



Employment Law Centre of WA (Inc)

Working for WA Workers

Making an unfair dismissal claim: for national system employees

Information Kit

Advice Line 1300 130 956 or 9227 0111

Making an unfair dismissal 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 2020.

How to use this guide

This guide is to help you in considering or starting proceedings with the Fair Work Commission (**FWC**) in relation to unfair dismissal from your employment.

Who can apply?

- If you have been dismissed from your employment, and you believe that your dismissal was harsh, unjust or unreasonable, you can make a claim for unfair dismissal, subject to the eligibility criteria on page 6 .
- This information kit is only relevant to “national system employees” (see below). If you are a state system employee, see the ELC Fact Sheet – “Unfair dismissal for state system employees” and Information Kit – “Making an unfair dismissal claim: for state system employees”.
- Unfair dismissal is different from unlawful termination and adverse action, which deal with termination of employment situations involving discrimination or breaches of workplace and freedom of association rights. You may be eligible to make more than one type of claim. For more information, see the ELC Fact Sheets – “Unlawful termination for state system employees” and “General protections for national system employees” and the ELC Information Kits – “Making an unlawful termination claim: for state system employees” and “Making a general protections claim: for national system employees”.

National system employees

Only national system employees can make a claim for unfair dismissal with the FWC. An employee is a national system employee if his or her employer is a constitutional corporation (generally, incorporated and engaging in significant trading or financial activity). Sole traders and partnerships are state system employers. 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’s Information Kit – “Making a general protections claim: for national system employees”.

Unfair Dismissal

What is unfair dismissal?

You can allege unfair dismissal if you believe that the termination of your employment was harsh, unjust or unreasonable. For example, a termination may be:

- harsh because of its impact on you as an employee or because it is disproportionate to your possible misconduct or poor performance;
- unjust because you were not guilty of the alleged misconduct or poor performance, or you were not given sufficient warnings; or
- unreasonable because there was no evidence to support a termination.

Proving unfair dismissal

To prove unfair dismissal you must show that:

- you are an employee;
- you have been dismissed; and
- the dismissal was harsh, unjust or unreasonable.

To prove that a dismissal has occurred, you must demonstrate that:

- your employment was terminated at the initiative of your employer; or
- you were constructively dismissed, which means that you had no other choice except to resign as a result of your employer's conduct. For more information see ELC's Fact Sheet - "Constructive dismissal: when you are forced to resign".

To prove that a dismissal was harsh, unjust or unreasonable, you must show that the employer:

- did not have a valid reason relating to your conduct or capacity to do the job; or
- did not follow a fair procedure in terminating your employment. For instance:
 - you were not notified of a reason for termination;
 - you were not given an opportunity to respond or improve your conduct or performance;
 - you had not previously been warned about any unsatisfactory performance; or
 - the employer unreasonably refused to allow you to have a support person present to assist at any discussions relating to dismissal.

A dismissal is not unfair if it is the result of a genuine redundancy. This means that the employer no longer requires your job to be done by you or anyone else. Your dismissal will not be considered a "genuine redundancy" if:

- it was reasonable for you to have been redeployed in your employer's business or the business of an associated entity of your employer; or
- your employer did not comply with obligations in the applicable award or enterprise agreement to consult with you about the redundancy.

Small businesses

If your employer is a "small business", this may affect your eligibility to make an unfair dismissal claim (see below under the heading "Are you eligible to make a claim"). It will also affect the way that your claim is assessed.

Is your employer a "small business"?

Your employer is a "small business" if it employs fewer than 15 employees. Casual employees can only be included in the count if they have worked on a "regular and systematic" basis. You and any other workers being dismissed at the same time are included in the count.

Demonstrating “unfair dismissal” as a small business employee

If your employer is a small business then it only needs to demonstrate that it has complied with the Small Business Fair Dismissal Code (**Code**) for the FWC to find that the dismissal was not unfair, and for your claim to be rejected. If the FWC finds that your employer did not comply with the Code, the FWC will then go on to consider whether or not the dismissal was harsh, unjust or unreasonable in accordance with the process outlined above. So if your employer is a small business you need to show that:

- your employer did not comply with the Small Business Fair Dismissal Code; and
- the dismissal was harsh, unjust or unreasonable.

