



McDONALD MURHOLME<sup>©</sup>



# FAIR WORK. LAWS. UNFAIR DISMISSAL

## USER GUIDE TO THE FAIR WORK ACT

**Have you been dismissed from your employment?**

**Have you been forced to resign?**

**Are you being adversely treated in your employment?**

**What are your rights as an employee?**

**How does the law protect employees?**

.....

This is a how-to guide to navigate possible causes of action under the *Fair Work Act 2009* (Cth) where your employment has been terminated, if you have been forced or coerced into resigning your employment or if you are being adversely treated in employment.

You may make either an unfair dismissal application or a general protections application.

**You only have 21 days from the date of termination of your employment to lodge an unfair dismissal or general protections application with the Fair Work Commission (FWC).**

This guide is not a substitute for legal advice. It is a resource for those unable to afford legal advice or for practising solicitors. You may find a free online copy of the *Fair Work Act 2009* (Cth) at <http://www.austlii.edu.au/>



**This User Guide is current as of January 2020 ©**

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## **Section 1:**

# **IF YOU HAVE BEEN DISMISSED FROM YOUR EMPLOYMENT**

## If you have been dismissed from your employment

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You may be entitled to make either an unfair dismissal application or a general protections application to the Fair Work Commission where you have been dismissed from your employment or forced to resign.

You may only file one type of FWC application as the FWC may only consider one type of claim in relation to your dismissal.

# 21 DAYS

**IMPORTANT: You must make your FWC application within 21 days after your dismissal takes effect**  
[\(section 394\(2\)\(a\)\)](#) and [\(section 366\)](#)

**What is the difference between an unfair dismissal application and a general protections application?**

**The two main differences are your eligibility and the criteria to be satisfied for each claim. Below is a brief summary of the differences between each type of claim.**

**For a more detailed explanation, please refer to the dedicated section of this user guide.**

**You should elect for the claim that best fits and describes your particular situation.**

Eligibility – Unfair Dismissal	Eligibility – General Protections
<p>To make an unfair dismissal application you must:</p> <ul style="list-style-type: none"> <li>- Be a national systems employee;</li> <li>- Have been employed for a minimum employment period of 6 months or 12 months if your employer is a small business employer;</li> <li>- Have a modern award or enterprise agreement apply to your employment OR earn below the current high income threshold of \$148,700 per annum.</li> </ul>	<p>To make a general protections application: - you may be a prospective employee or employee</p> <p>There are no maximum income thresholds or minimum employment periods.</p>
Criteria – Unfair Dismissal	Criteria – General Protections
<p>An unfair dismissal application may be made where:</p> <ul style="list-style-type: none"> <li>- You have been dismissed at the initiative of your employer OR forced to resign (also known as constructive dismissal); and</li> </ul>	<p>A general protections claim may be made where:</p> <ul style="list-style-type: none"> <li>- You have a protected attribute such as 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; OR</li> <li>- You have a workplace right; OR</li> <li>- You have been temporarily absent from work due to illness or injury; AND</li> <li>- Your employer has terminated your employment because of the above attributes, either because you have the attribute, had or exercised the workplace right or were temporarily absent from work.</li> </ul>

# Unfair Dismissal

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The *Fair Work Act 2009* (Cth) only protects certain employees from unfair dismissal. To be eligible to make an unfair dismissal application:

## **1.You must be a national system employee (382(a))**

You are a national system employee if you are employed by a corporation/ company or the Commonwealth [sections 13](#) and [section 14](#). Eligibility requirements differ between states. In Victoria all employees are national system employees.

## **2.You must have been employed for the minimum employment period applicable to your employment. This depends on whether your employer is a small business employer [section 382](#) > definition directs to [\(section 383\)](#);**

- if your employer is a small business employer you must have been employed for one year prior to your dismissal [\(section 383\(b\)\)](#)
- if your employer is not a small business employer you must have been employed for 6 months prior to your dismissal [\(section 383\(a\)\)](#)

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### **3. A modern award or enterprise bargaining agreement must govern your employment or your annual rate of earnings must be less than high income threshold ([section 382\(b\)](#))**

Whether your employment is governed by a modern award or enterprise bargaining agreement may be specified in your contract of employment. If you do not have a contract of employment, your employment is more likely to be governed by a modern award or enterprise bargaining agreement.

