

Fact Sheet – Unfair dismissal for state system employees

1 Background

1.1 What is unfair dismissal?

Unfair dismissal occurs when an employee is dismissed in a harsh, oppressive or unfair manner. For example, a termination may be:

- harsh because of its impact on an employee or because it is disproportionate to the employee's misconduct or poor performance;
- unfair because the employee was not guilty of the alleged misconduct or poor performance or because the employee was not given an opportunity to respond to any allegations; or
- unreasonable because there was no evidence to support a termination.

1.2 Who can make a claim?

To make a claim for unfair dismissal in the Western Australian Industrial Relations Commission (**WAIRC**) you must be:

- an employee;
- employed under the state system (see ELC fact sheet "National system employee or state system employee - which one are you?);
- earning less than \$172,200 per year (as at 1 July 2020) if you are not covered by an award or industrial agreement; and
- dismissed (or constructively dismissed) from your employment (see ELC Fact Sheet "Constructive dismissal - when you are forced to resign").

1.3 How long does an employee have to make a claim?

An employee has 28 calendar days to make an unfair dismissal claim from the date of his or her dismissal. If there is a genuine reason why the claim was not filed in this time it may be possible to seek an extension of time. See ELC Fact Sheet – "Missed the deadline for making a claim: what can you do?".

1.4 What will be considered?

In deciding whether there has been an unfair dismissal, the WAIRC will generally consider:

- whether there was a valid reason for the dismissal;
- whether the employee was given reasons for the dismissal;
- whether the employee was given an opportunity to respond to the reasons for the dismissal; and
- whether there were any warnings relating to unsatisfactory performance prior to the dismissal.

2 What is required of the parties?

2.1 Applicant (employee)

When lodging an unfair dismissal application, an applicant must:

- identify the employer – the legal entity that employed the applicant;
- state why he or she believes the dismissal was unfair and what he or she is seeking; and
- pay the \$50 lodgment fee.

3 Conciliation

3.1 When will conciliation be used?

After the relevant documents have been lodged, the application will proceed to a conciliation conference between the parties, which is presided over by a member or a Deputy Registrar of the WAIRC.

3.2 What is conciliation?

Conciliation is an informal process involving an independent person trying to assist the parties to agree on how to resolve the dispute. It should be noted that:

- the WAIRC pursues conciliation as far as possible and tries to leave formal arbitration as a last resort;
- conciliations are conducted on a “without prejudice” basis, meaning that statements made in conciliation cannot be used in an arbitration hearing;
- the presiding Deputy Registrar will set out the conduct of the conciliation; and
- the parties to a conciliation must meet their own costs.

3.3 When and where will the conciliation conference be held?

Conferences are generally held in the WAIRC in Perth but are also held in regional centres.

The conference is generally arranged by the Commissioner’s Associate. The parties are usually notified by letter but, in urgent cases, may be notified by telephone or email.

3.4 Who is required to attend the conciliation?

Both the applicant and the respondent must attend the conciliation. In addition:

- the respondent may send an appropriate person from senior management who has authority to agree to a settlement;
- you may have a person attend the conference to support you (not as your agent) if the Commissioner allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

3.5 How do you prepare for the conciliation?

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

- know your case – review what happened and prepare a summary in date order;

- have all relevant documents (eg medical certificates or employment contracts);
- get advice from a lawyer or union;
- consider bringing along a support person or lawyer (the Registry can provide you with a list of possible lawyers); and
- conduct yourself in a polite and courteous manner.

3.6 What should you say at the conciliation?

You should attempt to explain at the conciliation:

- what happened/what the relevant facts are;
- why you think that the termination was unfair or unlawful;
- how the termination was carried out and whether you were given warnings; and
- what you want in terms of orders or compensation.

3.7 What happens in the conciliation?

The aim of conciliation is to try to resolve the matters in dispute without the need for a formal arbitration. This general process involves:

- the applicant and the respondent (the parties) meeting to discuss the dispute;
- the parties summarising their positions and discussing ways to resolve the matter; and
- the Commissioner sometimes dividing the conference and speaking separately with the parties.

3.8 What happens if the parties agree to a resolution?

If the parties agree to a resolution, the Commissioner may make an order that:

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

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

If the Commissioner concludes that the parties cannot agree to a resolution, the matter is usually listed for a hearing where a Commissioner decides whether you have been unfairly dismissed. This will take place at a formal hearing, which requires the parties to present formal evidence.

4 Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

Web www.elcwa.org.au

Wageline

Tel 1300 655 266

Web www.dmirs.wa.gov.au/wageline

Western Australian Industrial Relations Commission

Tel 08 9420 4444

Web www.wairc.wa.gov.au

Outside Perth Metro 1800 624 263 (FREECALL)

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