

Employment and Cancer



Some people can experience problems at work when they have cancer, or are caring for someone with cancer. This fact sheet provides information about what to do if you have a legal problem at work. It explains the law and legal options that apply to most employees in Australia, and describes some of the organisations that may be able to assist you.

This fact sheet provides information of a general nature and should not be considered to be legal advice. The law that applies to you can depend on what type of organisation you work for, and can vary between the different states and territories. Everyone's situation is different, so it is important to get specific advice on the law that applies to you and how that law relates to your individual circumstances. This factsheet also provides some suggestions for where you may seek legal information and advice.

Types of employment problems you may face

Discrimination

Being treated unfairly at work or when you're trying to get a job because you have cancer or have had cancer, may be disability discrimination, which is against the law in Australia. It's also against the law to be treated unfairly at work because you care for a person affected by cancer.

Examples of discrimination include not giving a person a job or promotion because they have cancer, or having an unreasonable rule that

all employees must stand at work all day (for example, in a factory or shop), when standing all day might be impossible for a person with cancer.

A person affected by cancer must not be treated differently by an employer in decisions about:

- Whether or not to hire someone;
- What terms and conditions to offer an employee;
- Whether to offer an employee benefits, such as training or promotions; and
- Dismissing or letting an employee go.

There are some exceptions, for example where a person cannot do the necessary parts of a job safely to an acceptable standard, even if the employer made reasonable changes to the work or workplace for them. Another exception is where the cost of making changes so the person affected by cancer could do the job effectively and safely are unreasonably high.

Bullying or harassment

Some people with cancer might feel they are being bullied or harassed at work. Bullying is defined as an individual or group repeatedly behaving unreasonably towards a worker, which creates a risk to health and safety. Bullying includes people spreading misinformation or malicious rumours about another person, for example, saying that they're not pulling their weight, or taking too much time off. Employers in all states and territories are required to ensure that their employees are protected, as far as is practical, from risks which may affect health and safety, including where health and safety is affected by bullying.

Difficulties doing usual job during treatment

Australia's anti-discrimination laws require an employer to make reasonable changes to help you perform the essential elements of your job if you're unable to perform them because of your illness. These elements (known as the inherent requirements of the job) include being able to work safely, productively and as part of a team. This may mean, for example, if you work in a factory, that you're allowed to sit to do your work, rather than stand, as long as you're completing the job. You can only be dismissed if you can't perform the essential elements of your job, even after your employer has made reasonable changes. Generally, your employer should also be accommodating if you are only unable to perform the essential elements of your job for a short period of time, such as immediately following treatment where there is a reasonable prospect of you returning to your full time duties.

Taking time off for treatment

If you need to take time off for treatment, usually you must take personal leave first, then annual leave, then any long-service leave and finally unpaid leave if you have no more paid leave. Carers can also use their personal/carers leave and annual leave to care for someone with cancer, and may also be entitled to take two days each of unpaid carer's leave and compassionate leave per year. You may also be entitled to income protection under a company policy, insurance policy, superannuation fund or workplace agreement.

In general, it is against the law to dismiss someone for taking leave due to illness if they're off work for less than 3 months over a 12-month period and they have provided medical certificates or statutory declarations for their absence within a reasonable period of time. It is therefore important to let your employer know when you're taking leave and to provide medical certificates or statutory declarations in accordance with your employer's workplace policies or awards.

Returning to work

Your employer is required to help you by making minor changes to your role to take account of what you can and can't do during and after treatment.

This may include making flexible working arrangements, including allowing part-time work. Being offered a more junior role or less pay may be adverse action or constructive dismissal by your employer, which are against the law. Consider talking to a lawyer before accepting an offer of a new role or less pay. Your medical advisors may be able to assist your employer with useful advice about your return to work, for example, what rest breaks you might need.

Where to go for help

** If you have been dismissed, it's very important that you seek advice immediately – you only have 21 days after being dismissed to lodge an unfair dismissal, unlawful dismissal or general protections complaint in the Fair Work Commission. Time limits for other claims vary and may be substantially longer. It is therefore important that you seek advice as soon as possible so that you do not lose the opportunity to make a claim.*

There are a number of places you can go to for help. These include talking to your employer or seeking assistance from external bodies. In some cases of discrimination, particularly where there is bullying or harassment, some people don't feel comfortable talking to someone at their workplace about the problem so choose to take their complaint to an external body immediately.

