaching the law.

Do I need a lawyer or paid agent?

You are *not* obliged to retain a lawyer or paid agent. If you wish, you can retain a lawyer or paid agent and seek the permission of the FWC to be represented by that lawyer or paid agent. Before you retain a lawyer or paid agent you should consider:

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

Note: 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.

Note: The filing fee may be waived by the FWC if you can show that it would cause you "serious hardship". To be eligible, you must file a fee waiver application form at the same time as (or soon after) you file your claim.

Note: Interpreters may be provided free of charge in some circumstances. Contact the FWC for more information.

Note: The FWC is not able to provide you with legal advice.

Note: JobWatch recommends that you obtain legal advice about what remedy you are likely to receive, if any.

Do I need a lawyer or paid agent? (cont.)

Generally, you will have to pay your own legal costs regardless of the result of your case. Some employment law firms and advocates offer a “no-win-no-fee” arrangement which often means you don't have to pay all of their fee if you are not successful with your claim.

Representing yourself?

It is important to be prepared for the conference. The FWC conciliator 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.

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.

Discontinuing your matter

You should file a ‘Notice of Discontinuance’ form (Form 50) with the 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.

What if a settlement cannot be reached at a conference?

If a settlement is not reached at a conference, and there are no jurisdictional issues, the FWC will issue a certificate that will give the applicant **14 days** to either;

- proceed with the claim in the FWC via consent arbitration which requires the agreement of the respondent; or
- to file in the either of the federal courts which does not require the consent of the respondent. You should get advice about what may be best for you.

If the FWC is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, the FWC must issue a certificate stating that your dispute could not be resolved at a conference. If the 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.

Note: 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.

Note: 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.

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

Consent Arbitration

The FWC has the 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 a 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.

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

Court hearing

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. For further assistance, contact JobWatch, your union or a lawyer.

Unlike arbitrations, the Federal Court and the Federal Circuit and Family Court of Australia have powers to make any orders deemed fit.

Costs

Generally, each party pays its own legal costs. However in some circumstances, the FWC may, on application within **14 days** after the 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.

Fair Work Ombudsman's claim

In addition to filing your claim at FWC within the **21 day** time limit, you can also make a request for assistance with the FWO. The FWO has discretion to investigate your complaint and take your matter to court. Nevertheless, you should still file your GPD-T claim within the **21 day** time limit because the FWO may not be able to assist you within that timeframe or at all.

Note: 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 the FWC of the agreement to a consent arbitration.

Note: 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.

Note: 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.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Australian Human Rights Commission	1300 656 419
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	1300 292 153
Queensland Law Society (for referral to a lawyer)	1300 367 757
Queensland Human Rights Commission	1300 130 670
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133
Equal Opportunity Tasmania	1300 130 670

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Commonwealth of Australia Attorney-General's Department, the Victorian State Government, Victoria Legal Aid and Victoria Law Foundation.

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.