



Employment Law Centre of WA (Inc)

Working for WA Workers

Making an unfair dismissal claim: for state system employees

Information Kit

Advice Line 1300 130 956 or 9227 0111



Making an unfair dismissal claim: for state 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 has been prepared to assist you in considering or commencing proceedings in the Western Australian Industrial Relations Commission (**WAIRC**) in relation to unfair dismissal.

Unfair dismissal

What is unfair dismissal?

Unfair dismissal occurs when an employee is terminated in a harsh, oppressive or unreasonable manner. For example, a termination may be:

- harsh because of its impact on an employee or because it is disproportionate to the employee's misconduct or poor performance;
- oppressive because the employee was not guilty of the alleged misconduct or poor performance; or
- unreasonable because there was no evidence to support a termination.

Are you eligible to make a claim?

To make a claim for unfair dismissal in the WAIRC you must be:

- an employee;
- employed under the state system (i.e. not an employee of a constitutional corporation – call ELC's Advice Line or see ELC Fact Sheet "National system employee or state system employee: which one are you?" for further information); and
- earning less than \$177,200¹ per year if you are not covered by an industrial instrument.

Proving unfair dismissal

To prove unfair dismissal you must show three (3) main things:

- you are an employee;
- your employment was terminated by your employer; and
- the termination was harsh, oppressive or unfair.

In determining whether there has been an unfair dismissal, the WAIRC will generally consider whether:

- there was a "valid reason" for the termination (see below);
- you were given reasons for the dismissal;
- you were given an opportunity to respond to the reasons; and
- you were given any warnings relating to unsatisfactory performance.

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

A “valid reason” relates to:

- your capacity to do the job; or
- your behaviour or conduct at work; or
- the operational requirements of the business.

To show “unfairness” you must show the employer did not:

- have a valid reason; or
- 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
 - you had not previously been warned about any unsatisfactory performance.

How do you lodge a claim?

When lodging an unfair dismissal application you must:

- identify your employer – the legal entity who employed you; and
- show you were dismissed by your employer, and did not resign; and
- state why you believe the dismissal was unfair and what you are seeking.

What are the time limits?

- You must lodge your claim **28 days** from the date that your employment was terminated.
- A late application may be accepted in some circumstances. Any late application must include reasons as to why your application was delayed and why it would be unfair for the WAIRC not to accept the application. For more information, see ELC Fact Sheet – “Missed the deadline for making a claim: what can you do?”

Which forms do you use?

- Form 2 *Notice of claim of harsh, oppressive or unfair dismissal* is the application form for starting an unfair dismissal claim in the WAIRC.
- The WAIRC Registry will serve a copy of the completed form on your employer, so there is no need for you to do this yourself unless the WAIRC specifically instructs you to do so.

What costs are involved?

- You are required to pay a lodgement fee of \$50.00.
- This fee may be waived on the grounds that it would cause serious hardship. In order to apply for a waiver, a waiver form must be completed and submitted together with Form 2 *Notice of claim of harsh, oppressive or unfair dismissal*. Contact the WAIRC for the fee waiver form.



- Generally, you will bear your own costs.

What else should you know?

Confidentiality

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

Do you need representation?

- You do not necessarily need representation, but you can choose to be represented if you wish. Representation can include a union representative or a lawyer.
- You must give your authority by lodging a Form 11 *Notification of Representative Commencing or Ceasing to Act*.

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 WAIRC registry on 9420 4444 or the Translating and Interpreting Service on 131 450.

What will happen at the WAIRC?

- The WAIRC will help you and your employer to reach an agreement by conciliation.
- If you cannot reach an agreement, the matter may proceed to arbitration. The outcome of arbitration is binding.

What is conciliation?

Conciliation is a process involving an independent person trying to assist to resolve a dispute. It should be noted that:

- the WAIRC pursues conciliation as far as possible and attempts to leave formal arbitration as a last resort;
- conciliations are conducted on a “without prejudice” basis. This means that statements made in conciliation generally cannot be used in an arbitration hearing;
- the presiding Commissioner will set out the conduct of the conciliation;
- the parties to a conciliation are required to meet their own costs; and
- there is no transcript or record taken of proceedings by the WAIRC other than when the matter is settled by agreement of the parties and the terms are put in writing.

When will conciliation be used?

- After your application has been lodged, the WAIRC conciliates the claim. The purpose of a conciliation conference is to bring the employee and employer together in an informal, private meeting to attempt to reach an agreement without the need for a formal hearing. This is usually chaired by a member of the WAIRC.

When and where will the conciliation be held?

- Conferences are generally held in the WAIRC.
- Sometimes conciliation conferences may be held over the telephone for employees or employers living in regional areas.
- The conference is generally arranged by the Commissioner's Associate. The parties are usually notified by letter but, in urgent cases, may be notified by telephone or email.

Who is required to attend the conciliation?

Both you and your employer are 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 conciliation in support (not as your agent) if the Commissioner allows;
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter or before the conciliation conference request the WAIRC organise an interpreter for you;
- while the parties must attend, witnesses are not required; and
- if you fail to attend a conciliation conference, your application may be dismissed.

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 legal practitioner, union or employer organisation;
- consider bringing along a support person or legal representative (the Registry can provide you with a list of possible legal practitioners); and
- conduct yourself in a polite and courteous manner.

Further, you may want to look at the relevant provisions of the *Industrial Relations Act 1979* (WA) and associated regulations.

What should you say at the conciliation?

- What happened / what are the relevant facts;
- Why do you believe that the termination was unfair;
- How was the termination carried out and whether you were you given warnings; and
- What you are seeking (e.g. reinstatement, compensation).



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

If you and your employer reach an agreement, the Commissioner may make an order (providing you both agree) that:

- gives effect to your agreement; or
- discontinues the application without disclosing the terms of 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 Commissioner concludes that the parties cannot reach an agreement then the matter is usually listed for arbitration.
- If you wish to request a formal arbitration hearing, you may do so by lodging a signed letter setting out your request with the WAIRC Registry.
- If the WAIRC is satisfied that all reasonable attempts to reach a settlement by conciliation have been or are likely to be unsuccessful, the WAIRC will issue a written conciliation certificate.
- The WAIRC Commissioner issuing the certificate will indicate his or her assessment of the merits of the application and may also give recommendations.

Arbitration

If the matter proceeds to arbitration, it will be heard by the WAIRC in a formal hearing. A decision is then issued which is binding on both parties.

Such hearings are held in public, unless ordered otherwise, and any decision is issued in a public document (www.wairc.wa.gov.au). However, you may be able to reach settlement at any time before and during arbitration.

Notice and conduct of arbitration proceedings

A Notice of Listing of the date of arbitration will be sent to you and your employer. The materials included must be sent to the Registry and served on your employer.

Discontinuance

You may discontinue proceedings at any time by submitting Form 1A *Multipurpose Form* to the WAIRC.



Forms – to go to the following Forms [Click here](#):

- Form 2 – Notice of claim of harsh, oppressive or unfair dismissal
- Form 1A – Multipurpose Form
- Form 11 – Notification of Representative Commencing or Ceasing to Act

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

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