



Contents

- What are my rights?
- Do I have grounds to make a claim?
- What other rights do I have?
- Can I make more than one claim?
- Eligibility - Can I make a claim to FWA?
- How do I make a claim?
- Where to get help

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 Victorian workers

HOURS:

Mon - Friday
9.00am-5.00pm
(closed Tuesday
12.00noon - 2.00pm)

Metro
9662 1933
Rural
1800 331 617
www.jobwatch.org.au

Effective from 1st July 2009

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).

It is not intended to cover all your potential rights and entitlements and you should obtain legal advice before acting on any of the following information.

If you are employed in a state or territory other than Victoria, you also need to get specialist advice about your case.

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

- 'Unfair Dismissal' claim to Fair Work Australia (FWA). Please see JobWatch's 'Unfair Dismissal' infosheet for more information. **Note:** you only have **14 days** from the date that your dismissal took effect to file your claim;

OR

- 'General Protections Dispute' termination claim to FWA if the termination of your employment was unlawful 'adverse action' (see below). **Note:** You have **60 days** from the date your dismissal took effect to file your General Protections Dispute' termination claim.

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 FWA 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 (see 'Where to get help' on page 10).

What are my rights?

Your employer must not take unlawful 'adverse action' against you (for example, terminate your employment) for 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 2);
- you have a **workplace right** (see definition of 'workplace right' 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 10)

'**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.

Do I have grounds to make a claim?

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 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 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.

Regardless, 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 entitlements and your ability to exercise and enforce those 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 (i.e. you have rights under an Award, Enterprise Agreement or possibly your contract of employment);
- 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 FWA 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 Australia, Fair Work Ombudsman, etc); or
- you are able to make a complaint or inquiry in relation to 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 10)

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

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

- it is still unlawful even if only part of the reason for the termination of your employment was unlawful.

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.

For information on how to make a General Protections Dispute termination claim see page 6

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 on this page 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 FWA or a Federal Court may not agree that you were forced to leave your employment.

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

Remember time limits: You only have 14 days from date of your dismissal to file an unfair dismissal claim and 60 days from date of your dismissal to file a General Protections Dispute termination claim at FWA

Can I make more than one claim?

In general, 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 FWA 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 FWA 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).

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

Eligibility - Can I make a claim to FWA?

You must be an employee

Workers engaged as independent contractors (sometimes called sub-contractors) are 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 do not know what your employment status is, 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).

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 FWA 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.

The 60 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

- File your General Protections Dispute Termination claim at FWA within the 60 day deadline.
- Give a copy of the form to your employer, using the correct means as soon as reasonably practicable after filing your claim with FWA.

You must make your claim within 60 day time limit

A General Protections Dispute termination claim must be filed at FWA within **60 days** from when the termination of your employment took effect.

FWA 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 an '**Application for FWA to deal with a General Protections Dispute**' (Form 8). It is available from Fair Work Australia.

Fair Work Australia
Level 4,
11 Exhibition Street
Melbourne 3000
(GPO Box 1994)
Tel: 1300 799 675
Fax: (03) 9655 0401

Website: www.fwa.gov.au

Filing your claim

You need to file your claim with FWA and give a copy of your claim form to your former employer using the correct means (see below) as soon as practicable after the form is lodged with FWA.

You can file your claim with FWA on-line, by post or fax or by personally delivering it to FWA. You should be aware that FWA is not able to provide you with legal advice.

To properly give your

claim form to your employer you may:

- deliver the form in person; or
- send the form by registered post; or
- fax, provided that you keep a copy of the transmission record showing that the transmission was successful; or
- email, provided that you keep a printout of the 'sent item' showing your employer's email

address and date and time of transmission of the email.

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

- your union (if you are a member);
- a solicitor; or
- FWA.

Make sure you file your claim within the **60 day** deadline, even if you have not yet received legal advice.

Fees

A \$60.60 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 FWA if you can show that it would cause you "serious hardship". To be eligible, you must file a '**Fee Waiver Application Form**' with

FWA. This form is available from FWA 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 FWA can consider the merits of 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 (**60 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.

If you are eligible to make a General Protections Dispute termination claim, FWA **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 FWA will allocate a date for the Conference within 1-4 weeks of receiving the application. FWA 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 conciliator. The conciliator does not make a decision about

who is right and wrong. The role of the conciliator 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 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 FWA for more information (see 'Where to get help' on page 10).

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 pay 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 FWA.

If you are entitled to, or have leave of FWA 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 (see ‘Where to get help’ on page 10).

Representing yourself?

It is important to be prepared for the conference. The FWA 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.

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 FWA 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 FWA.

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 FWA;

or

- wait for the relevant documents to be prepared, including recommendations by FWA and decide whether to proceed with your claim to a

Federal Court.

If FWA is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, FWA must issue a certificate stating that.

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

If FWA considers that your claim would not have a reasonable prospect of success if it proceeds to a hearing at a Federal Court, it must advise the parties.

A claim to a Federal Court must be made

within **14 days** after the FWA certificate is issued.

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

Costs

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

This can only happen if FWA (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 with FWA within the **60 day** time limit, you can also file a ‘*Workplace Complaint Form - Discrimination*’ with the Fair Work Ombudsman (see ‘*Where to get help*’

on page 10). 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 60 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

Job Watch Inc
Metro: (03) 9662 1933
Rural: 1800 331 617

Fair Work Infoline
(Office of the Fair Work
Ombudsman)
13 13 94

Law Institute of Victoria
(for referral to a lawyer):
(03) 9607 9550

Fair Work Australia
Helpline (Unfair
Dismissal)
1300 799 675

Federal Court of
Australia and
Federal Magistrates'
Court of Australia
8600 3333

DISCLAIMER

Job Watch Inc disclaims any liability in respect of any action taken or not taken in reliance on the contents of this publication. This information is current at the time of printing July 2009.

The information in this infosheet is of a general nature only. It is not a substitute for professional legal advice. Readers should not act on the basis of any information contained here without first obtaining legal advice relevant to their particular employment situation.



JobWatch

Metro - 9662 1933
Rural - 1800 331 617

www.jobwatch.org.au