

# Defending Your Job

20 January 2016

## Overview

- + Disability discrimination legislation: Commonwealth, State and Territory
- + Practical tips for navigating disability discrimination disputes in the workplace



# Disability discrimination legislation

## Laws that prohibit disability discrimination

- + Anti-discrimination legislation
  - + Commonwealth: Disability Discrimination Act 1992 (Cth)
  - + State and Territory legislation, e.g.:
    - + Equal Opportunity Act 2010 (Vic)
    - + Anti-Discrimination Act 1977 (NSW)
    - + Discrimination Act 1991 (ACT)
- + Workplace legislation
  - + Commonwealth: Fair Work Act 2009 (Cth)
  - + State and Territory workplace legislation

## The Commonwealth Disability Discrimination Act

- + Prohibits both direct and indirect discrimination
- + Direct discrimination
  - + Treating a person with a disability less favourably than a person without the disability would be treated in similar circumstances, because of the disability (“the comparator test”)
  - + Includes a failure to make reasonable adjustments for a person with a disability which has the effect of treating that person less favourably

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## The Commonwealth Disability Discrimination Act

- + Indirect discrimination
  - + Requiring a person with a disability to comply with a general requirement that, because of the disability, they are unable to comply with
  - + Includes situations where the person with a disability would be able to comply if reasonable adjustments were made, but they are not made

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## Employment discrimination under the Disability Discrimination Act — employees

- + It is unlawful for an employer to discriminate against an employee on the ground of the employee's disability:
  - + In the terms and conditions of employment provided
  - + By denying or limiting access to opportunities for promotion, transfer or training, or to any other benefits associated with employment
  - + By dismissing the employee
  - + By subjecting the employee to any other detriment
  
- + It is also unlawful for an employer to discriminate against prospective employees

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## Exceptions under the Disability Discrimination Act

- + It is not unlawful for an employer to discriminate against another person because of that person's disability in certain circumstances
  - + Where the aggrieved person would be unable, because of their disability, to carry out the inherent requirements of the job, even if reasonable adjustments were made
  
  - + If avoiding the discrimination would impose an unjustifiable hardship on the employer

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## Inherent requirements under the Disability Discrimination Act

- + The following matters are relevant to the question of whether a person would be able to carry out the inherent requirements of a job
  - + The person's past training, qualifications and experience
  - + Where the person is already employed by the employer — their past performance in working for the employer

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## Unjustifiable hardship under the Disability Discrimination Act

- + The following matters are relevant to the question of whether avoiding discrimination would impose an unjustifiable hardship on an employer
  - + The nature of any benefit or detriment likely to be experienced by any person concerned (including the broader community)
  - + The effect of the disability of any person concerned
  - + The financial circumstances of the employer
  - + The estimated amount of expenditure required to be made by the employer
  - + The availability of financial and other assistance to the employer
- + The burden of proving that avoiding discrimination would impose an unjustifiable hardship lies on the employer

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## Liability under the Disability Discrimination Act

- + The Act provides for vicarious liability in certain circumstances:
  - + E.g., a corporation may be liable for unlawful discrimination committed by a director or employee
  
- + The Act also provides for accessorial liability in certain circumstances:
  - + E.g., a person who instructs or induces another person to commit unlawful discrimination is also liable for unlawful discrimination

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## Proceedings under the Disability Discrimination Act

- + Complaint to the Australian Human Rights Commission (AHRC)
  
- + Conciliation in the AHRC
  - + Intended to lead to a settlement of the complaint
  - + The AHRC cannot make a determination that discrimination has occurred
  
- + If the conciliation process is unsuccessful, an affected person may apply to the Federal Circuit Court or Federal Court

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## Remedies under the Disability Discrimination Act

- + The Federal Circuit Court or Federal Court may make orders
  - + Declaring that the respondent has committed unlawful discrimination
  - + Directing the respondent not to repeat or continue the unlawful discrimination
  - + Requiring the respondent to pay compensation, vary the termination of an agreement, or perform any other act in order to redress any loss or damage
  - + Requiring a respondent to employ or re-employ an applicant

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## State and Territory anti-discrimination legislation

- + State and Territory anti-discrimination laws are framed in broadly similar terms to the Commonwealth Disability Discrimination Act
  - + Both direct and indirect discrimination are prohibited
  - + Protect employees and prospective employees
  - + Employers are required to make reasonable adjustments
  - + There are exceptions relating to unjustifiable hardship and reasonable requirements of a job
  - + There are provisions for accessorial and vicarious liability

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## State and Territory anti-discrimination legislation

- + However, there are some important substantive and procedural differences, e.g.:
  - + Under the Victorian and ACT legislation, direct discrimination is not determined by reference to a “comparator test”
  - + Under the Victorian legislation, it is not necessary to undergo conciliation before proceedings are brought (in VCAT)