- Your employment may be governed by a modern award where your position, including duties and responsibilities, falls within one of the defined classifications under a modern award. A complete list of modern awards can be found on the [Fair Work Commission website](#).
- Your employment is governed by an enterprise bargaining agreement where your employer has gained approval of the agreement from the Fair Work Commission, and your position, including duties and responsibilities, or place of work falls within the coverage of the agreement.

**The current high income threshold is \$148,700.**

**The high income threshold is indexed annually and is updated on the Fair Work Commission website.**

**The indexing calculation can be found in [clause 2.13](#) of the [Fair Work Regulations 2009](#) which commences at \$100,000 from the base year 2009.**



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#### 4. You must have been dismissed from your employment ([section 394](#))

Dismissal from employment has defined meanings and negative meanings under the *Fair Work Act 2009* (Cth) ([section 386](#)).

#### You have been dismissed from your employment if:

- your employment was terminated at your employer’s initiative ([section 386\(1\)\(a\)](#)); or
- you resigned from your employment because of the conduct or course of conduct of your employer ([section 386\(1\)\(b\)](#))
- You should provide the date of your dismissal and any notice received in questions 1.2 and 1.3 of the FWC Unfair Dismissal [Form F2](#). You should state the details of your dismissal including how your dismissal occurred in questions 3.2 of the FWC Unfair Dismissal [Form F2](#).

#### However a dismissal does not include where ([section 386\(2\)](#)):

- a) your fixed-term contract of employment has ended;
- b) you have a training contract arrangement that has ended;
- c) you have been demoted.

**If you have been demoted, you may be able to make a FWC general protections claim.**

**You only have 21 days from the date of termination of your employment to lodge an unfair dismissal or general protections application with the Fair Work Commission (FWC).**

## What should be included in my application?

.....  
The FWC unfair dismissal application form [Form F2](#) contains broad guiding questions in relation to what you should include and provides space to answer these questions.

You should ensure that you answer each question on the form. In general you should use numbered paragraphs, provide dates of events that occurred and who was involved in your dismissal.

Keep in mind that the purpose of application is to outline all of the facts giving rise to your unfair dismissal claim and to support the criteria for an unfair dismissal application.

You may need to refer to particular provisions of the *Fair Work Act 2009* (Cth), but of primary importance is to substantiate your claim through consideration of what actions or conduct of your employer gives rise to your claim.

**There are four elements to an unfair dismissal application you must demonstrate in your application (section 385).**

- (a) You must have been dismissed from your employment; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code (if a small business); and
- (d) the dismissal was not a case of genuine redundancy.

**You may attach your own statement of events and/or answers to the questions as a separate document to the form.**

**To do so you should reference your attached document in each question box.**

**If you do draft your own document, ensure that it answers the required information outlined in the form and criteria for an unfair dismissal claim.**

.....  
To be unfairly dismissed there must be an invalid reason(s) and/or unfair procedure taken by your employer.

**1. You must have been dismissed from your employment**

This element is addressed in [\*Am I eligible to make an unfair dismissal application?\*](#)

The next three elements to be satisfied demonstrate the “unfair” component of an unfair dismissal claim.

Question 3 of the FWC Unfair Dismissal [Form F2](#) is about whether there was a valid reason and procedure taken in dismissing you from your employment.

You should address any reasons given in dismissing you in question 3.1 of the FWC Unfair Dismissal [Form F2](#) including why the reasons given are not valid.

You should address the unfair procedural elements primarily in question 3.2 of the FWC Unfair Dismissal [Form F2](#).

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## 2. Your dismissal must have been harsh, unjust or unreasonable (section 387)

The meaning of “harsh, unjust or unreasonable” is defined in the *Fair Work Act 2009* (Cth) according to the following criteria:

- a) Whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees);
- b) Whether the person was notified of that reason;
- c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
- d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;
- e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal;
- f) The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal;
- g) The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h) Any other matters that the FWC considers relevant.

