



Employment Law Centre of WA (Inc)

Working for WA Workers

**Denial of contractual benefits
in the
Western Australian Industrial
Relations Commission**

Information Kit

**Advice Line 1300 130 956 or 9227 0111
RRR Advice Line 1300 520 054 or 9227 0185**

Denial of contractual benefits in the WAIRC

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*Information includes any and all data, documents, pages and images”.

This information kits is current as at December 2009



How to use this guide

This guide is to assist you in considering or commencing proceedings in the Western Australian Industrial Relations Commission (**WAIRC**) in relation to denied contractual benefits.

What are denied contractual benefits?

'Denied contractual benefits' are benefits due under the employment contract (not an Award) which an employee has not received.

Can you make a claim?

To make a claim you must:

- be an employee;
- earn below \$122,900 (unless your employment is subject to an industrial instrument);
- specify what benefit you were entitled to and what it is you are claiming.

What are the exclusions?

Prior to 1 July 2009, the WAIRC was generally not able to deal with a claim of denied contractual benefits where the employer was a constitutional corporation. Following recent amendments to federal legislation, an employee of a constitutional corporation may now be able to claim denied contractual benefits in the WAIRC. See

<http://www.wairc.wa.gov.au/Files/who%20can%20make%20a%20claim.doc> for more information. You can contact the Employment Law Centre for legal advice on 1300 130 956 or 08 9227 0111.

In any event, if your employer is a constitutional corporation, you may enforce a breach of your employment contract in the Magistrates Court. See the “**Unpaid Entitlements in the MC**” information kit for more detail.

What are the time limits?

Claims for unpaid entitlements in the WAIRC must be commenced within **6 years** of the entitlement becoming payable.

It is best to commence action without delay.

What costs are involved?

- You are required to pay a lodgement fee of \$50.00.
- Generally, you will bear your own legal costs.

What do you do if your employer has not paid (or has underpaid) your entitlements?

- Calculate your underpayment or non-payment.
- Approach your employer.
- Commence legal action.

Calculate your underpayment or non-payment

Calculate how much you should have been paid by multiplying the number of hours worked with your relevant rate of pay. You can look at pay slips or other records of employment to determine your hours worked. Then subtract what you were paid from what you should have been paid to determine the amount of underpayment or non-payment.

Approach your employer

You may decide to informally approach your employer and make him or her aware that you do not think you have been paid correctly.

Give your employer a copy of your calculations and give him or her a chance to go over them. Your employer may agree with you and pay you the amount outstanding.

If your employer disagrees with you, or you don't feel comfortable informally approaching your employer you may like to put your concerns in writing:

- State that you believe that you have been underpaid to the amount you calculated, asking that they either pay the amount or commence negotiations with you within 14 days of the date of the letter.
- You may also wish to state in the letter to your employer that if the payment is not made or negotiations have not begun by the date stated, that you will commence legal action to recover the amount owed.

Remember to keep a copy of the letter for yourself. A sample demand letter is attached at the end of this document.

This letter serves two purposes. First, it may result in your employer paying you the amount owed. Second, it shows that you sought recovery of the amounts owed.

Commencing legal action

First, in order to seek assistance with recovering unpaid benefits, we recommend you contact the Department of Commerce's industrial inspectors on 9222 7700 (if you are employed in the state system).

If you choose to commence an action yourself:

- you should seek legal advice in relation to whether you can claim in this jurisdiction;
- you will need to complete a Form 3 *Notice of Application* and a *Particulars of Claim* form (available from www.wairc.wa.gov.au) and lodge three (3) copies:
 - in person at the WAIRC Registry located at Level 16, 111 St George's Terrace, Perth WA 6000; or
 - by post to WAIRC Registry, Locked Bag 1, Cloisters Square, Perth WA 6850; and
 - you will need to include a \$50 filing fee which is payable for denial of contractual benefits claims in the WAIRC.
- You should also send a copy of Form 3 *Notice of Application* to your employer when you send the three (3) copies to the WAIRC Registry;
- You must then lodge at the Registry a signed and witnessed Form 4 *Declaration of Service* stating that you have served your claim on your employer.;
- Your employer then has 21 days from receipt of the stamped copy of Form 3 to respond to your claim for denial of a contractual benefit by lodging with the WAIRC a Form 5 *Answer and Counter Proposal* and serving a copy of Form 5 on you;
- If you receive a copy of Form 5 from your employer within this 21 day period, you write a letter to the Registrar that same day requesting that your matter be listed for hearing;
- If your employer does not send you a copy of Form 5 within this 21 day period, you should write a letter to the Registrar on the 21st day after you sent the employer a copy of Form 3 requesting that your matter be listed for hearing; and
- The WAIRC will then send a Notice of Listing to you and your employer, showing the date, time and place for a conciliation conference.

What is conciliation?

Conciliation is a process involving an independent Commissioner or a Deputy Registrar assisting parties to reach a resolution between them. It should be noted that:

- the WAIRC pursues conciliation as far as possible and attempts to leave formal arbitration as a last resort;
- conciliations are conducted on a “without prejudice” basis. This means that statements made in conciliation generally cannot be used in an arbitration hearing;
- the presiding Commissioner or Deputy Registrar will set out the conduct of the conciliation;
- the parties to a conciliation are required to meet their own costs; and
- there is no transcript or record taken in the proceedings other than when the matter is settled by agreement and then the terms will often be put in writing.

