



Employment Law Centre of WA (Inc)

Working for WA Workers

# **Making a claim for unpaid minimum entitlements**

## **Information Kit**

**Advice Line 1300 130 956 or 9227 0111**

## **Making a claim for unpaid minimum entitlements**

Disclaimer .....	3
How to use this guide.....	4
Assistance in making a claim.....	4
Which system of employment laws applies to you? .....	4
What are unpaid entitlements? .....	4
To make a claim you must: .....	5
What are the time limits? .....	5
What costs are involved?.....	5
What do you do if your employer has not paid (or has underpaid) your entitlements? .	5
Work out which award, agreement or law sets out the entitlement .....	5
Calculate your underpayment or non-payment .....	5
Approach your employer.....	6
Starting legal action .....	6
What forms do you lodge? .....	7
Serving the claim form .....	7
Affidavits .....	8
Employer's response to your claim .....	8
Pre-trial conference .....	9
Can you discontinue the claim? .....	10
What should you do before the IMC hearing?.....	10
How can you prepare for your hearing?.....	10
Witnesses .....	11
In the Courtroom.....	11
Courtroom etiquette .....	11
The Industrial Magistrate's decision.....	12
Enforcing a court order .....	12
More Information.....	14

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

This information kit is current as at 1 July 2020.



## How to use this guide

This guide is to help you in considering or starting a claim in the Industrial Magistrates Court (**IMC**) for unpaid entitlements. This guide deals with IMC procedure in relation to claims for unpaid entitlements under state laws and instruments and small claims under the *Fair Work Act 2009* (Cth) (**FW Act**). The small claims procedure under the FW Act can only be used to recover an amount of money owing to a maximum of \$20,000.

## Assistance in making a claim

This guide is designed to assist you in making a claim independently. However, many unpaid entitlement claims come within the area of responsibility of the Fair Work Ombudsman (**FWO**) or the Department of Mines, Industry Regulation and Safety - Wageline service and inspectorate division. These services may assist you to write a letter to your employer requesting a payment and, in some circumstances, will assist you in a court action to recover your unpaid entitlements. You should call Wageline if you are a state system employee and FWO if you are a national system employee.

## Which system of employment laws applies to you?

If your employer is a sole trader or a partnership you are likely to be in the state system. If your employer is incorporated and engaged in trading or financial activities you will most likely be in the national system. You can call ELC on 1300 130 956 or 9227 0111 to get advice about which system is likely to apply to you. Wageline and the FWO may also help you to work this out. See also ELC Fact Sheet - "National system employee or state system employee: which one are you?".

## What are unpaid entitlements?

Unpaid entitlements are entitlements due under:

- an award;
- an industrial agreement (including an Australian Workplace Agreement, a collective agreement, an enterprise agreement and an enterprise bargaining agreement);
- the *Long Service Leave Act 1958* (WA);
- the *Industrial Relations Act 1979* (WA);
- the *Minimum Conditions of Employment Act 1993* (WA);
- the *Workplace Relations Act 1996* (Cth);
- the FW Act; or
- any other industrial instrument,

which the employee has not received.

This information kit deals with unpaid entitlements under legislative instruments, and not under employment contracts. If you have not been paid an entitlement that you are owed under your employment contract, see ELC Information Kits: "Making a breach of contract claim" and "Making a denial of contractual benefits claim".



### **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 IMC must be commenced within **6 years** of the entitlement becoming payable. However, it is best to start action without delay.

### **What costs are involved?**

Generally, you will bear your own costs including a \$40 lodgement fee when lodging your claim with the IMC.

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

- Work out which award, agreement or law sets out the entitlement.
- Calculate your underpayment or non-payment (**unpaid entitlement**).
- Approach your employer for payment of the unpaid entitlement.
- If your employer does not pay you the unpaid entitlement within a reasonable amount of time, start legal action.

### **Work out which award, agreement or law sets out the entitlement**

If you signed an industrial agreement or a written common law contract, you should have been given a copy.

