

This factsheet is part of a series from Legal Aid NSW that aims to help answer your questions about COVID-19 and everyday law.

You may be worried or confused about how COVID-19 will affect you and your everyday life. Sometimes a crisis can make legal problems worse or new problems might develop. Legal Aid NSW understands that there will be a lot of questions about money worries, fines, police, housing, Centrelink, employment, guardianship and mental health. This series of factsheets will give you helpful information and contacts to assist you to manage all the changes that are happening in our community.

I was getting the JobKeeper payment. What will happen to my job when JobKeeper ends?

The JobKeeper scheme ended on 28 March 2021. Your employment will continue after the end of JobKeeper unless your employer decides to dismiss you.

If your employer decides to dismiss you because JobKeeper has ended, you should get legal advice.

After JobKeeper

After JobKeeper ends, can my employer:

- *continue to stand me down,*
- *continue to give me reduced hours, or*
- *continue to direct me to work different duties or at a different location?*

During the JobKeeper scheme, some employers were allowed to give certain directions to employees who were getting the payment. Employers could do things like stand you down, reduce your hours of work, make you perform different duties or make you work at a different location.

If you were given one of these JobKeeper directions, from 29 March 2021 that direction no longer applies to you. This means that from 29 March 2021 you should return to your normal hours and days of work and do your usual duties from your usual location.

If your employer stands you down, or continues to stand you down, after 29 March 2021 and does not pay you, this may be unlawful, and you could be entitled to recover your wages. Outside of JobKeeper, employers have limited options to lawfully stand you down without pay, and you should get legal advice about your situation.

If you are a casual employee, your employer does not have to give you a set or minimum number of hours of work. This means your employer can give you fewer or no shifts if the business is quiet, or if there are other staff performing the work.

What if I have a dispute?

The Fair Work Commission (FWC) has been dealing with disputes about directions given under the JobKeeper scheme. Any orders made by the FWC will not have effect after 29 March 2021. After 29 March 2021, the FWC can still deal with disputes about JobKeeper, but cannot make any orders. The FWC can only deal with JobKeeper disputes by mediation or conciliation, or by making a recommendation or expressing an opinion.

I have been getting the JobKeeper payment. My employer has asked me to continue to work reduced hours after JobKeeper ends. What should I do?

If your employer asks you to continue to work reduced hours after JobKeeper ends, you should get legal advice.

If your employer asks you to sign an agreement about reducing your hours, make sure you check whether the agreement is permanent or if it has a clear end date. If you sign an agreement, this may permanently change your hours of work, even if you think it is temporary. You should get legal advice before signing any agreement to reduce your hours of work.

If your employer continues to tell you to work reduced hours when you have not agreed to do this, you should let your employer know you do not want to. It is best to do this in writing. You should also get legal advice as soon as you can. Letting this situation go on too long can sometimes mean you have agreed to the change in hours.

If your employer forces you to work reduced hours, you may have a claim for unpaid wages or an unfair dismissal claim.

I didn't get JobKeeper, but I agreed with my employer to reduce my hours of work or my pay. When can I go back to my normal hours or pay?

During the COVID-19 pandemic some employers who did not join the JobKeeper scheme asked employees to agree to work less hours or agree to cut their pay. These agreements are generally allowed as long as you agreed to the changes and you were still paid at least the minimum wage or minimum rate in your award or enterprise agreement.

If you agreed to work less hours or reduce your pay, check the terms of the agreement. If there is an end date on the arrangement you should ask your employer to confirm you will return to normal hours or pay after that date. You are entitled to return to your normal hours or rate of pay when the agreement ends.

Get legal advice if there is no end date to the new agreement and you have a dispute with your employer.

Can my employer force me to use my annual leave when JobKeeper is over?

If you were getting the JobKeeper payment, your employer was able to ask you to take your annual leave. You could not refuse without a good reason. As the JobKeeper scheme has ended, your employer is no longer able to direct you to take your annual leave in the same way.

