



Employment Law Centre of WA (Inc)

Working for WA Workers

Making an unlawful termination claim: for state system employees

Information Kit

Advice Line 1300 130 956 or 9227 0111



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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 starting proceedings in the Fair Work Commission (**FWC**) in relation to an unlawful termination of your employment.

Unlawful termination

You can claim unlawful termination if you are a state system employee and you believe that the termination of your employment was based primarily on discriminatory grounds.

State system employees

Only state system employees can make a claim for unlawful termination. An employee is most likely to be a state system employee if his or her employer is in Western Australia and is not a constitutional corporation. Most commonly this is where the employer is a sole trader, a partnership, or an incorporated entity that does not carry out significant financial or trading activities (many non-profit organisations fit this definition). If you are unsure about whether you are a state system employee or not then call Wageline or the Employment Law Centre (**ELC**)'s Advice Line (see below), or see the ELC Fact Sheet - "National system employee or state system employee: which one are you?". If you are a national system employee, see ELC Fact Sheet – "General protections for national system employees" and ELC Information Kit – "Making a general protections claim: for national system employees".

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 for unlawful termination must be made to the FWC. All state system employees, no matter what the size of the employer or the employee's income, or the length of employment, can potentially make a claim for unlawful 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;
- penalties of up to \$63,000 for corporations and up to \$12,600 for individuals; and
- any other order the court considers necessary.

How do you lodge a claim?

When lodging an unlawful termination application you must:

- identify the employer – the legal entity who employed you;
- show you were dismissed by your employer; and
- state why you believe the termination was unlawful and what you are seeking.

What are the time limits?

You must lodge your application with the FWC within 21 days of the date your dismissal took effect.

A late application may be accepted in some exceptional circumstances. Any late application must include reasons as to why your application is delayed and why it would be unfair for the FWC not to accept the application. For further information, see ELC Fact Sheet – “Missed the deadline for making a claim: what can you do?”

What form should you use?

Use *Form F9 – Application for the Commission to deal with an Unlawful Termination Dispute*. There is a link to this form below. You can also access this form here: https://www.fwc.gov.au/documents/forms/Form_F9.docx.

What costs are involved?

- You are required to pay an application fee of \$71.90.

- This fee may be waived on the grounds that it would cause serious hardship. In order to apply for the fee to be waived, complete and submit an *Application - waiver of application fee* form (see link below), together with Form F9.

In general, parties bear their own legal costs. The FWC can order one party to bear some or all of the costs of the other party. However, this is uncommon and is generally limited to situations where a claim is found to have been made vexatiously, without reasonable cause or where the claim had no reasonable prospect of success.

How do you submit the application?

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

To deliver the application in person, go to the FWC office in your capital city between the hours of 9.00am and 5.00pm. In Western Australia, the address is Floor 16, 111 St George's Terrace, Perth, 6000. This address can also be used for postal applications. Other postal addresses can be found on the FWC website.

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

What happens after you lodge your 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 will arrange a conciliation between you and the employer and will notify both you and your employer in writing about the time and date of the conciliation. Both parties are required to attend the conciliation. An application for the conciliation to be "adjourned" (postponed) 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. Hearings 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 the FWC. If you decide to represent yourself in proceedings it will be easier for you if you are well prepared.
- If you wish, or the employer wishes, to be represented by a lawyer or paid agent you will need the permission of the FWC, unless the lawyer or paid agent is an

employee or officer, 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 FWC member dealing with your case why you would like that individual or those individuals to be present.

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 the FWC 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 FWC on 1300 799 675 or the Translating and Interpreting Service on 131 450.

What will happen at the FWC?

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

What is conciliation?

Conciliation is an informal, private and generally confidential process in which a FWC conciliator assists employees and employers to resolve an unlawful termination 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 tries to help the parties to reach an agreement.

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

- the conciliator explains his or her role and the manner in which the conciliation is to be run;
- both sides briefly outline 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 the FWC will try 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.
- The FWC will use a conciliation conference in place of (or before) a hearing wherever possible.

Where will the conciliation be held?

The conference will be conducted over the phone or at the FWC's offices. The FWC's offices in Western Australia are located at Floor 16, 111 St George's Terrace, Perth.

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 FWC conciliator/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 conciliation. You should:

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

What should you say at the conciliation?

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

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

Once an employee has alleged that his or her termination was unlawful, the employer must prove the termination was not unlawful. In other words, the onus of proof in relation to unlawful termination is on the employer.

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?

- If the matter cannot be resolved before or during the conference and the FWC 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.
- 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**)
- If the FWC feels that arbitration or an unlawful termination court application would not have a reasonable prospect of success, it must tell you and your employer.

Proceeding to a final decision

If conciliation has failed, you have the option of trying to obtain your former employer's consent to proceed to arbitration within FWC.

If your former employer does not agree to arbitration, 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 within FWC

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 F9B, 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, 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.

Note that 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 F9B 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

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 the FWC has issued you with a conciliation certificate. You can bring an action in the Federal Circuit Court (**FCC**) (Fair Work Division) or the Federal Court (Fair Work Division). This information kit will only deal with how you may make an application to the FCC.

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

Federal Circuit Court (Fair Work Division) (formerly the Federal Magistrates Court)

If you elect to have your dispute heard by the FCC, you must complete Form 3 – Claim under the Fair Work Act 2009 alleging unlawful termination of employment and lodge it together with the certificate issued by the FWC. This must be done within 14 days of the FWC 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 your application. You must pay a filing fee of \$71.90. You may be able to apply for the filing fee to be waived if you cannot afford to pay it.

Discontinuance

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

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.

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 (click on the hyperlink) or go to www.fwc.gov.au

[Form F9](#) – Application for the Commission to deal with an unlawful termination dispute (FWC)



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

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

[Form F9B](#) - Notification of agreement for consent arbitration of an unlawful termination dispute (FWC)

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

[Form 3](#) – Claim under the Fair Work Act 2009 alleging unlawful termination of employment - paragraph 45.07(b) (FCC)

If you cannot access them 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 9227 0111

Web www.elcwa.org.au

Wageline

Tel 1300 655 266

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

Fair Work Commission

Address Level 16
111 St George's Terrace
PERTH WA 6000

Tel 1300 799 675

Web www.fwc.gov.au

Email perth@fwc.gov.au

Federal Circuit Court

Address Peter Durack Commonwealth Law Courts Building
1 Victoria Avenue
PERTH WA 6000

Tel 92687100

Web www.federalcircuitcourt.gov.au

Email waregistry@fedcourt.gov.au

WorkSafe

Tel 1300 307 877

Web www.commerce.wa.gov.au/worksafe