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## The Fair Work Act

- + The Fair Work Act prohibits an employer from taking “adverse action” against an employee because of the employee’s physical or mental disability
- + The Act also prohibits an employer taking adverse action against an employee because the employee has exercised a “workplace right”, which includes rights under Commonwealth, State and Territory anti-discrimination legislation
- + Also applies to prospective employees
- + These prohibitions are included in what is known as the ‘general protections’ provisions of the Fair Work Act

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## “Adverse action” under the Fair Work Act

- + “Adverse action” includes taking, threatening to take, or organising any of the following actions:
  - + An employer dismissing an employee
  - + An employer injuring an employee in his or her employment
  - + An employer prejudicially altering the position of the employee
  - + An employer discriminating between the employee and other employees
  - + A prospective employer refusing to employ a prospective employee
  - + A prospective employer discriminating against a prospective employee in the terms or conditions on which employment is offered

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## Exceptions to “adverse action” under the Fair Work Act

- + The following types of “action” are not prohibited:
  - + Actions that are not unlawful under any anti-discrimination law in force in the place where they occur
  - + Actions that are taken because of the inherent requirements of the position concerned

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## Proving an employer took adverse action for a prohibited reason under the Fair Work Act

- + Multiple reasons
  - + E.g. where an employer takes adverse action against an employee for a number of reasons, and those reasons include the employee's physical or mental disability, the employer is taken to have taken the adverse action because of the employee's physical or mental disability
- + Reverse onus
  - + E.g. where an employee establishes a prima facie case that their employer has taken adverse action against them because of their physical or mental disability, the onus is on the employer to prove that they did not take adverse action against the employee for that reason
- + These provisions apply to other general protections claims

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## Dismissal for temporary absence because of illness or injury

- + An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury
  - + Exception: where the employee is absent from work for a period greater than 3 months, or the employee has been absent for more than a total of 3 months within a 12 month period
  - + The multiple reasons and reverse onus provisions in the previous slide also apply here
  - + This is another of the 'general protections' provisions

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## General protections claims under the Fair Work Act

- + Application to the Fair Work Commission
- + If the application relates to a dismissal:
  - + It must be lodged within 21 days of the dismissal
    - + The FWC may grant an exemption from this requirement in exceptional circumstances, but the threshold for an exemption to be granted is very high
  - + The application proceeds to a compulsory conciliation
- + If the application does not relate to a dismissal, it only proceeds to conciliation with the consent of both parties

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## General protections claims under the Fair Work Act

- + If conciliation is unsuccessful, a claim may be brought in the Federal Circuit Court or Federal Court. Possible remedies include:
  - + Compensation or reinstatement
  - + Pecuniary penalties
  - + Injunctions to prevent, stop or remedy the effects of a breach

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## Unfair dismissal under the Fair Work Act

- + The Fair Work Act's protection against unfair dismissal may also be available
- + A dismissal is "unfair" when
  - + The dismissal is harsh, unjust or unreasonable
  - + The dismissal is not consistent with the Small Business Fair Dismissal Code
  - + The dismissal is not a case of genuine redundancy
- + The FWC may make orders for compensation or reinstatement where a person has been unfairly dismissed

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## Choosing how to proceed

- + An applicant must choose whether to bring proceedings under the Disability Discrimination Act, the Fair Work Act, or State or Territory anti-discrimination legislation
- + Concurrent proceedings are not permitted
- + Legal advice is essential

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## Tips for dealing with your employer

### Tips for dealing with your employer

- + Be specific about what you require
  - + Make sure you are clear about what reasonable adjustments you are seeking from your employer
  - + Consider the role you are employed in and what specific adjustments are necessary for you to perform that role
  - + Approach your employer with solutions, not only problems

## Tips for dealing with your employer

- + Seek support and advice
  - + Seek support and advice from the MS Employment Support Service and/or your doctor at an early stage regarding the difficulties that might arise in your employment and what measures you can take to avoid them

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## Tips for dealing with your employer

- + Be up front and be prepared
  - + Be direct about asking your employer to make reasonable adjustments
  - + Be prepared for the conversation
  - + Consider what objections your employer might make in response to your request and prepare practical responses to them

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## Tips for dealing with your employer

- + Seek support from an advocate if necessary
  - + Seek advice and support from the MS Employment Support Service and/or union representative
  - + Join your union
  - + If possible, try to avoid a dispute with your employer
  - + Bring your support person to meetings with your employer

## Tips for dealing with your employer

- + Make sure you have everything in writing
  - + Request copies in writing of any decisions made by your employer
  - + Ensure there is an email trail of your dealings with your employer (but be nice about it)
  - + Keep file notes of meetings with your employer

## Tips for dealing with your employer

### Summary

- + Be specific about what you require
- + Seek support and advice
- + Be up front and be prepared
- + Seek support from an employment advocate if necessary
- + Try to avoid a dispute with your employer
- + Bring a support person to meetings
- + Keep succinct file notes
- + Make sure you have everything in writing

Thank you