If an award applies to your employment, check what it says about when your employer can direct you to take annual leave.

If no award or enterprise agreement applies to your employment, your employer can only require you to take annual leave if the requirement is reasonable. An example might be when you have got a large amount of leave.

My employer dismissed me when JobKeeper ended. What can I do?

A dismissal is only unfair if it is harsh, unjust or unreasonable and it is not a genuine redundancy.

Redundancy

If you have been dismissed because your employer no longer needs your role to be performed by anyone, this is likely to be a genuine redundancy and not an unfair dismissal.

When making your role redundant, your employer must consider any reasonable redeployment opportunities for you. If your employer does not do this, then it might not be a genuine redundancy.

If you are covered by award or an enterprise agreement, your employer must consult with you about the redundancy. If your employer does not do this, then it might not be a genuine redundancy.

If you are not sure if your redundancy is genuine, get legal advice.

Unfair dismissal

Your dismissal may be unfair if:

- you have been dismissed for a reason other than redundancy,
- you were not given a good reason for your dismissal, or
- you were not treated fairly during the dismissal.

If you think you have been unfairly dismissed, get legal advice about making an unfair dismissal application to the Fair Work Commission (FWC).

To be eligible to make an unfair dismissal application, you must have been employed for the 'minimum employment period' which is at least six months if your employer has more than 15 employees, or at least 12 months if your employer has less than 15 employees.

You must make an application for unfair dismissal to the FWC within 21 days of the dismissal taking effect. The 21-day time limit is strict.

If you are a casual employee, you cannot make an unfair dismissal application unless you have been employed for at least the minimum employment period on a regular and systematic basis and have a reasonable expectation of ongoing employment.

If I am made redundant at the end of JobKeeper, how will my payment be calculated and paid?

If you are made redundant, your employer must pay you the entitlements that are owed to you.

Notice requirements

Casual employees are not entitled to notice of termination or pay instead of notice.

If you are made redundant, your employer must give you notice of the termination of your employment. This must include written notice of the day of your termination which cannot be before the day the notice is given to you. How much notice you should be given depends on how long you have worked for your employer and in some circumstances, if you are over 45 years old.

The National Employment Standards (NES) say how many weeks' notice your employer must give you. If you are covered by an award or enterprise agreement, you may be entitled to a different amount of notice. You can use the Fair Work Ombudsman's [P.A.C.T calculator](#) to work out how many weeks' notice your employer must give you.

Your employment contract may give you more notice than what is in the NES, award or enterprise agreement, but it cannot give you less.

The rate of your notice payment will depend on when you were given notice:

- If you were given notice of termination while you were getting JobKeeper payments, or had a JobKeeper direction, and you had to work during your notice period, your rate should be the JobKeeper payment rate up to 28 March 2021.
- If you were given notice of termination while you were getting JobKeeper payments and you were getting a top-up payment, this is the rate your notice should be paid for any time you worked during your notice period up to 28 March 2021.
- If you are given notice of the termination after 28 March 2021, you should be paid at your ordinary rate of pay while you work out your notice.

If you are dismissed on the spot and not given notice, your employer should give you a notice payment. This is called "pay in lieu of notice". This amount must be paid at your ordinary rate of pay, not the JobKeeper payment amount.

Redundancy pay

You are not entitled to redundancy pay if you are:

- a casual employee; or
- an apprentice

You are entitled to redundancy pay if your employer has 15 or more employees and you have been employed for 12 months or longer without a gap. Your redundancy payment must be based on your normal rate of pay, not your JobKeeper rate.

The 12 months without a gap includes only the times that you were permanently employed (full-time or part-time). Any periods of casual employment that you had before you were made permanent may not count.

If you are a permanent employee, any periods where you were stood down under JobKeeper or for another reason (except industrial action) do count.

In some industries, you may be entitled to a redundancy payment even if your employer has fewer than 15 employees. Check your award or enterprise agreement to see what it says about redundancy.

Leave

Casual employees do not get annual leave.