**You should answer and address each criterion in your application as comprehensively as possible. One approach you may take is to list and provide an answer to each criterion individually in question 3.2 of the FWC Unfair Dismissal Form F2.**

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### **3. If your employer is a small business employer, your dismissal must not have been consistent with the Small Business Fair Dismissal Code ([section 388\(2\)](#))**

Your employer is a small business employer if they are a national systems employer who employs fewer than 15 employees at the time of your dismissal. ([section 23\(1\)](#))

The number of employees includes the dismissed employee [section 23\(4\)\(a\)](#) but only includes casual employees who are employed on a regular and systematic basis ([section 23\(2\)\(b\)](#))

The Small Business Fair Dismissal Code is a separate document from the *Fair Work Act 2009* (Cth) that is merely declared to be the Small Business Fair Dismissal Code ([section 388\(1\)](#)).

**A free online copy of the Small Business Fair Dismissal Code may be found [here](#) on the Fair Work Ombudsman website or on the [FWC website](#)**

# Small Business Fair Dismissal Code

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To be consistent with the Small Business Fair Dismissal Code:

In the case of summary dismissal, which is when you are dismissed without notice or payment in lieu of notice, it is fair for an employer to dismiss you without notice or warning if they believe on reasonable grounds that your conduct is sufficiently serious to justify immediate dismissal.

## **Serious misconduct is defined to include:**

- theft, fraud, assault, violence and
- conduct that causes serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of your employer's business;
- wilful or deliberate behaviour that is inconsistent with the continuation of the employment contract
- intoxication at work;
- refusal to carry out a lawful and reasonable instruction [Regulation 1.07, Fair Work Regulations 2009](#)



.....  
Fair dismissal also includes where your employer has reported the alleged theft, fraud or violence to the police on reasonable grounds.

**If you were not summarily dismissed your employer should have:**

- given you a valid reason for why your employment is at risk based on your conduct or capacity only;
- given you a verbal or written warning if there is no improvement in your conduct or capacity;
- provided you with an opportunity to respond to any warning and to give you a reasonable chance to rectify the problem including providing you with additional training and articulating their expectations; and
- allowed you to have a support person to assist in any disciplinary discussions.

Your employer is required to provide evidence of compliance with the Small Business Fair Dismissal Code if you file an unfair dismissal application (Small Business Fair Dismissal Code – Procedural Matters).

**There is a [Small Business Fair Dismissal Checklist](#) that provides further guidance about consistency with the Code.**

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#### **4. Your dismissal must not have been a genuine redundancy ([section 389](#))**

Your dismissal will not have been a genuine redundancy if it would have been reasonable for you to be redeployed within your employer's enterprise or within an associated entity of your employer ([section 389\(2\)](#)).

#### **Your dismissal will have been a case of genuine redundancy if:**

- your employer no longer required your job to be performed by anyone because of changes to the operational requirements of their enterprise ([section 389\(1\)\(a\)](#)) ; AND
- your employer complied with any obligation in a modern award or enterprise agreement that applied to your employment to consult about the redundancy ([section 389\(1\)\(b\)](#)) ; AND
- it was not reasonable to redeploy within employers enterprise agreement



## What can I claim in my Fair Work Commission (FWC) unfair dismissal application?

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You will be required to state what outcome you are seeking by lodging a FWC unfair dismissal application in question 2 of the FWC unfair dismissal application.

You may seek either reinstatement to your position or payment of compensation ([section 390\(1\)](#)).

However you may only seek payment of compensation where reinstatement is inappropriate, and compensation is appropriate ([section 390\(3\)](#)).

You should justify why you are seeking one form of remedy over the other and why the other remedy is inappropriate.

### **Any misconduct reduces compensation payable.**

No compensation is payable for shock, distress or humiliation caused by your dismissal ([section 392\(3\) and \(4\)](#)).

The current compensation cap is the lesser of \$74,350 and 26 weeks of your total remuneration ([section 392\(5\) and \(6\)](#)).

You may not claim compensation for the costs you incur for making the unfair dismissal claim ([section 611](#))

.....

**There are several limiting factors when it comes to the calculation of any compensation payments (section 392).**

**These include:**

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

# Step-by-Step Guide to completing FWC Form F2 - Unfair Dismissal

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## Question 1: Your Employment

### 1.1 What date did you begin working for your employer?

This is the date that you first commenced employment either on a casual or permanent basis. The date of this may be found in any employment contract you may have or your first pay slip.

