



Employment Law Centre of WA (Inc)

Working for WA Workers

Making a general protections claim: for national system employees

Information Kit

Advice Line 1300 130 956 or 9227 0111

Making a general protections claim: for national system employees

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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 making a general protections claim in the Fair Work Commission (**FWC**) against your employer for adverse action that is prohibited under the Fair Work Act.

A general protections claim is made for adverse action which results in you being dismissed from your employment. A claim may also be made for adverse action taken while you are still employed. This Information kit covers both situations.

What is adverse action?

An employer takes “adverse action” against an employee where an employer:

- dismisses an employee;
- injures the employee in his or her employment (note this is an injury to the employment, not a physical injury. It might occur, for example, where the employer demotes or suspends the employee);
- alters the position of the employee to the employee’s prejudice; or
- discriminates between the employee and other employees.

A prospective employer takes “adverse action” against a prospective employee where the prospective employer:

- refuses to employ the prospective employee;
- discriminates against the prospective employee in the terms or conditions of employment offered.

Note that “adverse action” also includes threatening to take one of the actions described above or organising such action.

Are you eligible to make a claim?

A person is eligible to make a general protections claim for adverse action which their employer has taken against them if that person is:

- a national system employee; or
- a prospective national system employee.

To find out whether you are a national system employee call Wageline on 1300 655 266 or see the ELC Fact Sheet “National system employee or state system employee: which one are you?”.

If you are a state system employee, you cannot make a general protections claim. However, state system employees may be able to make other claims. For more information, see ELC’s Fact Sheets – “Workplace bullying”, “Discrimination and sexual harassment”, “Unlawful termination for state system employees” and ELC Information Kit – “Making an unlawful termination claim: for state system employees”.

When is an employer prevented from taking adverse action?

An employer cannot take adverse action against an employee because:

- that person has a workplace right;
- that person has, or has not, exercised a workplace right;
- that person proposes to exercise or not to exercise a workplace right;
- that person prevents the exercise of a workplace right by the other person; or
- a third person has exercised, proposes or has at any time proposed to exercise a workplace right for the second person's benefit, or for the benefit of a group of people to which the second person belongs.

An employer also cannot take adverse action against an employee due to the employee's:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin

To make a successful claim against your employer, you will need to demonstrate that the adverse action was carried out because of your workplace right, or because of one of the characteristics listed above. You can still make a claim if the workplace right or other characteristic only formed part of the reason for the adverse action. However, if your employer can demonstrate that the adverse action was taken for another reason then you may not be successful.

What is a "workplace right"

A "workplace right" that is protected by the law from adverse action includes:

- a right to make a complaint or inquiry in relation to employment;
- an entitlement to a benefit, role or responsibility established under a workplace law or instrument; and
- a right to initiate or participate in a process established under a workplace law or instrument.

Rights established under a "workplace law" or "workplace instrument" include not only rights established under statute, but also those established under instruments such as awards and through processes such as protected industrial action, conferences, hearings held by the FWC, and court proceedings.



Are there any circumstances in which adverse action is permissible?

Adverse action may be permissible in certain circumstances. For example, adverse action that would otherwise be in breach of the discrimination-based rights listed above may be taken where it is necessary due to the inherent requirements of the job. It may be taken where the action is authorised by any federal law and certain state anti-discrimination laws.

Adverse action may also be taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed if that action is taken:

- in good faith; and
- to avoid injury to the religious susceptibilities of adherents of that religion or creed.

How do you make an application?

(a) If you have been dismissed

If you have been dismissed and you decide to make a general protections claim against your employer, you must apply to the FWC within **21 days** of your dismissal taking effect. The correct form is Form F8—*General protections application involving dismissal*. You must complete and lodge Form F8 with the FWC and pay a \$71.90 filing fee. This form is available on the FWC website: See <https://www.fwc.gov.au/content/rules-form/general-protections-application-involving-dismissal>.

(b) If you have not been dismissed

If you have not been dismissed and you decide to make a general protections claim against your employer, you must apply to the FWC within 6 years of the adverse action. The correct form is Form F8C — *General protections application not involving dismissal*. You must complete and lodge Form F8C with the FWC and pay a \$71.90 filing fee. This form is available on the FWC website: See <https://www.fwc.gov.au/content/rules-form/general-protections-application-not-involving-dismissal>.

(c) Late applications

The FWC will only consider late applications in exceptional circumstances. To make a late application, you must include the reasons why the application is late and why it would be unfair for the FWC not to accept the application. The FWC will then consider if an extension of time should be granted. You should contact ELC's Advice Line for legal advice on how to apply out of time. Or, for further information, see ELC Fact Sheet "Missed the deadline for making a claim: what can you do?".

(d) Request to waive filing fee

If paying the filing fee will cause you serious financial hardship, you can lodge an application to the FWC for the filing fee to be waived.

What happens after you make an application?

