

# Denial of contractual benefits 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. If you are unsure which system you fall under, 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. 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
- Denial of Contract Benefits claim to the Western Australian Industrial Relations Commission.

This claims guide deals with making a Denial of contractual benefits claim in the Western Australian Industrial Relations Commission.

You may also be eligible to make a claim to the Magistrates Court of Western Australia. You can see our publication: [Claim Guide: Breach of contract for WA employees.](#)

## Eligibility

To make a claim you must:

1. be an employee;
2. earn below the high income threshold (unless your employment is subject to an industrial instrument), which may be found at: <https://www.wairc.wa.gov.au/resources/maximum-salary-level-for-lodging-certain-claims/>;
3. specify what benefit you were entitled to and what it is you are claiming.

If the entitlement that you are seeking to enforce is under legislation, an award or industrial agreement, you will not be able to make a Denial of contractual benefits 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 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

A filing fee applies to lodge your application with the Western Australian Industrial Relations Commission. More information about fees can be found here: <https://www.wairc.wa.gov.au/about-us/fees/>

Generally, you will bear your own legal costs.

## Pre-claim process

The first step is to 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. You can contact Wageline or the Fair Work Ombudsman.

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

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);

then a denial of contractual benefits claim is not the right claim for you.

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

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.

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 3 – Notice of Claim of Entitlement to a Benefit Under a Contract of Employment with WAIRC. This form may be lodged:

- in person at the WAIRC Registry located at Level 17, 111 St Georges Terrace, Perth WA 6000;
- by post to WAIRC Registry, Locked Bag 1, Cloisters Square, Perth WA 6850;
- through the online lodgment portal here: <https://portal.wairc.wa.gov.au>; or
- by email to WAIRC Registry at: [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au);

There is often a filing fee applicable when filing forms. Information about fees can be found here: <https://www.wairc.wa.gov.au/about-us/fees/>

### **Serving the claim**

There is no need for you to send a copy of your Form 3 to your employer. The Commission's Registry will do this for you. Your employer then has 21 days from receiving a copy of your Form 3 to respond to your claim for denial of a contractual benefit by lodging with the WAIRC a Form 3A Employer Response to Contractual Benefit Claim.

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

If you receive a copy of Form 3A from the WAIRC Registry within this 21-day period, you will be contacted by the Commission to arrange to have your matter dealt with, usually by first scheduling a conciliation conference.

If you have not received a response within this 21-day period, you should write a letter to the Registrar on the 21st day after you sent the employer a copy of Form 3 requesting that your matter be dealt with. The WAIRC will then send a Notice of Listing to you and your employer, showing the date, time and place for a conciliation conference.

## **Conciliation**

Conciliation is a process which involves an independent Commissioner or a Deputy Registrar assisting parties to reach a resolution between them. 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 or Deputy Registrar 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 in the proceedings other than when the matter is settled by agreement and then the terms will often be put in writing.

### **What happens in the conciliation?**

The general process involves:

- You and your employer meeting to discuss the dispute;
- you and your employer summarising your respective positions and discussing ways to resolve the matter; and
- the Commissioner or Deputy Registrar sometimes dividing the conference and speaking separately with the parties.

### **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 or Deputy Registrar’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 will be 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 conference in support if the Commissioner or Deputy Registrar 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;
- if you fail to attend a conciliation conference, your application may be dismissed; and
- if your employer fails to attend the conciliation conference, the Commissioner or Deputy Registrar may contact the employer and organise another conciliation conference, or they may refer your claim for hearing.

## **How do you prepare for the conciliation?**

You should be well prepared for the conciliation. You should:

- know your case by reviewing what happened and prepare a summary;
- locate all relevant documents (e.g. medical certificates or employment contracts);
- seek advice from a legal practitioner or union; and
- conduct yourself in a polite and courteous manner.

## **What should you say at the conciliation?**

State why you believe you have been denied a contractual benefit.

State what you are seeking. For example, if you believe you have been underpaid, state the amount that you believe is outstanding.

## **Do you need representation?**

It is not necessary to be represented in conciliation proceedings. You may choose to be represented if you wish. Representation can be by any adult person as an agent, trade union, or by a legal practitioner. The Registry can provide you with a list of legal practitioners.

You must give your authority by lodging Form 11 – Notification of Representative Commencing or Ceasing to Act.

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

If you both agree, the Commissioner or Deputy Registrar may make an order that either:

- gives effect to your agreement; or
- discontinues the application without disclosing the terms of the agreement.
- You should make sure that you are clear about:
  - the terms of the settlement;
  - the time-frames for payment of monies; and
  - the amount of tax to be deducted.

Sometimes you will be asked to sign a deed of settlement agreeing to the terms of settlement.

After any settlement monies are received, you will need to file with the Registry a Form 1A Multipurpose Form discontinuing the application.

## **What happens if you and your employer do not reach agreement in conciliation?**

If the Commissioner or Deputy Registrar concludes that the parties cannot reach agreement, then the matter is usually listed for arbitration where a ruling is made about the merits of the matter. This will take place at a formal hearing which requires the parties to present formal evidence.

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 or Deputy Registrar who issues the certificate will indicate his or her assessment of the merits of the application and may also give recommendations.

Hearings are held in public, unless ordered otherwise, and any decisions are issued in public documents.

We recommend that you seek further legal advice if you decide to continue with your claim at this stage.

## **Forms**

The following forms may be found at: <https://portal.wairc.wa.gov.au/forms>

Form 3 – Notice of Claim of Entitlement to a Benefit Under a Contract of Employment

Form 1A – Multipurpose Form

Form 11 – Notification of Representative Commencing or Ceasing to Act.

If you cannot access the forms using the link above, please contact the Western Australian Industrial Relations Commission registry for assistance.



## 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]**

## 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)

Commissions	Government departments & other supports
<p><b>Western Australian Industrial Relations Commission</b></p> <p>Phone: (08) 9420 4444 or 1800 624 263</p> <p>Web: <a href="https://www.wairc.wa.gov.au/">https://www.wairc.wa.gov.au/</a></p>	

### Disclaimer:

This factsheet only contains general information. This factsheet is not legal advice and should not be relied on as a substitute for legal advice. You may wish to seek advice from a lawyer regarding your own particular circumstances. We are not responsible for any consequences arising from your use of, or reliance on, the information contained in this factsheet.

Further information about our disclaimer and your use of this factsheet can be found here:

<https://circlegreen.org.au/disclaimer/>