Talk to your employer

If you feel comfortable to do so, it is usually a good idea to approach your manager in the first instance to discuss your concerns and see if you can resolve the problem together. The problem may simply be a misunderstanding. It can be helpful to take a support person with you to meet with your manager, to support you if you become distressed and as a witness to the conversation. Let your manager know if you plan to bring someone to the meeting. You should keep detailed notes of any discussions about the problem with your manager, including dates, and also keep any email exchanges about the problem. These will help you remember everything that has happened so you can explain it later.

Seeking additional support

If you don't feel comfortable raising the problem directly with your manager or the problem hasn't been resolved at this level then you could contact the human resources department, someone higher up in your workplace, or your union. You should keep detailed notes, including dates, of any discussions you have with any of these people about your employment problem.

Making a more formal complaint

If you can't resolve the problem by speaking with your manager or someone else in your organisation, then you may wish to make a formal complaint. In this case it is a good idea to seek advice quickly because some of the timeframes for making some complaints are very tight. **For example, if you qualify for unfair dismissal protection, you only have 21 days after being dismissed to lodge an unfair dismissal claim. This time limit also applies for general protections dismissal or unlawful dismissal claims.**

Time limits for other claims vary and may be substantially longer. It is therefore important that you seek advice as soon as possible so that you do not lose the opportunity to make a claim.

Seeking information or advice and making complaints

This section has information about organisations which provide information or services for people who are experiencing problems at work, as well as a description of agencies you might encounter if you're making a complaint.

Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is a free service that has the power to mediate, investigate and prosecute employment complaints. They can also take cases to federal court to enforce workplace laws. The FWO runs a free helpline, which is a good point of first contact if you think that you have an employment problem. If after discussing your situation with someone at the FWO you'd like to make a formal complaint,

Unfair dismissal

Generally, you may be able to make an unfair dismissal complaint if:

- You were dismissed, and
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy

Unlawful dismissal

The *Fair Work Act 2009* also makes it unlawful for an employer to dismiss an employee for certain prohibited reasons, including because of a temporary absence for illness. If you think you have been dismissed because you have been temporarily absent from work because of your illness, then you may have an unlawful dismissal claim.

General protections

The *Fair Work Act 2009* protects workplace rights and provides protection from workplace discrimination. Workplace rights include the right to take annual and personal leave, the right not to be dismissed or treated negatively for taking temporary leave for illness, and the right to a safe working environment.

If you think you have been dismissed or treated negatively because you have been absent from work because of your illness, or you have been discriminated against, then you may have a general protections claim.

you will need to fill in a workplace complaint form. The FWO usually tries to sort out employment disputes by mediating between the employee and the employer, but they can also investigate the situation if they think that this is necessary to resolve your complaint, and prosecute if they consider it appropriate.

- Ph.: **13 13 94**
- Website: **<http://www.fairwork.gov.au>**

Fair Work Commission

The Fair Work Commission (FWC) is Australia's national workplace relations tribunal. It operates like a court so FWC staff cannot provide you with advice about your problem, for example, whether to make a complaint or how to run your case. **Unfair dismissal and general protections dismissal complaints must be lodged within 21 calendar days of the dismissal – weekend and public holidays are counted within the 21 days (unless the 21st day falls on a weekend or public holiday, in which case you have until the next business day to lodge a complaint).** If you have time, it is a good idea to get advice from the FWO (above), or legal advice (see suggestions for places to get legal advice below), before lodging your complaint, as it can be difficult to know which type of complaint to make.

- Ph.: **1300 799 675**
- Website: **<http://www.fwc.gov.au/>**

JobWatch

JobWatch is an employment rights law centre, which offers a free and confidential telephone information and referral service for Victorian workers, and can also offer representation and assistance for disadvantaged workers.

- Melbourne residents, ph.: **9662 1933**
- Country Victorian residents, ph.: **1800 331 617**
- Email: **jobwatch@jobwatch.org.au**
- Website: **<http://www.jobwatch.org.au/>**

Community law centres

Community law centres give people free legal information and advice. Find a community law centre by contacting the Victorian Federation of Community Law Centres:

- Ph.: **9652 1500**
- Email: **administration@fclc.org.au**
- Website: **<http://www.communitylaw.org.au/>**

If you live outside of Victoria, contact the National Association of Community Legal Centres to find a community law centre:

- Ph.: **(02) 9264 9595**
- Email: **nacclc@clc.net.au**
- Website: **<http://www.nacclc.org.au/>**

Your union

If you belong to a union, your union may be able to arrange for you to be provided with free legal advice. Some unions will also represent their members by making claims on their behalf.

