

Fact sheet – Missed the deadline for making a claim: what can you do?

1. What can you do if you have missed the deadline for making a claim?

If you intend to make a claim against your employer – for example, an unfair dismissal claim or a general protections claim – you must generally lodge that claim within a particular time-frame. This time-frame is called a “limitation period”. Different types of claims have different limitation periods.

If you have not lodged your claim within the required time-frame (i.e. within the limitation period) then you must include an “out-of-time application” with your claim, explaining why your claim should be accepted late.

It is **always** preferable to lodge a claim within the limitation period because there is no guarantee that an out-of-time application will be accepted.

Some common limitation periods (current at 1 July 2018) are:

Unfair dismissal (national system)	21 days
Unfair dismissal (state system)	28 days
General protections (dismissal)	21 days
General protections (no dismissal)	6 years
Unlawful termination	21 days
Breach of the NES or a modern award	6 years

These limitation periods are generally strictly enforced.

Most claim processes provide for “out-of-time applications”. This means that your claim might be accepted after the limitation period has expired if you can demonstrate that certain special circumstances exist.

2. What types of circumstances are relevant?

It can be very difficult to make an out-of-time application successfully. Generally, you have to demonstrate that exceptional circumstances prevented you from lodging the correct claim in time, and that you were actively addressing the issue from the time it occurred. The following reasons are generally *not* successful:

- mental distress resulting from the incident giving rise to the claim;
- ignorance of the claim existing or of the limitation date;
- a medical condition or illness that is not of a serious nature or which would not reasonably be expected to prevent a claim being made.

The following circumstances are examples of circumstances that have contributed to an out-of-time application being accepted:

- representative error (i.e. an applicant was given incorrect information by a legal professional and acted on that information);
- attempts to lodge a claim within time failed for reasons beyond the control of the applicant;
- the applicant tried to obtain advice and information on how to make a claim immediately after the incident occurred.

However, each situation is unique and the fact that any of these circumstances exist in your own case will not guarantee that an out-of-time application will be accepted.

3. Procedure

For most claims in the state and national systems, there are no specific forms for an out-of-time application. You must attach a separate sheet with the heading “out-of-time application”, stating that you are requesting the claim be accepted out of time and giving the reasons why it was not submitted in time.

Unfair dismissal claim forms in the national system deal with out-of-time claims at section 1.4. If you can’t fit your out-of-time argument in this section you can attach it as a separate piece of paper.

4. National system – criteria

For unfair dismissal claims, the relevant section of the *Fair Work Act 2009* (Cth) is reproduced below. It is not compulsory to address all of these criteria in the out-of-time application, however, all of the criteria will be considered by the Fair Work Commission (**FWC**) in determining whether or not to accept the claim outside of the limitation period. The criteria in relation to a general protections claim are similar.

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the person first became aware of the dismissal after it had taken effect; and

(c) any action taken by the person to dispute the dismissal; and

(d) prejudice to the employer (including prejudice caused by the delay); and

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position.

5. State system – criteria

The relevant section of the *Industrial Relations Act 1979* (WA) is phrased in broad terms:

(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

In considering whether it would be unfair not to accept an out-of-time application, the Commission generally considers the factors listed at (a) to (f) above.

6. Next steps

If you are unsure about which limitation period applies, you should contact the Employment Law Centre of WA Inc for assistance on 1300 130 956.

If you think a limitation period is about to expire for a claim you wish to make, then call the Western Australian Industrial Relations Commission (**WAIRC**) (for state system employees) or the FWC (for national system employees) for information on fax and online lodgment options, to ensure you lodge it within time.

7. Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

Web www.elcwa.org.au

Fair Work Commission

Address Level 16, 111 St George's Terrace, Perth 6000

Tel 1300 799 675

Web www.fwc.gov.au

Email perth@fwc.gov.au

Western Australian Industrial Relations Commission

Address Level 17, 111 St George's Terrace, Perth WA 6000

Tel 08 9420 4444

Web www.wairc.wa.gov.au

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