



Unlawful termination in Fair Work Australia

Information Kit

Advice Line 1300 130 956 or 9227 0111

Unlawful termination in FWA

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

This information kit is current as at January 2010

How to use this guide

This guide is to assist you in considering or commencing proceedings in Fair Work Australia (FWA) in relation to an unlawful termination of your employment.

Unlawful termination

You can claim unlawful termination if you believe that the termination of your employment was based primarily on discriminatory grounds.

What is unlawful termination?

An unlawful termination occurs if, as an employee, you are dismissed for a prohibited reason.

Prohibited reasons

An employer must not terminate your employment for one or more of the following prohibited reasons:

- temporary absence from work due to illness or injury of a kind prescribed in the regulations;
- trade union membership or participation in trade union activities outside working hours or with the employer's consent during working hours;
- non-membership of a trade union;
- seeking office as, or acting or having acted in the capacity of, a representative of employees;
- the filing of a complaint, or participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- 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;
- absence from work during maternity leave or other parental leave; or
- temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Can you make a claim?

Eligibility

A claim of unlawful termination must be made to FWA. All employees, no matter what the size of the employer or the employee's income, can make a claim for unlawful termination, even if the employer also points to 'operational reasons' for the termination.

Remedies

A court may order the following remedies if it finds that the employee was unlawfully terminated:

- injunctions to prevent, stop or remedy the effects of a contravention;
- compensation for loss that a person has suffered because of the contravention;

- reinstatement and other orders regarding continuity of service; and
- penalties of up to \$33,000 for corporations and up to \$6,600 for individuals.

How do you lodge a claim?

When lodging an unlawful termination application you must:

- be an employee or a potential employee; and
- identify the employer – the legal entity who employed you or would have employed you; and
- show you were dismissed by your employer and did not resign, or that you were unsuccessful in gaining employment with the employer; and
- state why you believe the termination was unlawful and what you are seeking.

However, the onus of proof in relation to unlawful termination is on the employer. Once an employee has alleged that their termination was unlawful, the employer must prove the termination was not unlawful.

What are the time limits?

- You must lodge your application with FWA within 60 days after termination of employment.

FWA may extend this period by taking into account:

- the reason for the delay;
- any action taken by the employee to dispute the termination;
- prejudice to the employer (including prejudice caused by the delay);
- the merits of the application; and
- fairness.

What form should you use?

Use Form F9 – Application for FWA to deal with an Unlawful Termination Dispute – copies of which are available from the FWA website Forms page – www.fairwork.gov.au

What costs are involved?

- You are required to pay an application fee of \$59.50.
- This fee may be waived on the grounds that it would cause serious hardship. In order to apply for a waiver, complete an Application for waiver of application fee form must be completed and submitted along with Form F9.

How do you submit the application?

Completed application forms can be lodged at any Fair Work Australia Office in person, by facsimile, by post or electronically, through the eFiling facility on the FWA website.

To deliver the application in person, go to the FWA office in your capital city between the hours of 9.00am – 5.00pm. In Perth, the address is 111 St George's Terrace,

Perth, 6000. This address can also be used for postal applications. Other postal addresses can be found on the FWA website.

Submitting an application online can be done by using the FWA eFiling facility on the FWA website.

To submit an application by facsimile, send your application to the nominated fax number in your capital city, which can be found on the FWA website. In Perth, this number is (08) 9464 5171.

Costs

In general, the parties bear their own costs. However, in some situations where a party has engaged a lawyer or a paid representative, the FWA may make an order for the lawyer or paid representative to pay the costs of the other party.

What happens to your application?

After lodgement, FWA will acknowledge receipt of the application and will give written notification of the application to your employer. The employer will also be provided with information about the FWA process and be provided with an employer response form. A conciliation conference between the employer and the employee will be arranged, with both parties receiving written details of the time and date of the conference. Both parties are required to attend the conference. An application for adjournment must be made in writing and will only be granted on substantial grounds (e.g. you are overseas).

What else should you know?

Confidentiality

- Your file will remain confidential, as will the details of any conferences held. Hearing and decisions, however, are generally public.

Do you need representation?

- There is no requirement for you to be represented by another person when you appear in proceedings at FWA. If you decide to represent yourself in proceedings it will be easier for you if you are well prepared.
- If you wish to be represented by a lawyer or paid agent you will need the permission of FWA, unless the lawyer or paid agent is one of your employees or officers, a union or employer organisation or a peak union or employer council or a bargaining representative.
- You may consider bringing one or more individuals with you for support, but you should be prepared to tell the FWA member dealing with your case why you would like the presence of such individuals.

What if you have difficulty reading and speaking English?

- You can ask a friend or community organisation to assist you.
- You can also request for FWA to provide an interpreter either when lodging your application or before the day of the conference.
- There is no cost to you if you require an interpreter.

- If you require assistance, you can contact the FWA Information Line 1300 799 675 or the Translating and Interpreting Services through the Department of Immigration and Citizenship on 131 450.

What will happen at FWA?

- FWA will help you reach an agreement with your employer by conciliation.
- If you cannot reach an agreement you can elect to proceed to a court for an unlawful termination action.

What is conciliation?

Conciliation is an informal, private and generally confidential process where a FWA conciliator assists employees and employers to resolve an unfair dismissal application by agreement. Both parties will be allowed to put forward their case, and also respond to any allegations made against them.