If you don't remember signing anything when you began employment, you need to find out what kind of arrangement covers your employment, or which law sets out the entitlement you are seeking to recover. To find out you can call Wageline on 1300 655 266 if you are employed in the state system or FWO on 13 13 94 if you are employed in the national system. They should be able to tell you:

- whether you are covered by an award or industrial agreement;
- whether the award or agreement is state or federal;
- the name of the award or agreement; and
- the name of the law or other instrument which sets out the entitlement you are seeking to recover.

Wageline or FWO may also be able to send you a copy of any award which applies to your employment.

### **Calculate your underpayment or non-payment**

Regardless of the type of entitlement you are claiming, you can calculate the amount of your unpaid entitlement by comparing the amount which you should have been paid (**lawful entitlement**) with the amount which was actually paid to you by your employer.

The general calculation is as follows:

- unpaid entitlement = lawful entitlement – amount paid.

Your entitlement for:

- **unpaid wages for hours worked** is calculated by multiplying the number of hours that you worked with the rate of pay set out in your pay slip.
  - entitlement (unpaid wages) = hours worked x ordinary rate of pay
- **unpaid wages for payment below the minimum rate of pay** is calculated by multiplying the number of hours that you worked with the statutory rate which applies to you.
  - entitlement (underpayment) = hours worked x statutory rate of pay
- **unpaid long service leave** is calculated by multiplying the amount of long service leave you are entitled to (determined under *Long Service Leave Act 1958 (WA)* by the amount of continuous service you have completed) with the rate of pay set out in your pay slip. You can call ELC to get advice in relation to your long service leave entitlement.
  - entitlement (LSL) = statutory LSL hours x ordinary rate of pay

The amount your employer paid you should be set out in your payslip.

### 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.

### Starting legal action

Generally, if you are covered by:

- an award;

- an industrial agreement;
- an enterprise agreement;
- an Employer-Employee Agreement;
- the *Long Service Leave Act 1958* (WA);
- the *Industrial Relations Act 1979* (WA); or
- the *Minimum Conditions of Employment Act 1993* (WA);
- the *Workplace Relations Act 1996* (Cth); or
- the FW Act;

you may commence legal action in the IMC.

If you are covered by a common law contract please see ELC Information kit - "Making a denial of contractual benefits claim".

### **What forms do you lodge?**

You will need to:

- complete all of the *Originating Claim* forms (Forms 1.1, 1.2, 1.3 and 2) if you are enforcing a state system entitlement or national system entitlement.
  - If you are a national system employee and you are claiming an amount of no more than \$20,000 (as discussed), you should elect that the Small Claims procedure under section 548(1) of the FW Act applies by ticking 'yes' in the relevant box on Forms 1.1, 1.2 and 1.3 (these documents are available for download at [www.imc.wa.gov.au](http://www.imc.wa.gov.au) and are hyperlinked on the last page of this document); and
- lodge the forms, together with a \$40 filing fee in the IMC Registry located at Level 17, 111 St Georges Terrace, Perth WA 6000, either:
  - in person;
  - by pre-paid post to Industrial Magistrates Court Registry, Locked Bag 1, Cloisters Square, Perth 6850. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
  - electronically.

The Registry will stamp Forms 1.2 and 1.3 and return them to you. If lodging electronically, a number is automatically generated, together with the Court seal. For assistance with the lodgement process, contact the Industrial Magistrates Court Registry on (08) 9420 4467.

### **Serving the claim form**

Once you have lodged your claim forms you will usually have 30 days to deliver Form 1.3 to your employer. This is called "serving" your employer.

Form 1.3 can be served either by a person (that person doesn't have to be you) or by pre-paid post. It is a good idea to check the company details of the employer with the Australian Securities and Investments Commission (**ASIC**) as this may be used by the



Court as evidence if your employer does not respond to your claim. Any printout or information should be attached to your claim form.

The form should be served on a Director, Manager or Company Secretary.

