

# Breach of contract (minor case claim) for WA employees

## A Circle Green Community Legal claim guide

### Introduction

This claim guide is for state and national system employees in Western Australia who wish to make a breach of contract claim.

There are two systems of employment law in Western Australia: a state system and a national system. While this information resource is suitable for both state system employees and national system employees, it will help you to know which system of employment law you are covered by. If you are unsure, please see our publication: [“Q&A: State or national for WA employees”](#).

The information below has been written to assist you with the practical process of making a breach of contract claim in the minor cases jurisdiction of the Magistrates Court of WA. If you are not yet ready to make a claim and you are seeking more general information, you may wish to view our Q&A resources first. If you need legal advice before making a claim, you can [submit an application for advice to us here](#) or see our [private solicitors list here](#).

This claim guide is provided as general information only and is not intended to be a substitute for legal advice. By using the information on this page, you agree to our full [disclaimer](#).

### Key terms used

This information resource uses a number of key terms. You can click on our glossary in a new window and read what the key term means. See our glossary here:

<https://circlegreen.org.au/resource/glossary-workplace-law/>

We encourage you to read this claim guide from start to finish. If you are looking for a specific piece of information, you can click on any heading below to skip to that section.

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## Overview

Employees who are seeking to enforce unpaid entitlements under their contract of employment can make either:

- a Breach of Contract claim to the Magistrates Court of Western Australia; or
- a Denial of Contract Benefits claim to the Western Australian Industrial Relations Commission.

This claims guide deals with making a Breach of Contract claim in the Magistrates Court of Western Australia.

You may also be eligible to make a claim to the WAIRC. You can see our publication: [“Claim Guide: Denial of Contractual Benefits for WA employees”](#).

## Eligibility

To be eligible to make a Breach of Contract claim for an employment entitlement, you must:

1. be or have been an employee;
2. be seeking to enforce an unpaid entitlement of less than \$10,000; and
3. the entitlement you are seeking to enforce is a term of your contract of employment.

If the entitlement that you are seeking to enforce is under legislation, an award, or an industrial agreement, you will not be able to make a Breach of Contract claim.

Please see our publication: [“Claim Guide: Unpaid Minimum Entitlements for WA Employees”](#) for more information on how to enforce entitlements under legislation, an award or an industrial agreement.

## Time limits

This claim must be commenced within **6 years** of when the entitlement became payable. However, it is best to commence action without delay.

## Costs

For claims less than \$10,000, you are required to pay the minor cases lodgement fee. Information about fees can be found here: <https://www.magistratescourt.wa.gov.au/apps/DocList/doclist.aspx>

You are exempt from paying a lodgement fee if you are under 18 years of age on the day you would otherwise be required to pay the fee.

If you are an ‘eligible individual’, you may be able to pay a reduced lodgement fee.

Eligible individuals include:

- holders of a Centrelink health care card, health benefit card, pensioner concession card, or Commonwealth seniors health card;
- holders of a card issued by the Department of Veterans' Affairs of the Commonwealth that certifies entitlement to Commonwealth health concessions;
- individuals in receipt of youth training allowance or benefits under the Commonwealth student assistance scheme;
- individuals who have been granted legal aid; and
- individuals who are deemed eligible by the Court on the grounds of financial hardship or in the interests of justice.

All individuals seeking to pay reduced or no lodgement fees must lodge an application to have their fee reduced or waived:

- Form 1A – Concession Card Holders and people under 18
- Form 1B – Financial Hardship
- Form 1C – In the Interest of Justice

The forms can be found here: <https://www.magistratescourt.wa.gov.au/apps/DocList/doclist.aspx>

Generally, you will bear your own legal costs. Legal costs are not usually awarded in the minor case jurisdiction. However, the unsuccessful party can be ordered to pay Court fees, service fees etc. Other costs are not awarded unless the Court is satisfied that the claim or defence was wholly without merit or that exceptional circumstances existed which would cause an injustice to be done to the successful party if costs weren't awarded.

## **Pre-claim process**

### Work out if your entitlement is contractual

A common law contract may be formed out of what has been said, done or written down and agreed to.

If you signed a written common law contract, you should have been given a copy.

You will need to check whether the entitlement you are seeking to enforce is a contractual entitlement or a minimum entitlement.

### **Are you claiming for minimum entitlements under an industrial instrument including legislation or an award?**

A breach of contract claim is not the right claim for you if the entitlement that you are seeking to enforce is under:

- an Award;
- an Industrial Agreement;

- an Australian Workplace Agreement (Awa);
- an Interim Transitional Employment Agreement (Itea);
- an Employer-Employee Agreement;
- the Long Service Leave Act 1958 (WA);
- the Minimum Conditions of Employment Act 1993 (WA); or
- the Fair Work Act 2009 (Cth);

To seek to enforce entitlements under those arrangements, please see our claims guide on making a claim for unpaid minimum entitlements here: <https://circlegreen.org.au/resource/claim-guides-for-wa-workers/>

## **Sending a letter of demand**

Once you have clarified it is a contractual entitlement.