The conciliator is independent and does not take sides, but works to bring the parties to an agreed resolution. The conciliator will be a Commissioner appointed by FWA, who can make a decision that is binding on both the employee and employer.

Generally, the steps of a conciliation conference will be as follows:

- the conciliator explains their role and the manner in which the conciliation is to be run;
- each side briefly outlines their version of events, any relevant facts and what remedies they seek;
- the conciliator may allow or ask questions;
- the circumstances of the complaint and relevant issues are discussed. The conciliator may talk separately to the parties; and
- the conciliator assists the parties to reach agreement by identifying common ground, suggesting possible options and sometimes by making recommendations and assisting the parties in drafting an agreement in writing.

When will conciliation be used?

- After your application has been lodged FWA will seek to conciliate the claim as the first option. The purpose of a conciliation conference is to bring the employee and employer together in an informal, private meeting to reach an agreement without the need for a formal hearing.
- FWA will use a conciliation conference in place of (or before) a hearing wherever possible.

When and where will the conciliation be held?

The conference will take place at a location mutually agreed upon by you, your employer and FWA. This is most likely to be at the FWA offices, which in Perth is located at 111 St George's Terrace, Perth. It may also be by telephone conference.

Who is required to attend the conciliation?

Both the employee and the employer are required to attend the conference. In addition:

- the 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 (not as your agent) if the FWA Commissioner allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

How do you prepare for the conciliation?

It will help you to be well prepared for the conference. You should:

- know your case – review what happened and prepare a summary;
- locate all relevant documents (e.g. medical certificates or employment contracts);
- seek advice from a legal practitioner, union or employer organisation;
- consider bringing along a support person or legal representative, if allowed; and
- conduct yourself in a polite, courteous manner.

What should you say at the conciliation?

At the conference, you should be prepared to answer the following questions:

- What happened (i.e. what are the relevant facts)?
- Why do you think that the termination was unlawful?
- What are you seeking (i.e. employment, reinstatement, compensation)?

The onus of proof in relation to unlawful termination is on the employer. Once an employee has alleged that their termination was unlawful, the employer must prove the termination was not unlawful.

What happens in the conciliation?

The aim of conciliation is to attempt to resolve the matters in dispute without the need for a formal arbitration. This general process to achieving 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;
- the conciliator sometimes dividing the conference and speaking separately with the parties.

What happens if the parties agree to a resolution?

FWA may make a binding order that gives affect to the agreement made between you and your employer.

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

- If the matter cannot be resolved before or during the conference and FWA is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, it may issue a certificate to that effect.
- The employee uses this certificate to bring an unlawful termination court application.
- If FWA feels that an unlawful termination court application would not have a reasonable prospect of success, it must advise the parties accordingly.

Elect to proceed to court

If settlement is not reached at the conciliation conference and you wish to proceed to court, you must bring an unlawful termination court application within 14 days after FWA has issued you with a conciliation certificate. You can bring an action in the small claims division of the Federal Magistrates Court (Fair Work Division) for claims under \$20,000 or the Federal Court (Fair Work Division) for claims over \$20,000.

You cannot make an unlawful termination court application without a certificate from FWA, unless the application includes an application for an interim injunction.

Federal Magistrates Court (Fair Work Division)

If you elect to have your dispute heard by the Federal Magistrates Court (Fair Work Division), you must complete Form 3 – Claim under the Fair Work Act 2009 alleging unlawful termination of employment and lodge it along with the certificate issued by FWA. This must be done within 14 days of FWA issuing the certificate.

Your employer can file a response to your application by completing and lodging a Response – General Federal Law form. This must be lodged within 14 days of receiving the application to which the response applies.

Federal Court (Fair Work Division)

If you elect to have your dispute heard by the Federal Court (Fair Work Division), you must complete Form 5C – Claim under the Fair Work Act 2009 alleging unlawful termination of employment and lodge it along with the certificate issued by FWA. This must be done within 14 days of FWA issuing the certificate.

Discontinuance

You are able to reach settlement at any time before and during conciliation or court proceedings and so discontinue your application.

You may discontinue proceedings with FWA at any time after lodging your application form by completing a Notice of Discontinuance form (F50) and lodging it with FWA and serving it on your employer.

You may discontinue proceedings with the Federal Magistrates Court up to 14 days before your hearing date by completing a Notice of Discontinuance and lodging it with the court and serving it on your employer. Discontinuance outside of this time will require leave of the court. There is no fee for discontinuance, but you should be aware that the court may make cost orders made against you.



You may discontinue proceedings with the Federal Court at any time after lodging your application form by completing a Notice of Discontinuance (Form 29) and lodging it with the court and serving it on your employer. There is no fee for this, but you should be aware that the court may make cost orders made against you for discontinuance.

More Information

The Employment Law Centre of WA (Inc)

Tel 9227 0111
Advice Line 1300 130 956
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

Fair Work Australia

Address 111 St George's Terrace
PERTH WA 6000
Tel 1300 799 675
Fax 9464 5171
Web www.fwa.gov.au
Email perth@fwa.gov.au

Federal Magistrates Court

Address Peter Durack Commonwealth Law Courts Building
1 Victoria Avenue
PERTH WA 6000
Tel 92687100
Web www.fmc.gov.au
Email waregistry@fedcourt.gov.au

Forms

[Form F9](#)

[Waiver form](#)

[Form F50](#)