Once you have lodged your application with the FWC, the FWC will provide the employer with a copy of the application, information about the process that the FWC will follow and an employer response form.

The FWC may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. Mediation and conciliation are procedurally similar in that both are confidential processes which help the parties identify issues in dispute, think of ways to resolve the issues, consider alternatives and work together to reach an agreement. Further, the processes involve an independent third party who will assist the parties - in the case of a mediation, it is a mediator and for conciliation, it is the conciliator. This information kit provides information on conciliation below. The information can be applied similarly where the dispute is dealt with by mediation.

Step 1: Conciliation

What is conciliation?

Conciliation is an informal, private and generally confidential process in which a FWC conciliator assists employees and employers to resolve a dispute by agreement. The object of conciliation is for the parties to agree to a remedy for the dispute without the need for a formal hearing. The conciliator is independent and does not take sides, but tries to help the parties reach an agreement.

Who is required to attend the conciliation?

(a) If you have been dismissed

If you have been dismissed, you and your employer are both 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 (not as your agent) if the FWC Commissioner allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

(b) If you have not been dismissed

For general protections claims that don't involve a dismissal, it is not compulsory for the employer to attend a conciliation conference. Because of this, you are entitled to proceed directly to court (see Step 2 below) without first participating in a conciliation conference.

If your employer agrees to participate, then both you and your employer are required to attend the conference. 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 (not as your agent) if the FWC conciliator allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

When and where will the conciliation be held?

The FWC will notify you in writing of the date of the conciliation. The conciliation may take place over the telephone. If you are required to attend in person, the conciliation will most likely be at the FWC offices. The FWC's offices in Western Australia are located at 111 St George's Terrace, Perth.

What happens at the conciliation?

During the conciliation, the conciliator will ask both parties to put forward their case, and also respond to any allegations made against them. Generally, the steps in a conciliation will be as follows:

- the conciliator will explain his or her role and the manner in which the conciliation is to be run;
- each side briefly then outlines their version of events, any relevant facts and what remedies they seek;
- the conciliator may then allow or ask questions;
- the parties will discuss the circumstances of the complaint and relevant issues;
- the conciliator may then talk separately to the parties; and
- the conciliator will assist the parties in trying 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.

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;
- locate all relevant documents (e.g. medical certificates or employment contracts);
- seek advice from a lawyer or union;
- 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)?
- If you have been dismissed, why do you think the employer dismissed you? – i.e. you need to show that the reason the employer dismissed you was because of a workplace right (e.g. because you made a complaint or inquiry) or because of a discriminatory characteristic (e.g. because of your age, disability, pregnancy etc).
- If you have not been dismissed, why do you think the employer took adverse action against you? – i.e. you need to show that the reason the employer took adverse action against you was because of a workplace right (e.g. because you made a complaint or inquiry) or because of a discriminatory characteristic (e.g. because of your age, disability, pregnancy etc).
- What are you seeking (i.e. employment, reinstatement, compensation)?

Once you allege that your employer has dismissed you or taken adverse action against you for a particular reason, your employer has the burden of proving that you were not dismissed, or that they did not take adverse action against you, for that reason.

What happens if you and your employer reach agreement in conciliation?

If you and your employer reach an agreement, the FWC may make a binding order that gives effect to the agreement. It is also quite common for the employer to prepare a document to be signed by both parties that formalises the agreement. Often this is in the form of a deed that releases the employer from liability from further claims by the employee in exchange for the reinstatement of the employee or the payment of compensation to the employee.

What happens if you and your employer do not reach agreement in conciliation?

(a) If you have been dismissed

If no agreement is reached between you and your employer and the FWC is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, the FWC must issue a certificate stating that fact.

You then have 14 days to agree with your employer to arbitrate the matter within FWC, or to use the certificate to commence court proceedings to resolve the dispute in the Federal Court or Federal Circuit Court (**FCC**) (formerly the Federal Magistrates Court).

Note that if the FWC thinks that a general protections court application or an arbitration would not have a reasonable prospect of success, it must advise the parties accordingly.

(b) If you have not been dismissed

If no agreement is reached between you and your employer, you can consider whether you would like to continue your claim by commencing court proceedings in the Federal Court or FCC.

Note that if the FWC thinks that a general protections court application would not have a reasonable prospect of success, it must advise the parties accordingly.

Step 2: Proceeding to a final decision

If you have been dismissed and conciliation has failed, you have the option of trying to get your former employer's agreement to proceed to arbitration within FWC.

If you have been dismissed and your former employer does not agree to arbitration OR if you have not been dismissed, then your only option to proceed to a final decision is to make a general protections court application to the FCC or the Federal Court.

Arbitration by FWC (where you have been dismissed)

Once FWC has issued a certificate following conciliation, you can make an application for the FWC to arbitrate the matter if:

- you make the application within 14 days of the conciliation certificate being issued; and
- your former employer agrees to the matter being arbitrated.

You must make your application by filing form F8B, completed and signed by both you and your former employer.