### 1.2 What date were you notified of your dismissal?

This may be the same date that you were dismissed if you did not receive any notice. If you resigned because of the conduct of your employer, this is the date of your resignation.

### 1.3 What date did your dismissal take effect?

This question is to ascertain whether you have been employed for the minimum employment period required. The date your dismissal takes effect is the date your notice period ends, if you were given notice of the termination of your employment, for example, usually four weeks' notice.

If you were not given any notice of your dismissal and/or you were summarily dismissed, it is the date you were informed of the termination of your employment. If you resigned because of the conduct of your employer, this is the date your resignation takes effect.

If you were paid in lieu of notice, it will be the last day that you attended work

This may be different to your answer to question 1.2 if you gave your employer notice of your resignation.

.....

#### **1.4 Are you making this application within 21 calendar days of your dismissal taking effect?**

This is the date that the termination of your employment or your resignation takes effect. If you have given or been given notice, the date your dismissal takes effect is the date your notice period ends.

If you answer “no”, and are seeking to lodge an application later than 21 days after your dismissal takes effect, you may seek an exemption from the FWC. See [Can I lodge a FWC application outside of the 21 calendar day time period?](#)

#### **1.5 Have you made another claim to the Commission or to any other organisation regarding your dismissal (e.g. a general protections application)?**

You are not permitted to make an unfair dismissal application if you have already made a FWC general protections application or an application under any other legislation ([section 725](#)).

.....

## Question 2 – Remedy

### 2.1 What outcome are you seeking by lodging this application?

[See \*What can I claim in my unfair dismissal application?\*](#)

## Question 3 – Dismissal

### 3.1 What were the reasons for the dismissal, if any, given by your employer?

You may set out the events leading to your dismissal in this section and provide the reasons for dismissal as stated to you verbally or in writing.

You may also attach a copy of any termination letter or final pay slip to the back of your application.

### 3.2 Why was the dismissal unfair?

This is the most important question and requires substantive answers to the three elements listed in [\*What should I include in my unfair dismissal application?\*](#)

## General Protections (involving dismissal)

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### Am I eligible to make a general protections application (involving dismissal)?

The *Fair Work Act 2009* (Cth) protects against the taking of adverse action against you including dismissal [section 342](#) for defined reasons including:

- Race
- Age
- Gender
- Sexual orientation
- Physical or mental disability
- Family or carer's responsibilities
- Religion
- Marital status
- Pregnancy
- Political opinion
- Taking personal leave and/or for raising a complaint.

You may file a General Protections claim where you allege you have a particular protection and/or attribute and have been dismissed because of it ([section 365](#)).

**You must lodge your general protections application within 21 days of your dismissal taking effect ([section 366](#))**

.....

Dismissal from employment has defined meanings and negative meanings under the *Fair Work Act 2009* (Cth) ([section 386](#)).

### **You have been dismissed from your employment if:**

- your employment was terminated at your employer’s initiative ([section 386\(1\)\(a\)](#)); or
- you resigned from your employment because of the conduct or course of conduct of your employer ([section 386\(1\)\(b\)](#))

**Unlike an unfair dismissal application there is no minimum employment period or maximum income threshold to be satisfied and you are protected from adverse action even if you are not an employee.**

### **Adverse action is defined to include:**

- dismissal of an employee by an employer.
- termination of a contract by a contracting party against an independent contractor or a person engaged or employed by the independent contractor.
- refusal of a prospective contracting party to engage an independent contractor or refuses to supply or agree to supply goods or services to the independent contractor ([section 342](#))

## What should I include in my General Protections application (involving dismissal)?

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A general protections application [Form F8](#) is based on your employer taking adverse action against you because of a particular attribute and/or protection.

You should ensure that you address each criterion and question in the general protections application form.

Keep in mind that the purpose of application is to outline all of the facts giving rise to your general protections claim.

You may need to refer to particular provisions of the *Fair Work Act 2009* (Cth), but of primary importance is to substantiate your claim through consideration of what actions or conduct of your employer gives rise to your claim.

Ensure that you make clear that you have the particular attribute alleged, for example, a disability, or have exercised your workplace right to make a complaint.