### **Affidavits**

After serving Form 1.3 on your employer, you must lodge the affidavit of service at the Registry stating that you have served your claim on your employer. Try to do this as soon as possible after serving the claim and lodge it in the Court Registry. It is lodged in the same way that your application is lodged and given the same number. To prepare the affidavit of service, use:

- Form 3 if your employer is not a corporation;
- Form 4 if your employer is a public authority;
- Form 5 if your employer is a corporation and you served Form 1.3 other than in accordance with section 109X of the *Corporations Act 2001* (Cth); or
- Form 5.1 if your employer is a company and you served Form 1.3 in accordance with section 109X of the *Corporations Act 2001* (Cth).

You can check the details of your employer with ASIC online (<https://asic.gov.au/online-services/search-asics-registers/>).

In the affidavit you state:

- that you served the employer with the claim; and
- the time and place of service and the manner in which you served the claim, as set out in the form.

You must sign the affidavit in the presence of an appropriate witness. The following people can witness an affidavit:

- a Justice of the Peace;
- an experienced lawyer unless they helped prepare the affidavit, or are involved in the proceedings for which the affidavit is to be used;
- a public notary within the meaning of the *Public Notaries Act 1979* (WA); or
- a registrar or Clerk of a Court, or any mining Registrar appointed under the *Mining Act 1978* (WA).

If you are having difficulty serving your employer or if you are unsure about how to serve your particular employer, you can contact the Clerk to the Industrial Magistrate for assistance on (08) 9420 4467.

### **Employer's response to your claim**

Your employer may consent to the IMC making the final orders that you are seeking in your claim. If your employer consents, you do not need to appear before the IMC. The IMC will make the orders in your absence and your claim will be finalised. If your employer does not consent to the final orders sought in your claim, your employer must lodge a response to your claim with the IMC explaining why it disagrees with your claim or parts of your claim.



The time in which your employer must lodge a response depends on the employer's address for service. If your employer's address for service is:

- less than 1,000 km from Perth, your employer has 21 days in which to lodge a response; or
- more than 1,000 km from Perth, your employer has 28 days within which to lodge a response.

Your employer then has a further 14 days after lodging a response in which to serve its response on you.

Upon lodgment of the response, the Clerk of the Court will list the matter for a pre-trial conference. You will be advised in writing of the date and time of the conference.

The Clerk of the Court may request additional information in respect of your claim. If this happens, any information will need to be served on the respondent, together with an affidavit. This is generally done in the same way as for the original application.

### **Default judgment**

If your employer does not lodge a response to your claim within the appropriate time, you can apply to the Court for a default judgment in your favour against your employer. A default judgment is where the Court makes a judgment order without the parties going through the full trial process. To do this:

- complete Form 6 - Application, which is lodged in the same way as your original application and served on your employer in the same way. The lodgment fee for this is \$10; and
- complete and lodge Form 7 – Affidavit in the same way as for an original application.

If your employer does not respond to this within 14 days, the Court will set a date for the hearing to make a default judgment. Note, however, that this does not necessarily mean that the claim is finally determined, as your employer can apply to the Court to have the default judgment set aside within 14 days of the judgment being made.

### **Pre-trial conference**

The purpose of the pre-trial conference is to allow you and your employer to sit down together with the Clerk to discuss the claim and to try and resolve it without the need for a hearing. The pre-trial conference is confidential.

To prepare for the pre-trial conference, please note the following:

- Carefully consider your claim, any evidence you have to support your claim and your employer's defence before attending the pre-trial conference.
- You will need to be able to briefly explain your claim to the Clerk and your employer.
- Your employer will then explain its response to your claim.
- The Clerk will try to assist you and your employer in reaching an agreement.
- If the dispute cannot be resolved at the pre-trial conference it will be listed for a hearing before an Industrial Magistrate.

If the matter is listed for a hearing, the Clerk will prepare the matter for a hearing and outline the process to the parties. The Clerk will contact you and your employer to request:

- dates you are unavailable;
- the estimated time required for the hearing; and
- details of any witnesses you will be bringing.

### **Can you discontinue the claim?**

If you want to discontinue your claim:

- in whole, use Form 18 (*Notice of Discontinuance – Whole of Claim*); or
- in part, use Form 19 (*Notice of Discontinuance – Part of Claim*).

