

Fact Sheet – General protections for national system employees

1. Background

1.1 What is adverse action?

Adverse action is taken when an employer dismisses, injures, detrimentally alters the position of, or discriminates against an employee. A prospective employer who discriminates against a person or refuses to employ him or her (for discriminatory reasons) may also be said to have taken adverse action.

1.2 When is an employer prevented from taking adverse action?

In the national system, an employer cannot take adverse action against you on the basis of:

- your workplace rights;
- your participation in a union or any other form of industrial activity;
- your decision or stated intention **not** to participate in a form of industrial activity; or
- 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.

1.3 What is a “workplace right”?

A “workplace right” that is protected by the law from adverse action includes:

- a right to make a complaint or inquiry in relation to employment;
- an entitlement to a benefit, role or responsibility established under a workplace law or instrument; and
- a right to initiate or participate in a process established under a workplace law or instrument.

Rights established under a “workplace law” or “workplace instrument” include not only rights established under laws and instruments (such as awards), but also those established through processes such as protected industrial action, conferences and hearings held by the Fair Work Commission (**FWC**), and court proceedings.

1.4 Does an employee need to have already been dismissed in order to claim a remedy for adverse action?

An employee can make an adverse action claim even if he or she has not been dismissed. For example, an employee who is demoted, but not dismissed, by an employer because he or she exercised a workplace right, may be able to bring an adverse action claim.

2. Are there any circumstances in which adverse action is permissible?

Adverse action may be permissible in certain circumstances. Adverse action may be taken where it is necessary due to the inherent requirements of the job. It may also be taken where the action is authorised by any law.

Adverse action which involves discrimination may be permissible if taken by an institution that has doctrines, tenets or beliefs, or that is a religious institution if:

- the adverse action is taken in good faith; and
- the adverse action is taken in order to avoid injury to the religion.

3. Procedure

3.1 Eligibility

A person is eligible to make an application for a remedy to adverse action if that person is:

- an employee under the national system law;
- a prospective employee where the prospective employer comes under the national system.

To find out whether your employer comes under the national system, call Wageline on 1300 655 266. If you do not fall under the national system, you cannot make an adverse action claim; however there may be other discrimination claims that you can make.

3.2 Limitation periods

Where the adverse action has led to the dismissal of an employee, the applicant has 21 days from the date of dismissal to make an application to the FWC. In exceptional circumstances the FWC will consider applications made after this time.

If you miss the deadline to lodge a claim you may be able to make a late application. In your application you must include the reasons why the application is late and why it would be unfair for the FWC not to accept the application. The FWC will then consider if an extension of time should be granted. For further information, see ELC Fact Sheet – “Missed the deadline for making a claim: what can you do?”.

Where there has been no dismissal, an application must be made within 6 years of the conduct giving rise to the adverse action claim.

3.3 Forms and fees

For more information on lodging a claim, see the ELC Information Kit – “Making a general protections claim: for national system employees”. This is available on the Employment Law Centre of WA website (www.elcwa.org.au).

FWC

The correct application form for any adverse action claim with the FWC is [Form F8 – Application for the Commission to deal with a General Protections Dispute](#), available from the FWC website (www.fwc.gov.au). The fee for lodging a general protections claim with the FWC is \$71.90.

Federal Circuit Court

If you are lodging a claim with the Federal Circuit Court (**FCC**) alleging dismissal in contravention of a general protection, you must complete the following forms:

- [APPLICATION – Fair Work Division Form](#); and
- [Form 2 – Claim under the Fair Work Act 2009 alleging dismissal in contravention of a general protection](#).

These forms are available at the FCC website at www.federalcircuitcourt.gov.au and the filing fee is \$71.90.

If you are lodging a claim with the FCC alleging discriminatory adverse action in contravention of the general protection, you must complete the following forms:

- [APPLICATION – Fair Work Division Form](#); and
- [Form 4 - Claim under the Fair Work Act 2009 alleging contravention of a general protection](#).

These forms are available at the FCC website at www.federalcircuitcourt.gov.au and the filing fee is \$71.90.

For all other claims of adverse action (not including discrimination or dismissal) you must lodge the following forms:

- [APPLICATION – Fair Work Division Form](#); and
- [Form 4 - Claim under the Fair Work Act 2009 alleging contravention of a general protection](#).

These forms are available at the FCC website at www.federalcircuitcourt.gov.au and the filing fee is \$665.

3.4 What happens once the application is made?

The body to which an application is made, as well as the type of application, will depend on the type of adverse action.

Where the adverse action has resulted in the dismissal of the applicant:

Where the applicant has been dismissed as a result of the adverse action, the application must be made to the FWC. The FWC will inform the other party of the application and give them a chance to respond and then discuss the issue with each party before holding a conciliation conference. The object of the conference is for the parties to agree to a remedy for the dispute without the need for a formal hearing.

If no agreement can be made, the applicant will be issued with a certificate stating that conciliation has been attempted. The applicant can then bring a claim in the Federal Court or FCC. An employee that is also seeking an injunction to prevent the other party from performing an act does not need to attempt conciliation: the application can be made directly to the Federal Court or FCC.

Where the adverse action has not led to the employee's dismissal:

Where the adverse action has not led to the employee's dismissal, the employee may apply to the FWC and attempt conciliation. The consent of both parties is necessary for

this. The employee can also make an application directly to the Federal Court or FCC without conferencing.

4. Interpreters

If you indicate on your application form that an interpreter is required, the FWC will arrange for one to be present. There is no charge for an interpreter.

You can also use the Translating and Interpreting Service (**TIS**). This is a national service provided by the Department of Home Affairs, available 24 hours a day, 7 days a week. The phone number is 131 450 for the cost of a local call.

5. Remedies

If conciliation is not successful and the claim progresses to court proceedings, there are a range of remedies that may be available. Where the claim is successful, the Federal Court and FCC can make any order that the court believes to be appropriate. This may include:

- an injunction to prevent, stop, or correct the effect of an adverse action;
- compensation for loss suffered as a result of the contravention;
- a penalty (which can be payable to you); and/or
- an order for reinstatement.

6. Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

Web www.elcwa.org.au

Wageline

Information Service 1300 655 266

Web <http://www.dmirs.wa.gov.au/wageline>

Fair Work Commission

Address Level 16, 111 St George's Terrace, Perth 6000

Tel 1300 799 675

Web www.fwc.gov.au

Email perth@fwc.gov.au

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