- You may attach your own statement of events and/or answers to the questions as a separate document to the application.
- To do so you should reference your attached document in each question box. If you do draft your own document, ensure that it answers the required information outlined in the form and criteria for a general protections claim.
- You may rely on more than one protection and/or attribute.

**Once you allege a contravention of a general protections provision, it is presumed that the adverse action taken against you was because of the protection and/or attribute unless your employer proves otherwise ([section 361](#)). This is also known as the reverse onus.**



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## 1. Workplace Right

Your employer is prohibited from taking action against you for the exercise, existence or non-exercise of a workplace right(s) or to prevent you from exercising a workplace right ([section 340\(1\)](#)).

You have a workplace right if you have a benefit, role or responsibility under a workplace law or instrument, are able to initiate or participate in a process or proceedings under a workplace law or instrument or are able to make a complaint in relation to your employment. ([section 341](#))

### Common examples of workplace rights include:

- The right to a working environment that is safe and without risks to health under [section 21](#) of the [Occupational Health and Safety Act 2004 \(Vic\)](#);
- the right to take paid annual leave for a period agreed with the Respondent under [section 88](#) of the *Fair Work Act 2009* (Cth);
- the right to take paid personal leave when not fit for work because of a personal illness under [section 97\(a\)](#) of the *Fair Work Act 2009* (Cth);
- the right not to be discriminated against on the basis of race under [section 18](#) of the [Equal Opportunity Act 2010 \(Vic\)](#).
- the right to make a complaint or inquiry to an employer in relation to employment under [section 341\(1\)\(c\)\(ii\)](#) of the *Fair Work Act 2009* (Cth);

**A workplace right may also include entitlements contained in any modern award or enterprise bargaining agreement governing your employment.**

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## 2. Industrial activities

Your employer is prohibited from terminating your employment because you:

- Are or are not, was or was not an officer or member of an industrial association; or
- Engage, engaged or proposed to engage in industrial activity;
- Have not engaged or proposed to engage in industrial activity ([section 346](#))

### Engaging in industrial activity is defined to include:

- Becoming, not becoming, remaining or ceasing to be an officer or member of an industrial association;
- Organising or not organising or promoting an unlawful activity for or on behalf of an industrial association;
- Encouraging or not encouraging,
- Participating in or not participating in an unlawful activity organised or promoted by an industrial association; or
- Seeking or not seeking to be represented by an industrial association ([section 347](#))
- There are numerous other forms of protected industrial activity. For further information, refer to ([section 347](#)) of the *Fair Work Act 2009* (Cth).

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### 3. Protected attribute

Your employer is prohibited from terminating your employment because of a defined protected attribute [\(section 351\)](#).

The protected attributes under the *Fair Work Act 2009* (Cth) are race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

### 4. Temporary absence from work due to illness or injury

Your employer is prohibited from terminating your employment because you have been temporarily absent from work due to illness or injury [\(section 352\)](#).

#### [\(Section 352\)](#)

#### Temporary absence — illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.



# Step-By-Step Guide to completing FWC Form F8 – General Protections

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## Question 1: General protections dismissal

### 1.1 On what date were you dismissed?

This is the date that your employment ceased. If you were given notice of your dismissal, it is the day your notice period ends.

### 1.2 What date did your employment with the Respondent commence?

This is the date that you first commenced employment either on a casual or permanent basis. The date of this may be found in any employment contract you may have or your first pay slip.

### 1.3 What reasons (if any) did the Respondent give for dismissing you?

These reasons may be those listed in your termination letter, separation certificate and/or those stated to you verbally during any termination meeting.

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**1.4 Are you making this application within 21 calendar days of your dismissal taking effect?**

This is the date that the termination of your employment or your resignation takes effect.

If you have given or been given notice, the date your dismissal takes effect is the date after your notice period ends.

If you answer “no”, and are seeking to lodge an application later than 21 days after your dismissal takes effect, you may seek an exemption from the FWC.

[See Can I lodge a FWC application outside of the 21 calendar day time period?](#)

**1.5 Have you made another claim to the Commission or to any other organisation in relation to your dismissal (e.g an unfair dismissal claim)?**

You are not permitted to make general protections application if you have already made a FWC unfair dismissal application or an application under any other legislation ([section 725](#)).