### Calculate underpayment / non-payment

For example, if you are seeking unpaid wages you would calculate how much you should have been paid by multiplying the number of hours worked with your relevant rate of pay. You can look at pay slips or other records of employment to determine your hours worked. Then subtract what you were paid from what you should have been paid to determine the amount of underpayment or non-payment.

### Approach your employer to demand payment

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 letter of demand is at the end of this claim guide.

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.

# Claim process

## Starting a claim

You start the claim by filling in a Form 4 – Minor case claim with the Magistrates Court. Forms can be downloaded from the Magistrates Court website here:

<https://www.magistratescourt.wa.gov.au/apps/DocList/doclist.aspx>

The correct forms will be found under the 'Magistrates Court (Civil Proceedings) Rules 2005 Forms' tab.

Information about fees can be found here:

<https://www.magistratescourt.wa.gov.au/apps/DocList/doclist.aspx>

You will need three copies of the Form 4. One for you, one for the Court and one for the employer.

Complete and lodge the Claimant's copy of Form 4 with the Magistrates Court Registry. Keep a copy of Form 4 for your records.

## Serving the claim

Once you have lodged your claim forms with the Magistrates Court Registry, you will need to deliver Form 4 to your employer. This is called "serving" your employer.

The Magistrates Court has rules for service which must be followed. For example, if your employer is a sole trader (i.e. an individual) or a partnership, one way of serving the employer is by handing the document to that individual or to one of the partners, as the case may be. If your employer is a corporation (i.e. a company), one way of serving the document is by leaving it at, or posting it to, the company's registered office. Contact Circle Green or the Magistrates Court Registry for further information on how to serve your claim.

Another way of serving the employer is to arrange for an officer of the court – a bailiff – to serve the claim for you. There is a fee for this.

Make sure you keep a copy of every document you serve on your employer as well as any acknowledgement of receipt. This may help you if your employer argues that you did not serve the forms.

## Affidavit of service

After serving Form 4 on your employer, you must lodge with the Registry an "affidavit of service" completed by the person who served the document. The affidavit of service must state who served the document, as well as when, where and how the document was served. The form to use for this is Form 11.

If a bailiff served the claim for you, you do not need to lodge an affidavit of service. The bailiff will provide you with a certificate of service (Form 10).

## Employer's response to the claim

Once your employer has been served with your claim, the employer must respond within 14 days. The employer may decide to:

- pay you the money that the employer agrees is owed to you;
- admit you are owed the money; or
- defend the whole or part of the claim.

If your employer pays you the money owing, you should let the Magistrates Court know formally.

If your employer admits to owing you the money and lets the Magistrates Court know, you will receive a “notice of admission of claim” from the Magistrates Court with details of any payment offer. If you accept the offer, you should contact your employer and confirm your acceptance of the repayment terms. If you do not accept the offer, you can ask for an enforcement of judgment for the total debt. If your employer defends the claim either wholly or partially, you will be told by the Magistrates Court that a notice to defend has been lodged.

You can choose to accept any offer to pay part of the amount you are demanding as full satisfaction of your claim. If you do so, let the Magistrates Court know in writing. If your employer does not respond at all, you may apply for a default judgment after 14 days have expired.

## **Default judgment**

A default judgment in this situation means a judgment is made in your favour because the employer has failed to respond to your claim. To apply for default judgment, you need to lodge:

- Form 13 Application for Default Judgement; and either:
  - a certificate of service from the bailiff (Form 10); or
  - an affidavit of service (Form 11), to prove to the Registrar that your claim was served on the employer

## **Pre-trial conference/ mediation**

If your employer lodges a response to your claim indicating that it intends to defend the claim, the Registrar must list the case for a pre-trial conference within 14 days.

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

Carefully consider your claim, any evidence you have to support your claim and your employer's response before attending the pre-trial conference.

You will need to be able to explain your claim briefly to the Registrar and your employer.

Your employer will then explain its response to your claim.

The Registrar will try to assist you and your employer in reaching an agreement.

The pre-trial conference is compulsory and confidential. If you fail to attend the pre-trial conference, the Registrar may give “default judgment” against you.

Similarly, if the employer fails to attend the pre-trial conference, the Registrar may give “default judgment” against the employer.

No witnesses may be called at the conference.

If the dispute cannot be resolved at the pre-trial conference it will be listed for a trial before a Magistrate.

## **After the pre-trial conference**

The Registrar can direct you and your employer to do certain things and list your claim for a further pre-trial conference.

- Both parties can agree to attend mediation and may settle at any point.
- If settlement is reached, the Registrar will draw up consent orders for both parties to sign.
- If no settlement is reached, the Registrar will list the case for trial.

If you and your employer agree to a settlement, you may lodge a notice of discontinuance (Form 57) and request that the Court grant orders in accordance with the terms of your settlement.

## **Filling in Forms**

At the pre-trial conference, the Registrar may order you to lodge and serve a statement of claim. If this happens, you must lodge and serve your statement of claim on your employer within 14 days after the pre-trial conference.

