



Employment Law Centre of WA (Inc)

Working for WA Workers

Making a breach of contract claim

Information Kit

Advice Line 1300 130 956 or 9227 0111

Making a breach of contract claim

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

This information kit is current as at 1 July 2018.

How to use this guide

This guide is to assist you in considering or commencing minor case proceedings in the Magistrates Court in relation to claiming unpaid entitlements (of under \$10,000). You may also be eligible to make a claim in the Western Australian Industrial Relations Commission (**WAIRC**). See ELC Information Kit “Making a denial of contractual benefits claim”.

What are unpaid entitlements?

Unpaid entitlements are entitlements due under a common law contract which the employee has not received. If you are claiming an entitlement under a law, an industrial agreement or an award, see ELC Information Kit “Making a claim for unpaid minimum entitlements”.

Can you make a claim?

If you believe that your employer has breached a term of your common law contract, you may bring a claim against your employer in the Magistrates Court for breach of contract. The steps are outlined below.

To make a claim you must:

- be an employee; and
- specify what benefit you were entitled to and what it is you are claiming.

What are the time limits?

Claims for unpaid entitlements in the Magistrates Court must be commenced within **6 years** of the entitlement becoming payable. However, it is best to commence action without delay.

What costs are involved?

- For claims less than \$10,000, you are required to pay a lodgement fee of \$129.
- Generally, you will bear your own legal costs.

Legal costs are not usually awarded in the minor case jurisdiction. However, the unsuccessful party can be ordered to pay Court fees, service fees etc. Other costs are not awarded unless the Court is satisfied that the claim or defence was wholly without merit or that exceptional circumstances existed which would cause an injustice to be done to the successful party if costs weren't awarded.

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

- Work out what sort of contract, agreement or award governs your employment.

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

Determine what sort of contract, agreement or award governs your employment

Your employment may be regulated by:

- an award;
- an enterprise agreement;
- an industrial agreement;
- an Australian Workplace Agreement (**AWA**);
- an Interim Transitional Employment Agreement (**ITEA**);
- an Employer-Employee Agreement; or
- a common law contract of employment.

A common law contract may be formed out of what has been said, done or written down and agreed to.

If you signed an AWA, an ITEA, an Employer-Employee Agreement, or a written common law contract, you should have been given a copy.

If you don't remember signing anything when you commenced employment, you need to find out what kind of arrangement covers your employment. To find out you can call:

- Wageline on 1300 655 266 if your employer is in the **state system**; or
- The Fair Work Infoline (which is operated by the Fair Work Ombudsman) on 13 13 94 if your employer is in the **national system**.

You can call ELC on 1300 130 956 to get advice about which system is likely to apply to you. See also ELC Fact Sheet - "National system employee or state system employee: which one are you?".

Wageline and the Fair Work Infoline should be able to tell you:

- whether you are covered by an award;
- whether the award is state or national; and
- the name of the award.

They may also send you a copy of the award.

If the type of work you do is not covered by an award, you may be advised that the minimum conditions set out in the *Minimum Conditions of Employment Act 1993* (WA) or the *Fair Work Act 2009* (Cth) (**FW Act**) apply to your employment.

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. i.e.

entitlement (unpaid wages) = (hours worked x ordinary rate of pay) - what you were paid

Approach your employer

Taking formal legal action can be time-consuming and stressful. For this reason, it is worthwhile trying to resolve a dispute out of court.

You may decide to approach your employer informally and make the employer aware that you believe you have not been paid correctly.

Give your employer a copy of your calculations and give the employer an opportunity to review those calculations. 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 wish to put your concerns in writing:

- State that you believe that you have been underpaid the amount you calculated, and ask the employer either to pay you the amount outstanding or to commence negotiations with you within a particular time-frame – for example, within 14 days from the date of the letter.
- You may also wish to state in the letter 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 date and 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 attempted to recover the amounts owed.

Commencing legal action

You can make a claim for breach of a common law contract in the Magistrates Court.

If you are covered by:

- an award;
- a certified agreement;
- an industrial agreement;

- an AWA;
- an ITEA;
- an Employer-Employee Agreement;
- the *Long Service Leave Act 1958* (WA);
- the *Minimum Conditions of Employment Act 1993* (WA); or
- the *Fair Work Act 2009* (Cth),

you may generally commence legal action in respect of these in the Industrial Magistrates Court (**IMC**). Please see the ELC Information kit titled “Making a claim for unpaid minimum entitlements”.

Before commencing legal action yourself, we recommend that you contact:

- Wageline on 1300 655 266 if you are in the state system; or
- the Fair Work Ombudsman (**FWO**) on 13 13 94 if you are in the national system.

Which forms do you lodge?

If you do decide to make a breach of contract claim in the Magistrates Court, you will need to complete Form 4 *Minor Case Claim*. You may also need to complete Form 20 *Statement of Minor Case Claim* and Form 11 *Affidavit of Service* (see below). These forms are hyperlinked at the end of this document.