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## Question 2: Remedy

**What outcome are you seeking by lodging this application?**

[See \*What can I claim in my general protections application \(involving dismissal\)?\*](#)

## Question 3: Alleged contravention

**3.1 Describe the actions of the Respondent that have led you to make this application.**

This includes the adverse action taken against you including your dismissal.

See [What should I include in my General Protections application \(involving dismissal\)?](#) above.

**3.2 Which section(s) of the Fair Work Act 2009 do you allege the Respondent contravened when they took (or threatened or organised) the above action against you?**

You should mark the boxes that apply to your situation, depending on what you have described in question 3.1.

**3.3 Explain how the action you have described in 3.1 has contravened the section(s) of the Fair Work Act 2009 you identified in question 3.2**

This requires specific reference to the sections that you have alleged and the facts.

[See \*What should I include in my General Protections application \(involving dismissal\)?\*](#) above.

Alternatively you may answer questions 3.1 and 3.3 in the same space and cross-reference your answers.

## What can I claim in my general protections application (involving dismissal)?

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If your employer takes adverse action against you in contravention of a general protections, they may be found to have breached a civil remedy provision which may make them liable for a penalty.

You may seek compensation for any loss and damage you have suffered including humiliation, pain and suffering and/or that any penalty payable by your employer be paid to you.

The Federal Court or the Federal Circuit Court of Australia may make any order the court considers appropriate ([sections 539, 545 and 546](#))

You cannot claim costs incurred by you in taking FWC action ([section 611](#))

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## **Section 2:**

# **IF YOU HAVE NOT BEEN DISMISSED FROM YOUR EMPLOYMENT**



## Where you have not been dismissed from employment

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The *Fair Work Act 2009* (Cth) provides protection to employees who have not necessarily been dismissed from their employment but are being adversely treated by their employers.

### GENERAL PROTECTIONS

#### Am I eligible to make a general protections application not involving dismissal?

You may make a general protections application [Form F8C](#) even when you have not been dismissed from your employment ([section 372](#)). Unlike unfair dismissal, you are protected from adverse action even if you are not an employee.

The taking of adverse action is defined broadly and includes actions taken against contractors by principals ([section 342](#)):

#### **Adverse action not including dismissal can include:**

- a) injures the employee in his or her employment; or**
- b) alters the position of the employee to the employee's prejudice; or**
- c) discriminates between the employee and other employees of the employer.**

# What should I include in my general protections application?

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A general protections application not involving dismissal [Form F8C](#) is based on your employer taking adverse action against you because of a particular attribute and/or protection. You should ensure that you address each criterion and question in the general protections application form.

You may rely on more than one protection and/or attribute:

## 1. Workplace Right

A person, such as your employer or principal, is prohibited from taking action against you for the exercise, existence or non-exercise of a workplace right(s) or to prevent you from exercising a workplace right [\(section 340\(1\)\)](#).

You have a workplace right if you have a benefit, role or responsibility under a workplace law or instrument, are able to initiate or participate in a process or proceedings under a workplace law or instrument or are able to make a complaint in relation to your employment [\(section 341\)](#).

### Common examples of workplace rights include:

- the right to a working environment that is safe and without risks to health under [section 21](#) of the [Occupational Health and Safety Act 2004 \(Vic\)](#);
- the right to take paid annual leave for a period agreed with the Respondent under [section 88](#) of the *Fair Work Act 2009* (Cth);
- the right to take paid personal leave when not fit for work because of a personal illness under [\(section 97\(a\)\)](#) of the *Fair Work Act 2009* (Cth);
- the right not to be discriminated against on the basis of race under [section 18](#) of the [Equal Opportunity Act 2010 \(Vic\)](#).
- the right to make a complaint or inquiry to an employer in relation to employment under section 341(1)(c)(ii) of the *Fair Work Act 2009* (Cth);

**A workplace right may also include entitlements contained in any modern award or enterprise bargaining agreement governing your employment.**

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## 2. Industrial activities

A person, including your employer or principal, is prohibited from taking adverse action against you because you:

- are or are not, was or was not an officer or member of an industrial association; or
- engage, engaged or proposed to engage in industrial activity;
- have not engaged or proposed to engage in industrial activity ([section 346](#))

### Engaging in industrial activity is defined to include:

- a) becoming, not becoming, remaining or ceasing to be an officer or member of an industrial association;
- b) organising or not organising or promoting an unlawful activity for or on behalf of an industrial association;
- c) encouraging or not encouraging, participating in or not participating in an unlawful activity organised or promoted by an industrial association; or
- d) seeking or not seeking to be represented by an industrial association ([section 347](#))

There are numerous other forms of protected industrial activity. For further information, refer to [section 347](#) of the *Fair Work Act 2009* (Cth).