### **What should you do before the IMC hearing?**

- Write a letter of demand and send it to your ex-employer (see below);
- Get legal advice on the strength of your case;
- Try to negotiate a settlement (keep evidence of this);
- Know the costs involved in starting and proceeding with an action in this Court;
- Know which procedure to use and the Court location;
- Keep all papers related to your dispute in one place;
- Keep a copy of letters you send;
- Keep originals of any other documents;
- Keep dated records of telephone conversations with relevant people; and
- Contact witnesses and ask them to swear statutory declarations.

### **How can you prepare for your hearing?**

- Be familiar with your claim and your evidence so that you can present your claim to the Industrial Magistrate in a clear and concise manner.
- 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 Industrial Magistrate.
- Make detailed notes of all 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.
- Ensure you have everything that you need before you go to Court on the day of the hearing. Remember to bring a pen and paper.
- If you are intending to show documents to the Industrial Magistrate, you will need three copies of each document – one to give to the Industrial Magistrate, one to give your employer and one for yourself. If you are bringing witnesses make sure you have additional copies for them.

- 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 relevant Court and advise the Judicial Support Officer that you have a claim listed for hearing on that day.
- Make sure you are on time. If you miss your allotted time the Industrial Magistrate may dismiss your claim.
- If you have reached a last minute agreement with your employer you should tell the Clerk immediately.

### Witnesses

- If you have witnesses to support your claim, they will need to attend Court with you on the day.
- You will need to lodge and serve a witness summons at least 14 days before the trial.
  - The *Summons to Witness* is lodged in the same manner as the original claim and must be served personally on the witness (Form 22.1).
  - You must pay the witness' reasonable expenses of attending Court, and also make arrangements to enable the witness to attend Court. You will need to record how this has been done on the *Summons to Witness – Proof of Service Copy* (Form 22.2).
- On the day of the trial, 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. Note that it is a criminal offence to deliberately give false evidence in Court.

### In the Courtroom

- The Industrial Magistrate will sit behind a high desk at the front of the room and there will be a long table in front of the Industrial Magistrate.
- You will sit at one end of the table and your employer will sit at the other end, with you both facing the Industrial Magistrate.
- The Industrial Magistrate will probably ask you to go first in explaining your claim before giving your employer the opportunity to respond to what you have said.
- You do not have to have an opening submission, a brief outline is sufficient. Your employer will be given an opportunity to respond.
- If you have evidence that you want to show the Industrial Magistrate or have witnesses who are at Court to testify on your behalf, you should tell the Industrial Magistrate.

### Courtroom etiquette

- The IMC is designed to be less formal than some courts, however, you still need to ensure that you behave respectfully and courteously at all times.
- The proper way to address the Industrial Magistrate is "Your Honour" and you should listen very carefully to everything that the Industrial Magistrate says.

- You should also carefully follow any directions given to you by the Court staff. For example, when an Industrial Magistrate enters or leaves the Courtroom, one of the Court staff will ask everyone to stand up and will then announce when you are allowed to be seated again.
- You should never interrupt someone else who is talking in the Courtroom, even if your employer is saying something that you disagree with.
- If you wish to speak, you should stand up.
- You will have your turn to speak and the Industrial Magistrate will let you know when you can have your say. You should make a note of what has been said – including things that you do not agree with – so that you do not forget to mention this to the Industrial Magistrate when it is your turn.
- 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.
- If you have a mobile telephone, it must be turned off before you go into the Courtroom.

### **The Industrial Magistrate's decision**

- After all the evidence has been given, the Industrial Magistrate will give a decision on your claim.
- The decision will be in the form of a Court order.
- In some cases, the Industrial Magistrate may need more time to consider the issues and may postpone making a decision until a later date (this is called “reserving” the decision).
- If you are successful, the Industrial Magistrate will make an order with respect to the amount to be paid. This amount may include an amount for interest.
- The decision is usually for immediate payment (note that this may include payment by instalments), but in certain circumstances the Industrial Magistrate may give the employer a period of time by which to pay the amount ordered.
- If the Industrial Magistrate “reserves” his or her decision, a Court officer will contact you on a later date to advise you when the decision is ready.
- If you are unsuccessful, you may be entitled to appeal the decision. It is recommended that you seek your own independent advice if this happens.