The form to use for a statement of claim is Form 20. This form allows you to expand on the details of your claim which you set out in Form 4. The forms can be found here:

<https://www.magistratescourt.wa.gov.au/apps/DocList/doclist.aspx>

The first page of the form asks you to set out a summary of the facts relevant to your claim. The second page asks you to set out what it is that you are asking for from your employer (the remedy or relief you are seeking).

- Keep irrelevant matters out of this statement.
- Include a list of facts that are relevant in proving that your employer owes you the money that you say the employer does.
- Set the facts out in date order.
- Keep in mind that you may not introduce new facts at trial.
- Make sure that any facts that may assist you in your argument are included on this form.
- If there is more than one debt, divide up the information.

## **Hearing**

You will need to be familiar with your claim and your evidence so that you can present your claim to the Magistrate in a clear and concise manner.



You may want to 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 Magistrate.

You should make detailed notes of all of 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.

If you are intending to show documents to the Magistrate, you will need three (3) copies of each document. When they are asked for in Court, give them to the Magistrate's clerk (or associate). If you are bringing witnesses, make sure you have additional copies for them.

Check that you have everything that you need before you go to Court on the day of your hearing. Remember to bring a pen and paper.

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 Magistrates Court and inform the Registry that you have a claim listed for hearing on that day.

Make sure you are on time. If you miss your allotted time the Magistrate may dismiss your claim.

If you have reached a last-minute agreement with your employer, you should advise the clerk immediately.

## **Witnesses**

If you have witnesses to support your claim, they will need to attend Court with you on the day.

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.

Witnesses will most likely be asked to wait outside the Court until they are called.

## **Courtroom Etiquette**

The Magistrates Court is designed to be less formal than some courts, however, you still need to ensure that you behave respectfully and courteously at all times.

Address the Magistrate as "Your Honour", or "Sir/Madam".

Stand when the Magistrate speaks to you, or you speak to them.

You are expected to bow to the Magistrate when you enter or leave the Courtroom and when the Magistrate enters or leaves the Courtroom.

Speak only to the Magistrate or witness when appropriate.

You should never interrupt someone else who is talking in the Courtroom, even if your employer is saying something that you disagree with.

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.

You must not eat or drink in the Courtrooms.

Switch off your mobile phone.

## **The Magistrate's Decision**

After all the evidence has been given, the Magistrate will give a decision on your claim.

It is rare for the hearing to be adjourned (i.e. postponed). Generally, adjournments are only granted where the reason for the adjournment is shown to be out of your control.

If the Magistrate finds in your favour, they may order your employer to pay you the contractual entitlements you are claiming or a reduced amount, depending on the circumstances.

If you are unsuccessful, you may be entitled to appeal the decision. We recommend that you seek your own independent advice if this happens.

## **Enforcing a Court Order**

If your claim was successful but your employer does not pay you the amount specified in the Court order, you have a right to enforce payment of the amount (called "a debt").

The Magistrates Court order will only be enforced at your request.

First, contact the Registry and tell the Registry staff that an order was made by the Magistrate that your employer must pay a certain amount of money by a certain date and that it has not been done.

The Registry should be able to provide you with a copy of an order and tell you the steps involved in enforcing the order.

# Sample Demand Letter

[Remember to keep a copy and to remove all unnecessary information in brackets]

[Employer's name]

[Employer's address]

[Today's date]

Dear [insert employer's name here]

## Unpaid entitlements

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

I have calculated that there is an outstanding amount of \$[insert amount] in respect of [insert outstanding contractual entitlement/s].

I have received legal advice and understand I can make a claim in the Magistrates Court for this outstanding amount.

**[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]**

## Related resources

- [Q&A: State or national system for WA employees](#)
- [Claim Guide: Denial of Contractual Benefits for WA employees](#)
- [Claim Guide: Unpaid Minimum Entitlements for WA employees](#)

## Further information and assistance

### Circle Green Community Legal

WA employees can request free and confidential legal assistance with employment and workplace discrimination issues from Circle Green Community Legal.

Complete an online request: [circlegreen.org.au/get-help](https://circlegreen.org.au/get-help)

Telephone enquiries: 08 6148 3636 (Please note that we do not provide on demand legal advice)

For further information on our Workplace law services, please visit:

[circlegreen.org.au/workplace](https://circlegreen.org.au/workplace)

Courts and Commissions	Government departments & other supports
<p><b>Magistrates Court</b></p> <p>Phone: (08) 9425 2222                      Email:  <a href="https://www.magistratescourt.wa.gov.au">https://www.magistratescourt.wa.gov.au</a>                      Web:  <a href="https://www.magistratescourt.wa.gov.au">https://www.magistratescourt.wa.gov.au</a></p>	<p><b>Fair Work Ombudsman</b></p> <p>Phone: 13 13 94                      Web: <a href="http://www.fairwork.gov.au">www.fairwork.gov.au</a></p> <p><b>Wageline</b></p> <p>Phone: 1300 655 266                      Web: <a href="https://www.dmirrors.wa.gov.au/contactwageline">https://www.dmirrors.wa.gov.au/contactwageline</a></p>

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