To find the forms on the internet, follow this path:

- www.magistratescourt.wa.gov.au;
- then select these links:
 - Fees, Forms & Fact Sheets;
 - Magistrates Court (Civil Proceedings) Rules 2005 Forms; and
- choose Form 4, Form 20 and Form 11 (if needed) from the list.

Complete and lodge the Claimant’s copy of Form 4 with the Magistrates Court Registry. Keep a copy of Form 4 for your records.

Serving the claim

Once you have lodged your claim forms with the Magistrates Court Registry, you will need to deliver Form 4 to your employer. This is called “serving” your employer.

The Magistrates Court has rules for service which must be followed. For example, if your employer is a sole trader (i.e. an individual) or a partnership, one way of serving the employer is by handing the document to that individual or to one of the partners, as the case may be. If your employer is a corporation (i.e. a company), one way of serving the document is by leaving it at, or posting it to, the company’s registered office. Contact

ELC or the Magistrates Court Registry for further information on how to serve your claim.

Another way of serving the employer is to arrange for an officer of the court – a bailiff – to serve the claim for you. There is a fee for this.

Make sure you keep a copy of every document you serve on your employer as well as any acknowledgement of receipt. This may help you if your employer argues that you did not serve the forms.

Affidavit of service

After serving Form 4 on your employer, you must lodge with the Registry an “affidavit of service” completed by the person who served the document. The affidavit of service must state who served the document, as well as when, where and how the document was served. The form to use for this is Form 11.

If a bailiff served the claim for you, you do not need to lodge an affidavit of service. The bailiff will provide you with a certificate of service (Form 10).

Employer’s response to your claim

Once your employer has been served with your claim, the employer must respond within 14 days. The employer may decide to:

- pay you the money that the employer agrees is owed to you;
- admit you are owed the money; or
- defend the whole or part of the claim.

If your employer pays you the money owing, you should let the Magistrates Court know formally.

If your employer admits to owing you the money and lets the Magistrates Court know, you will receive a “notice of admission of claim” from the Magistrates Court with details of any payment offer. If you accept the offer, you should contact your employer and confirm your acceptance of the repayment terms. If you do not accept the offer, you can ask for an enforcement of judgment for the total debt.

If your employer defends the claim either wholly or partially, you will be told by the Magistrates Court that a notice to defend has been lodged.

You can choose to accept any offer to pay part of the amount you are demanding as full satisfaction of your claim. If you do so, let the Magistrates Court know in writing.

If your employer does not respond at all, you may apply for a default judgment after 14 days have expired.

Default judgment

A default judgment in this situation means a judgment is made in your favour because the employer has failed to respond to your claim. To apply for default judgment, you need to lodge:

- [Form 13](#) - Application for Default Judgement; and either:
 - a certificate of service from the bailiff ([Form 10](#)); or
 - an affidavit of service ([Form 11](#)),

to prove to the Registrar that your claim was served on the employer.

Pre-trial conference

- If your employer lodges a response to your claim indicating that it intends to defend the claim, the Registrar must list the case for a pre-trial conference within 14 days.
- The purpose of the pre-trial conference is to allow you and your employer to sit down together with the Registrar to discuss the claim and to try and resolve it without the need for a trial.
- Carefully consider your claim, any evidence you have to support your claim and your employer's response before attending the pre-trial conference.
- You will need to be able to explain your claim briefly to the Registrar and your employer.
- Your employer will then explain its response to your claim.
- The Registrar will try to assist you and your employer in reaching an agreement.
- The pre-trial conference is compulsory and confidential. If you fail to attend the pre-trial conference, the Registrar may give “default judgment” against you.
- Similarly, if the employer fails to attend the pre-trial conference, the Registrar may give “default judgment” against the employer.
- No witnesses may be called at the conference.
- If the dispute cannot be resolved at the pre-trial conference it will be listed for a trial before a Magistrate.

Mediation

- Mediation is another way for the parties to negotiate a settlement.
- A mediator cannot tell either party what to do.

- The mediator should assist the parties to reach a settlement that both parties agree with.
- If this process is unsuccessful then your case will be listed for a conference.
- Any offers or admissions made at mediation will not be communicated to the Magistrate, if the case goes to trial.

After the pre-trial conference

The Registrar can direct you and your employer to do certain things and list your claim for a further pre-trial conference.

- Both parties can agree to attend mediation and may settle at any point.
- If settlement is reached, the Registrar will draw up consent orders for both parties to sign.
- If no settlement is reached, the Registrar will list the case for trial.

If you and your employer agree to a settlement, you may lodge a notice of discontinuance and request that the Court grant orders in accordance with the terms of your settlement.

Statement of claim – Form 20

At the pre-trial conference, the Registrar may order you to lodge and serve a statement of claim. If this happens, you must lodge and serve your statement of claim on your employer within 14 days after the pre-trial conference.