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### 3. Protected attribute

This protection is only available to employees or prospective employees. It does not include contractors.

Your employer is prohibited from taking adverse action against you because of a defined protected attribute ([section 351](#)).

The protected attributes under the *Fair Work Act 2009* (Cth) are:

- **Race**
- **Colour**
- **Sex**
- **Sexual orientation**
- **Age**
- **Physical or mental disability**
- **Marital status**
- **Family or carer's responsibilities**
- **Pregnancy**
- **Religion**
- **Political opinion**
- **National extraction or social origin**

There is no protection from adverse action being taken against you due to temporary absence due to illness or injury.

This is only available where you have been dismissed from your employment.

# Step-By-Step Guide to completing FWC Form F8C – General Protections

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## Question 1: Background

### **1.1 If you are an employee or contractor – what date did your employment or engagement with the Respondent commence?**

This is the date that you first commenced employment or engagement either on a casual or permanent basis. The date of this may be found in any employment contract you may have or your first pay slip.

### **1.2 Have you made an application or claim to any other organisation regarding your dispute?**

You are not permitted to make a general protections application (not involving dismissal) if you have already made a complaint or application under an anti-discrimination law which is ongoing or if you have already made a general protections complaint or application ([section 734](#)).

## Question 2: Remedy

### **2.1 What outcome are you seeking by lodging this application?**

[See What can I claim in a general protections application \(not involving dismissal\)?](#)

# Step-By-Step Guide to completing FWC Form F8C – General Protections

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## Question 3: Alleged contravention

**3.1 Describe the actions of the Respondent that have led you to make this application.**

This includes the adverse action taken against you.

[\*See What should I include in my General Protections application \(not involving dismissal\)?\*](#)

**3.2 Which section(s) of the Fair Work Act 2009 do you allege the Respondent contravened when they took (or threatened or organised) the above action against you?**

You should mark the boxes that apply to your situation, depending on what you have described in question 3.1.

**3.3 Explain how the action you have described in 3.1 has contravened the section(s) of the Fair Work Act 2009 you identified in question 3.2.**

[\*See What should I include in my General Protections application \(not involving dismissal\)?\*](#)

Alternatively you may answer questions 3.1 and 3.3 in the same space and cross-reference your answers.

## What can I claim in a general protections application (not involving dismissal)?

.....  
If your employer takes adverse action against you in contravention of a general protections, they may be found to have breached a civil remedy provision, which may make them liable to pay a penalty.

You may seek compensation for any loss and damage you have suffered, including humiliation, pain and suffering and/or that any penalty payable by your employer be paid to you.

The Federal Court or the Federal Circuit Court of Australia may make any order the court considers appropriate ([sections 539, 545 and 546](#))

You cannot claim costs incurred by you in taking FWC action ([section 611](#))

**1. A person must bear the person's own costs in relation to a matter before the FWC.**

**2. However, the FWC may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to the FWC if:**

**(a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or**

**(b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.**

The FWC can also order costs under ([sections 376, 400a, 401 and 780](#)).

**3. A person to whom an order for costs applies must not contravene a term of the order.**

**This subsection is a civil remedy provision (see Part 4-1).**

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## **Section 3:**

# **GENERAL QUESTIONS**



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## How do I lodge an unfair dismissal or general protections application?

You must complete the unfair dismissal or general protections application form prior to lodging it with the FWC. The relevant forms to be filled out are:

- Unfair dismissal – [Form F2](#);
- General Protections involving dismissal – [Form F8](#); or
- General Protections not involving dismissal – [Form F8C](#)

These forms can be found at <https://www.fwc.gov.au/about-us/resources/forms>

There are numerous ways you can lodge your FWC application including:

- by using the online eFiling portal. This requires registering as a user. You must complete your FWC application prior to using the online portal.
- by posting your completed Form F2 to your closest FWC office.
- by emailing your Form F2 to “[your city]@fwc.gov.au” for example, [melbourne@fwc.gov.au](mailto:melbourne@fwc.gov.au)
- by telephone on 1300 799 675.
- by fax to the relevant FWC office.
- in person at a FWC office.