### **Enforcing a court order**

- If your claim is successful but your employer does not pay you the amount specified in the Court you have a right to enforce payment of the amount (a **debt**).
- The Court order will only be enforced at your request.
- Firstly, contact the Court Registry and tell the Registry Staff that an order was made by the Industrial Magistrate that your employer must pay a certain amount of money by a certain date and that it has not been done. The Registry will provide you with a



copy of an order and should be able to tell you the steps involved in enforcing the order.

**Forms:** click on the hyperlinks below or go to [www.imc.wa.gov.au](http://www.imc.wa.gov.au)

If you are enforcing unpaid minimum entitlements, you should use the following forms:

[Form 1.1](#)

[Form 1.2](#)

[Form 1.3](#)

[Form 1.3 \(back page\)](#)

[Form 2](#)

[Form 3](#)

[Form 4](#)

[Form 5](#)

[Form 5.1](#)

[Form 6](#)

[Form 7](#)

[Form 18](#)

[Form 19](#)

[Form 22.1](#)

[Form 22.2](#)

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.

As noted above, this information kit only deals with small claims under the FW Act – i.e. claims to the value of up to \$20,000. If you are trying to enforce national system entitlements to the value of more than \$20,000, then you must elect that the Small Claims procedure under section 548(1) does not apply by ticking 'no' in the relevant box on Forms 1.1, 1.2 and 1.3. You may wish to seek legal advice on this.



## More Information

### **The Employment Law Centre of WA (Inc)**

Advice Line 1300 130 956 or 08 9227 0111

Web [www.elcwa.org.au](http://www.elcwa.org.au)

### **Wageline**

Wageline 1300 655 266

Web [www.dmirs.wa.gov.au/wageline](http://www.dmirs.wa.gov.au/wageline)

Wageline has published a detailed guide for employees called *Taking a claim to the Industrial Magistrates Court*, which was based in part on this information kit. It is available at:

[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/taking\\_a\\_claim\\_to\\_the\\_imc\\_0.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/taking_a_claim_to_the_imc_0.pdf).

### **Fair Work Ombudsman**

Tel 13 13 94

Web [www.fairwork.gov.au](http://www.fairwork.gov.au)

### **Industrial Magistrates Court**

Address Level 17

111 St George's Terrace, Perth WA 6000

Tel (08) 9420 4467

Fax (08) 9420 4500

Web [www.imc.wa.gov.au](http://www.imc.wa.gov.au)

## Sample Letter of Demand

**Instructions:** This is a sample demand letter. Please:

- a) read the letter, paying particular attention to anything in square brackets, which may be information or instructions for you to provide further information;
- b) delete anything in the square brackets after you have read the instructions or inserted the required information, including this instruction box; and
- c) make a copy of the letter for your reference before sending it to your employer.

[Insert: Employer's name]

[Insert: Employer's address]

[Insert: Today's date]

Dear [Insert: Employer's name]

### Unpaid entitlements

I am writing to you in an attempt to settle my claim for outstanding entitlements that you owe me.

I have calculated that there is an outstanding amount of \$.....in respect of **[Insert (which is applicable): [annual leave / long service leave / unpaid wages]**.

I have received legal advice in relation to this matter. I understand that I can make a claim in the Industrial Magistrates Court for these outstanding entitlements.

**[Choose:** Please choose between the following 2 sentences and delete the alternative sentence:  
*Option 1 (include this ONLY IF you intend to do this, otherwise delete this sentence)*

If an agreement is not reached in relation to the above amounts I will commence legal proceedings against you.

**[OR]**

*Option 2 (say this if you are not sure whether you will take court action at this stage)*

To avoid the expense, stress and inconvenience to you 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]