Private lawyers

Private lawyers charge for their services. Some lawyers offer an initial free thirty minute consultation, and some take employment cases on a 'no win, no fee' basis. It is important to ask your lawyer for an estimation of the likely costs of making a complaint about your employment problem.

Ask your friends if they have any recommendations for a lawyer, or contact the **Law Institute of Victoria**, which provides a free legal referral service:

- Ph.: **9607 9550**
- Website: **<http://liv.asn.au/>**

If you live outside of Victoria, you can contact the Law Society in your state or territory.

Health and Safety Regulators

If you have had to take time off work because of stress related to bullying, then you may also be eligible for compensation. Each state and territory has its own regulator who is responsible for policing health and safety laws and for administering workers' compensation schemes. In Victoria, WorkSafe Victoria manages the workers compensation scheme and also investigates breaches of occupational health and safety laws. The WorkSafe Advisory Service can provide information on bullying, advice on how to raise the issue of bullying in your workplace or refer the matter to an inspector (where appropriate).

- Ph.: **1800 136 089 or (03) 9641 1444**
- Email: **info@worksafe.vic.gov.au**
- Website: **<http://www.worksafe.vic.gov.au/>**

If you live outside of Victoria, you can find the details of the regulator for your state or territory at:

- <http://www.safeworkaustralia.gov.au/sites/swa/pages/default>

Additional options in suspected bullying or discrimination cases

There are further complaints options in situations where you think that you have been bullied or discriminated against at work because you have cancer, or have had cancer in the past.

Anti-Bullying orders from the Fair Work Commission

From 1 January 2014, new anti-bullying laws will allow people who reasonably believe that they have been bullied at work to apply to the Fair Work Commission (**FWC**) for an order to stop the bullying. The FWC must respond within 14 days of the application, and may then hold a private conference, conciliate and/or have a hearing. Employees, volunteers, contractors, subcontractors, apprentices, trainees and students gaining experience will all be able to apply for an order to stop bullying.

If the employer does not comply with the anti-bullying order they may have to pay a penalty.

- Ph.: **1300 799 675**
- Website: **<http://www.fwc.gov.au/>**

Victoria Legal Aid

While Victoria Legal Aid doesn't give legal advice about general employment matters, they may be able to help you if you have experienced discrimination at work. Contact Legal Aid for free information about discrimination problems. In some cases they can negotiate, make a complaint, or take legal action on your behalf.

- Ph.: **1300 792 387**
- Website: **<http://www.legalaid.vic.gov.au/>**

Australian Human Rights Commission

If you think that you have been discriminated against because you have cancer, or because you care for someone with cancer, then you can make a complaint to the Australian Human Rights Commission (AHRC). Making a complaint to the AHRC is free and relatively simple, but if you get someone to make the complaint for you (for example, lawyer, advocate, union) they may charge, so always ask if there will be any costs involved. The AHRC is not a court or tribunal, but it can investigate your complaint (which would usually involve contacting your employer) and try to resolve it by conciliation. Conciliation is an informal process that allows you and your employer to discuss what happened and to try to find a way to resolve the complaint. If your complaint is not resolved at the AHRC you can go to the Federal Court of Australia or the Federal Magistrates Court. You will need legal advice if you are considering this option, because it can involve a lot of time and money.

- Ph.: **1300 656 419**
- Email: **complaintsinfo@humanrights.gov.au**
- Website: **<http://www.humanrights.gov.au/>**

Victorian Equal Opportunity and Human Rights Commission

Like the AHRC, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) offer a free and confidential dispute resolution service for people who think that they have been discriminated against. The VEOHRC helps employees and employers to talk through the problem, with the aim of reaching an agreement on how to solve the problem. The VEOHRC cannot make orders or award compensation, but your employer may agree to compensation or other solutions through the process of conciliation.

- Ph.: **1300 891 848**
- Email: **complaints@veohrc.vic.gov.au**
- Website: **<http://www.humanrightscommission.vic.gov.au/>**

If you live outside of Victoria, contact the equal opportunity or human rights commission in your state or territory.

Fair Work Ombudsman and Fair Work Commission

The Fair Work Ombudsman and Commission can also receive complaints about discrimination – **it is important to seek advice quickly from the FWO or legal advice before deciding which type of complaint to make.**

**For non-legal information or support about cancer, call the Cancer Council Helpline:
Ph: 13 11 20**

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