What happens in the conciliation?

This general process of achieving a resolution involves:

- you and your employer meeting to discuss the dispute;
- you and your employer summarising your respective positions and discussing ways to resolve the matter; and
- the Commissioner or Deputy Registrar sometimes dividing the conference and speaking separately with the parties.

When and where will the conciliation be held?

- Conferences are generally held in the WAIRC.
- Sometimes conciliation conferences may be held over the telephone for employees or employers living in regional areas.
- The conference is generally arranged by the Commissioner or Deputy Registrar’s Associate. The parties are usually notified by letter but, in urgent cases, may be notified by telephone or email.

Who is required to attend the conciliation?

Both you and your employer are required to attend the conciliation. In addition:

- your employer may send an appropriate person from senior management who has authority to agree to a settlement;
- you may have a person attend the conference in support if the Commissioner or Deputy Registrar allows;
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter;
- while the parties must attend, witnesses are not required;
- the meeting can be over the telephone;
- if you fail to attend a conciliation conference, your application may be dismissed; and
- if your employer fails to attend the conciliation conference, the Commissioner or Deputy Registrar may contact them and organise another conciliation conference, or they may refer your claim for hearing.

How do you prepare for the conciliation?

You should be prepared for the conciliation. You should:

- know your case by reviewing what happened and prepare a summary;
- locate all relevant documents (e.g. medical certificates or employment contracts);

- seek advice from a legal practitioner or union; and
- conduct yourself in a polite and courteous manner.

What should you say at the conciliation?

- State why you believe you have been a denied contractual benefit.
- State what you are seeking.

Do you need representation?

- It is not necessary to be represented in conciliation proceedings.
- You may choose to be represented if you wish. Representation can be by any adult person as an agent, trade union or by a legal practitioner.
- To have someone other than a lawyer represent you, you must give your authority by lodging Form 18 *Warrant to Appear as Agent*.
- The Registry can provide you with a list of legal practitioners.

What happens if the parties agree to a resolution?

If you both agree, the Commissioner or Deputy Registrar may make an order that:

- gives effect to your agreement; or
- discontinues the application without disclosing the terms of the agreement.

You should make sure that you are clear about:

- the terms of settlement;
- the time frames for payment of monies; and
- the amount of tax to be deducted.

Sometimes you will be asked to sign a deed of settlement agreeing to the terms of settlement.

After any settlement monies are received, you will need to file a Form 14 *Notice of Discontinuance of Application* with the Registrar.

What happens if the parties do not agree to a resolution?

- If the Commissioner or Deputy Registrar concludes the parties cannot agree to a resolution then the matter is usually listed for arbitration where a ruling is made as to the merits of the matter. This will take place at a formal court hearing which requires the parties to present formal evidence.
- If the WAIRC is satisfied that all reasonable attempts to reach a settlement by conciliation have been or are likely to be unsuccessful, the WAIRC will issue a written conciliation certificate.
- The WAIRC Commissioner or Deputy Registrar issuing the certificate will indicate his or her assessment of the merits of the application and may also give recommendations.
- Hearings are held in public, unless ordered otherwise, and any decisions are issued in public documents.

It is advisable to seek further legal advice if you decide to continue with your claim at this stage.



Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

RRR Advice Line 1300 520 054 or 08 9227 0185 (9.30am – 1pm)

Web www.elcwa.org.au

Hours 9.30am-3.30pm Mon, Tues, Thurs and Fri (as well as 5pm – 7.30pm on Tues evenings).

Department of Commerce

Wageline 1300 655 266

Western Australian Industrial Relations Commission

Address 16th Floor, 111 St George's Terrace, Perth WA 6000

Tel 08 9420 4444

RRR Line 800 624 263 (free call)

Web www.wairc.wa.gov.au

[SAMPLE DEMAND LETTER]

[REMEMBER TO KEEP A COPY AND TO REMOVE ALL UNNECESSARY INFORMATION IN BRACKETS]

**[Employer's Name
Employer's Address**

Today's date]

Dear **[INSERT EMPLOYER'S NAME HERE]**

Unpaid entitlements

I am writing to you in order to attempt to settle my claim for outstanding entitlements that you owe me.

I have calculated that there is an outstanding amount of \$.....under my contract of employment.

I have received legal advice and understand I can make a claim in the Western Australian Industrial Relations Commission for a denial of contractual benefits.

If an agreement is not reached in relation to the above amounts I will commence legal proceedings against you. **[ONLY IF YOU INTEND TO DO THIS]**

[OR]

To avoid the expense, stress and inconvenience to you of legal proceedings, an agreement in relation to my claim is required. **[SAY THIS IF YOU ARE NOT SURE YOU WILL TAKE COURT ACTION AT THIS STAGE]**

Please forward the outstanding amount to me within 14 days.

Yours sincerely

[INSERT YOUR NAME HERE]

Forms (click on the hyperlink) or go to www.wairc.wa.gov.au:

[Form 3](#)

[Form 4](#)

[Form 14](#)

[Form 18](#)