A summary of the Code is attached to the end of this document. In brief, it states that:

- no warning need be given for instances of summary dismissal; and
- in all other instances, a valid reason related to capacity or conduct must be given and the employee must then be given a reasonable amount of time to respond to the warning.

Making a claim with the FWC

Are you eligible to make a claim?

To make a claim for unfair dismissal with the FWC you must:

- be an employee (and not, for example, a contractor);
- be a national system employee (employed by a constitutional corporation);
- either be covered by a modern award or enterprise agreement, or be earning less than the high income threshold (\$153,600);¹
- have completed your “minimum employment period”, which is 12 months of employment if you were employed by a small business or 6 months otherwise;
- not be employed subject to a training agreement that was terminated at the end of its term;
- not be a casual employee employed on an irregular basis; and
- not be dismissed at the end of a specified task or period of time, or on a seasonal basis, for which you were hired.

Casual employees are generally prevented from making an unfair dismissal claim with the FWC, unless they can show that they were engaged on a regular and systematic basis and had a reasonable expectation that their employment would continue.

How do you lodge a claim?

When lodging an unfair dismissal application you must:

- identify the employer – the legal entity who employed you; and
- state why you believe the dismissal was unfair.

¹ This figure will be indexed again on 1 July 2021.

What form should you use?

The correct form to use is [Form F2 – Application for Unfair Dismissal Remedy](#), which is available on the FWC website. This application must be submitted to the FWC within the 21 day time limit discussed below. An electronic link to this form can be found at the bottom of this document.

What are the time limits?

You must lodge your claim within 21 days after the 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 remedies can you seek?

There are various remedies available for a successful claim for unfair dismissal. These include reinstatement, orders for continuity of service, orders to restore lost pay and compensation in lieu of reinstatement for future lost earnings. Compensation is capped at 6 months' wages or half the high income threshold (whichever is less).

If you reach an agreement in conciliation (discussed below), you and your employer will agree on the appropriate remedy which might include compensation, an apology, a reference or a combination of these.

What costs are involved?

The fee for lodging an unfair dismissal application with the FWC is \$74.50. The FWC can waive the application fee if it is satisfied that a person making an application will suffer serious financial hardship if the person is required to pay the fee. In order to apply to have the fee waived you must lodge [Form F80 – Waiver of Application Fee](#).

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.

A costs order can also be made where a party acts unreasonably (for example by continuing a claim after being made aware that it has no reasonable prospect of success) and this causes the other party to incur legal costs.

How do you submit the application?

Applications can be made to the FWC office in your capital city in a number of ways, including in person, by telephone, by facsimile (fax), by post or online through electronic filing on the FWC website.

To deliver an 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 FWC's offices are located at Level 16, 111 St George's Terrace, Perth, 6000. In Western Australia, postal applications should be made out to GPO Box X2206, Perth, 6001.

To make an application by telephone, call the FWC on 1300 799 675. A telephone application must be followed up by a written application, lodged by one of the methods

specified above, but is useful if you are running out of time to lodge your application. Payment of the lodgment fee must be made at the time of making the telephone application.

Submitting an application online can be done by following the FWC e-Filing procedure on the FWC website: www.fwc.gov.au.

To submit an application by facsimile, send your application through to the nominated fax number in your capital city. In Western Australia the fax number is (08) 9481 0904.

What happens to your application?

Once your application has been lodged with the FWC, your employer should receive written notification of the application, information about the process that the FWC will follow and an employer response form. If a conciliation is listed, as is normally the case, you and your employer should also receive details of the time and date for the conciliation of the application.

Confidentiality

Your file will remain confidential, as will the details of any conferences held. Hearings and decisions, however, are generally public.

How does the FWC deal with the matter?