The form to use for a statement of claim is Form 20. This form allows you to expand on the details of your claim which you set out in Form 4.

The first page of the form asks you to set out a summary of the facts relevant to your claim. The second page asks you to set out what it is that you are asking for from your employer (the remedy or relief you are seeking).

What should you write in your statement of claim?

- Keep irrelevant matters out of this statement.
- Include a list of facts that are relevant in proving that your employer owes you the money that you say the employer does.
- Set the facts out in date order.
- Keep in mind that you may not introduce new facts at trial.
- Make sure that any facts that may assist you in your argument are included on this form.
- If there is more than one debt, divide up the information.

How do you prepare for your hearing?

- You will need to be familiar with your claim and your evidence so that you can present your claim to the Magistrate in a clear and concise manner.
- You may want to practise at home with a friend or family member before the hearing day. This may help you to feel more at ease when you have to stand up in Court and tell your story to the Magistrate.
- You should make detailed notes of all of the facts of your claim to remind yourself of what you need to say. Make sure that these notes include times, dates, places and the names of any people involved.
- If you are intending to show documents to the Magistrate, you will need three copies of each document. When they are asked for in Court, give them to the Magistrate's clerk (or associate). If you are bringing witnesses, make sure you have additional copies for them.
- Check that you have everything that you need before you go to Court on the day of your hearing. Remember to bring a pen and paper.
- The Court staff will help with administration matters but they cannot give you legal advice.
- On the day of your hearing, you should report to the Magistrates Court and inform the Registry that you have a claim listed for hearing on that day.
- Make sure you are on time. If you miss your allotted time the Magistrate may dismiss your claim.
- If you have reached a last minute agreement with your employer you should advise the clerk immediately.

Witnesses

- If you have witnesses to support your claim, they will need to attend Court with you on the day.
- You and your witnesses will need to be prepared to swear an oath or affirm the truth of what you or they (as the case may be) are going to say.
- Witnesses will most likely be asked to wait outside the Court until they are called.

Courtroom etiquette

- The Magistrates Court is designed to be less formal than some courts, however, you still need to ensure that you behave respectfully and courteously at all times.
- Address the Magistrate as "Your Honour", or "Sir/Madam".

- Stand when the Magistrate speaks to you or you speak to him or her.
- You are expected to bow to the Magistrate when you enter or leave the Courtroom and when the Magistrate enters or leaves the Courtroom.
- Speak only to the Magistrate or witness when appropriate.
- You should never interrupt someone else who is talking in the Courtroom, even if your employer is saying something that you disagree with.
- You may feel upset towards your employer or frustrated by the Court system but you need to put these feelings aside on the day and focus on remaining calm when explaining your claim and when responding to issues raised by your employer.
- You must not eat or drink in the Courtrooms.
- Switch off your mobile phone.

The Magistrate's decision

- After all the evidence has been given, the Magistrate will give a decision on your claim.
- It is rare for the hearing to be adjourned (i.e. postponed). Generally, adjournments are only granted where the reason for the adjournment is shown to be out of your control.
- If the Magistrate finds in your favour he or she may order your employer to pay you the contractual entitlements you are claiming or a reduced amount, depending on the circumstances.
- If you are unsuccessful, you may be entitled to appeal the decision. We recommend that you seek your own independent advice if this happens.

Enforcing a court order

- If your claim was successful but your employer does not pay you the amount specified in the Court order, you have a right to enforce payment of the amount (called "a debt").
- The Magistrates Court order will only be enforced at your request.
- First, contact the Registry and tell the Registry staff that an order was made by the Magistrate that your employer must pay a certain amount of money by a certain date and that it has not been done.
- The Registry should be able to provide you with a copy of an order and tell you the steps involved in enforcing the order.



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

[Form 4](#) – Minor Case Claim

[Form 11](#) – Affidavit of Service

[Form 13](#) – Application for Default Judgment

[Form 20](#) – Statement of Minor Case Claim

If you cannot access the forms using the hyperlinks above, please call the ELC Advice Line and ask for them to be posted to you.



More 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.dmirr.wa.gov.au/wageline

Fair Work Ombudsman

Tel 13 13 94

Web www.fairwork.gov.au

Magistrates Court of Western Australia

Address Central Law Courts, 501 Hay Street, PERTH WA 6000

Tel (08) 9425 2222

Web www.magistratescourt.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 the outstanding entitlements that you owe me.

I have calculated that there is an outstanding amount of **[\$[insert amount]** in respect of **[annual leave/long service leave/wages – insert whichever is applicable]**.

I have received legal advice and understand I can make a claim in the Magistrates Court for this outstanding amount.

To avoid the expense, stress and inconvenience of legal proceedings, an agreement in relation to my claim is required.

Please forward the outstanding amount to me within 14 days.

Yours sincerely

[insert your name]