**You only have 21 days from the date the termination of your employment takes effect to lodge a FWC unfair dismissal application ([section 394\(2\)\(a\)](#)). If you post your application via registered post it will be taken to be lodged on the date of receipt by the FWC.**

# What happens after I lodge my FWC application?

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## 1. Unfair Dismissal

1. Lodgement of FWC Unfair Dismissal Application.
2. Employer is notified and provided with an opportunity to lodge an Employer's Response.
3. If your Employer raises a jurisdictional objection, such as that you were not dismissed or that you lodged your application out of time, a conference or hearing will be held.
4. A telephone conciliation is held between you and your employer.
5. If the matter is not settled or the unfair dismissal claim is not withdrawn, an arbitration conference or hearing is held to determine the merits of an unfair dismissal remedy application.
  - Conference – conducted in private, decision is only disclosed to parties directly and/or their representative ([section 592](#))
  - Hearing – open to the public, decision will be published ([section 593](#))
6. If you are dissatisfied with the FWC decision, you may apply to the Federal Court or the Federal Circuit Court for a further decision.

**\$73.20**

The cost of making an unfair dismissal or general protections application is currently \$73.20 (January 2020) and must be paid at the time of making your application ([section 395](#)). This application fee is indexed each financial year.

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## 2. General Protections (involving dismissal)

1. Lodgement of FWC General protections application
2. Employer is notified and provided with an opportunity to lodge an Employer's Response
3. A private conciliation or mediation will be conducted to deal with a general protections dispute ([section 368](#))
4. If unsuccessful, certificate issued ([section 369](#))
5. Once the certificate is issued, you and your employer may agree to submit to arbitration ([section 369](#))
6. Otherwise you may make a general protections court application to the Federal Court or the Federal Circuit Court for a decision.

## 3. General Protections (not involving dismissal)

1. Lodgement of FWC General Protections application ([section 372](#))
2. Employer is notified and provided with an opportunity to lodge an Employer's Response
3. A conference will be held if you and your employer agree ([section 374](#))
4. If there is no agreement to attend a conference by either or both parties, you may choose to make an application to the Federal Court or the Federal Circuit Court for a decision.

# What are my financial liabilities if I lodge a FWC application?

.....  
Each party is required to bear their own costs in relation to a FWC matter ([section 611](#)) thus you are not liable to pay the costs incurred by your employer.

**The costs you must bear include the application fee of \$73.20 and your own legal costs incurred, if any.**

However you or your employer may be ordered to pay some or all of the costs of the other if your FWC application or response:

- a) is vexatious or without reasonable cause; or
- b) has no reasonable prospect of success ([section 611](#))

You will not be required to pay the fee if the FWC is satisfied that you will suffer serious hardship if you are required to pay the application fee of \$73.20

You must apply to have the application fee waived at the time you lodge your FWC application.

You must complete a separate [Fee Waiver form](#) available.

## Can I lodge a FWC application outside of the 21 calendar day period?

.....  
The Fair Work Commission may allow a further period for application if there are exceptional circumstances and will consider:

- (a) the reason for the delay; and
- (b) any action taken by the person to dispute the dismissal; and
- (c) prejudice to the employer (including prejudice caused by the delay);  
and
- (d) the merits of the application; and
- (e) fairness as between the person and other persons in a like position  
[\(section 394\)](#)

It is usually very difficult to establish grounds for seeking an additional time period for lodgment of a Fair Work application.

**For example, mere ignorance of the statutory time limit or pursuit of another claim, are not exceptional circumstances.**

Long delays outside of time including more than two years will work against the applicant as it would cause substantial prejudice to the employer. However, there are several examples of where an extension has been granted, including representative error and direct communication with the employer.

If you do lodge your FWC application outside of the 21 calendar day period ensure that you explain the reason for the delay in question 1.4 of the relevant Form.

You should address the criteria listed above for why there are exceptional circumstances for the delay.

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