Your employer should pay out your unused annual leave if you are made redundant. You still get the same amount of annual leave even if you were getting JobKeeper payments.

Your employer does not have to pay out your unused paid sick leave or carer's leave unless it says so in your contract or an award or enterprise agreement.

Long service leave

In New South Wales, most employees (including casuals) who have completed five or more years of service and are dismissed for any reason except serious and wilful misconduct, should be paid out long service leave. You are entitled to two months of pay for every 10 years of service. For example, if you have worked for five years, you will get one month's pay.

If you are not sure if your employer is paying you the right amount of long service leave, you can call NSW Industrial Relations on **13 16 28** or get legal advice.

What if my employer offers me another job I don't want to do or says it can't afford to pay me a redundancy payment?

Your employer can apply to the FWC for an order to pay you less redundancy pay or no redundancy pay if your employer doesn't have the money to pay you in full, or if your employer has offered you acceptable alternative employment. If this happens, you should get legal advice.

Other acceptable employment may include roles in the same organisation or with a different employer. This alternative employment must be arranged before your last day of work. Whether you do or do not accept this role, your employer can apply to vary or reduce your redundancy payment.

If your employer says they cannot afford to pay you your redundancy, your employer will have to prove to the FWC that they do not have any funds to pay you.

If you are covered by an award that contains an industry-specific redundancy scheme like the *Building and Construction General On-site Award 2010*, your employer will not be able to apply to the FWC to reduce your redundancy entitlement.

I was told I was getting JobKeeper payments, or under a JobKeeper direction, but I think my employer didn't follow the JobKeeper rules. What can I do?

If you were an eligible employee for JobKeeper and were getting JobKeeper payments, your employer was required to pay you at least the JobKeeper amount per fortnight, even if you ordinarily earned less than this amount. This is called the 'minimum payment guarantee'.

However, if you normally earned more than the JobKeeper amount and have been working your usual hours (or increased hours), your employer was required to 'top-up' the JobKeeper amount to the rate of your ordinary pay. If your employer has not paid you the right amount you should get legal advice.

Under the JobKeeper scheme your employer could give directions to you about some things, like working on different days or at different locations. If you were getting JobKeeper payments your employer had to give you three days' written notice before giving the direction and had to talk with you about the direction, however if you were not getting JobKeeper payments your employer had to give you seven days' written notice before giving you the direction. Employers need to keep a written record of the discussion.

Under the JobKeeper scheme some employers were only able to give directions to reduce your hours of work if the direction did not mean you were working less than two hours on a workday or, if you are a part-time or full-time employee, reduced your hours of work to less than 60% of your ordinary hours.

If your employer has not followed the JobKeeper rules, you should get legal advice.

What if I am dismissed, pressured to resign, or have my hours cut after making a complaint or enquiry to my employer about my pay or entitlements?

You have the right to make an enquiry or complaint to your employer or get legal advice about your employment. This is often referred to as a 'workplace right' and you may be protected from any 'adverse action' taken against you by your employer if you have been asserting this right.

'Adverse action' might mean being dismissed, having your hours cut, having your pay cut, being demoted, being discriminated against, or having your position changed so that you are worse off. If you think your employer has taken adverse action against you because you complained, you should get legal advice. You may be able to make a General Protections application to the FWC.

If you have been dismissed because of exercising a workplace right, you must make an application within 21 days of the dismissal taking effect. The 21-day time limit is strict. If you were not dismissed, you have six years to make an application not involving dismissal.

How can I get help?

You can call LawAccess NSW on **1300 888 529** for information about employment and JobKeeper problems.

If you need an interpreter, call the Translating and Interpreting Service on 131 450 and ask for LawAccess NSW. If you find it hard to hear or speak, call the National Relay Service on 133 677 and ask for LawAccess NSW or visit www.relayservice.gov.au.

This factsheet is intended as a general guide to the law. Do not rely on this information as legal advice. We recommend you talk to a lawyer about your situation. This information is correct at the time of writing, however, it may change.