After the relevant documents have been lodged, the FWC can make initial inquiries and discuss the issues with the employer and the employee. In most cases the FWC will try to help resolve the issues by arranging for a conciliation as a first step. It is very unlikely that binding orders will be made in an initial conciliation and the focus is on assisting the employer and the employee to reach an agreement. Conciliations are conducted over the phone or at the FWC's premises. Where conciliation is unsuccessful, the FWC can decide the outcome in a private conference or a public hearing. These proceedings are more formal and result in a binding decision being made.

Do you need representation?

- Conciliations, conferences and formal hearings may be conducted with or without representation.
- You do not necessarily need a representative for a conciliation. You may be allowed to take a support person with you to the meeting, however this person is not authorised to act as your agent.
- You can also represent yourself at a conference or hearing, although some people prefer to be represented.
- Representatives are typically union representatives or lawyers.
- You may need to seek leave (i.e. permission) from the FWC to be represented depending on who is representing you and whether it is a conciliation, conference or a hearing.
 - Union representatives do not require permission to appear before the FWC whereas lawyers normally do.
 - Lawyers or paid agents do not require leave to appear before a staff member of the FWC at a conference, **unless** the conference is being

conducted by a Commission Member (the President, a Vice-President, a Deputy-President, a Commissioner or an Expert Panel Member of the FWC).

- If you are required to seek permission to be represented by a lawyer or paid agent, you must lodge a Notice informing the FWC they will be seeking the FWC's permission (and serve this notice on the other parties). This will put the FWC and each other party to the dispute on notice that permission will be sought.
- The FWC may then grant permission for a person to be represented by a lawyer or paid agent where it would:
 - enable the matter to be dealt with more efficiently; or
 - be unfair not to allow representation as the person is unable to represent himself or herself effectively; or
 - be unfair not to allow representation taking into account the fairness between the parties involved.

What if you have difficulty reading and speaking English?

You can ask a friend or community organisation to assist you. You can also request an interpreter. If you require assistance, you can contact the Translating and Interpreting Service on 131 450.

What is conciliation?

Conciliation is an informal, private and generally confidential process in which an FWC conciliator attempts to assist employees and employers to resolve an unfair dismissal application by reaching an agreement. Both parties will be allowed to put forward their case, and also respond to any allegations made against them.

As discussed above, 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 will be as follows:

- the conciliator explains his or her role and the manner in which the conciliation is to be run;
- each side briefly outlines their story including what happened, any relevant facts and what they want;
- the conciliator may allow or ask questions;
- the circumstances, and any issues arising, 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 and where will the conciliation be held?

Many conciliations are now being conducted by telephone. If the conciliation is not by telephone it will be held at the FWC offices. As mentioned above, the FWC's offices in Western Australia are located at Level 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 conciliation. 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 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 conference. 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 employee organisation;
- consider bringing along a support person; 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)?
- Why do you think that the termination was unfair?
- How was the termination carried out? Were you given warnings?
- What do you want (i.e. reinstatement, compensation)?

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 during conciliation, it may go to a conference or a formal hearing. The FWC will only deal with the matter in a conference or public hearing if, after considering the views of the parties, it believes that it would be the most effective and efficient way to resolve the matter.

What happens in a conference or formal hearing?

A conference is a more structured process than conciliation and can result in a binding outcome. A public hearing is similar in many ways to a court hearing. For this reason many people prefer to be represented by a lawyer in a hearing, however most claimants are capable of representing themselves if they are adequately prepared. During the hearing, the FWC Commissioner can ask questions directly to the employer and employee. After hearing from both parties, the FWC Commissioner can then make a decision that is binding on the employer and employee.

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

[Form F2](#) – Application for Unfair Dismissal Remedy

[Form F80](#) – Waiver of application fee

[Form F50](#) – Notice of Discontinuance

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

Fair Work Commission

Address Level 16
111 St George's Terrace, Perth 6000

Postal address GPO Box X2206, Perth 6001

Tel 1300 799 675

Fax (08) 9481 0904

Web www.fwc.gov.au

Email perth@fwc.gov.au

FWC's summary of the Small Business Fair Dismissal Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.