You can also ask for FWC to accept an application for arbitration after 14 days, but your application may not be accepted.

Your former employer does not have to agree to proceed to arbitration. However, arbitration within FWC is likely to be quicker, cheaper and less formal than a hearing in the FCC or the Federal Court. For this reason, your former employer may agree that it is the most efficient way to resolve the matter.

If your employer does not agree to the matter being arbitrated by FWC, then you can make an application to the FCC or the Federal Court for a hearing to determine the matter. If you make this type of court application, your employer does not have a choice and must participate in the hearing.

You have 14 days from the date of the issue of the conciliation certificate (mentioned above) to proceed to court. So if your employer has not signed form F8B and it is nearing 14 days since the issue of the certificate, you may need to lodge a court application, or risk not having an option to proceed at all.

Electing to proceed to court and making a claim

(a) If you have been dismissed

Upon receiving the FWC's certificate, you may bring a general protections court application in the FCC (Fair Work Division) or the Federal Court (Fair Work Division) depending on the amount of your claim. This information kit only deals with how you may make an application to the FCC (Fair Work Division).

If you decide to make an application to the FCC, you must file your application within **14 days** after the FWC has issued you with a conciliation certificate.

When you make your claim you must pay a \$71.90 filing fee and lodge the following forms:

- [Application](#) – Fair Work Division; and
- [Form 2](#) – Claim under the Fair Work Act 2009 alleging dismissal in contravention of a general protection - paragraph 45.06(b).

You may be able to apply for the filing fee to be waived if you cannot afford to pay it.

When filing the documents, you should file the original documents, together with a copy for each party to the matter (i.e. your employer). The Registry will keep the original and return to you a sealed copy to be served on your employer. You should make a copy of the documents for your own records.

Note that there are stricter rules on how documents should be served on your employer in the FCC. You may want to contact the ELC Advice Line about how to serve the documents on your employer.

(b) If you have not been dismissed

If conciliation fails, or if your employer does not agree to participate in a conciliation, you may bring an action in court. A general protections court application is brought in either the FCC (Fair Work Division) or the Federal Court (Fair Work Division) depending on the amount of your claim. This information kit only deals with how you may make an application to the FCC (Fair Work Division).

If you decide to make an application to the FCC, you must do so within **6 years** after the date on which the alleged adverse action occurred. To make your claim you must lodge the following forms:

- [Application](#) – Fair Work Division; and
- [Form 4](#) – Claim under the Fair Work Act 2009 alleging contravention of a general protection - paragraph 45.08 (b).

When you lodge the forms, you must pay a filing fee of \$71.90 if the claim involves discrimination or \$665 if the claim does not involve discrimination. You may be able to apply for the filing fee to be waived if you cannot afford to pay it.

When filing the documents, you should file the original documents, together with a copy for each party to the matter (i.e. your employer). The Registry will keep the original and return to you a sealed copy to be served on your employer. You should make a copy of the documents for your own records.

Note that there are stricter rules on how documents should be served on your employer in the FCC. You may want to contact the ELC Advice Line about how to serve the documents on your employer.

What happens after you have made and served a claim?

After you have filed and served your claim, the Registry will set a date for a hearing and will notify the parties of that date. Before the hearing, your employer is required to file and serve on you a response to your claim within 14 days after you served your employer with your claim.

You should be aware that there are some legal rules and technicalities that apply to court proceedings. You can access a copy of the rules on the FCC website: www.federalcircuitcourt.gov.au. If you need assistance, please call the ELC Advice Line.

Discontinuance

If at any time before and during your FWC or court proceedings you and your employer agree to settle the dispute, you should discontinue your proceedings.

(a) Discontinuance of proceedings with the FWC

You may discontinue proceedings with the FWC at any time after lodging your application form and prior to being issued with a certificate from the FWC by completing a *Notice of Discontinuance* form (F50), lodging it with the FWC and serving it on your employer. If you discontinue your application before your application is listed for a conference or, if it is listed for conference, at least 2 days before the date of the conference, your filing fee may be refunded.

(b) Discontinuance of proceedings with the FCC

You may discontinue proceedings with the FCC 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. To discontinue the proceedings after this time will require “leave” (i.e. permission) of the court.

Forms

[Form F8](#) – General protections application involving dismissal (FWC)

[Form F8C](#) – General protections application not involving dismissal (FWC)

[Form F80](#) – waiver of application fee (FWC)

[Form F8B](#) - Notification of agreement for consent arbitration of a general protections dispute (FWC)

[Form F50](#) – Notice of Discontinuance (FWC)

[Application](#) – Fair Work Division (FCC)

[Form 2](#) – if you have been dismissed (FCC)

[Form 4](#) – if you have not been dismissed (FCC)

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. Alternatively you can call the FWC and the FCC on the numbers listed below, or access their websites as listed below.



More Information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or (08) 9227 0111

Web www.elcwa.org.au

Wageline

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Fair Work Commission

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