

# General protections (dismissal) for national system employees

## A Circle Green Community Legal claim guide

### Introduction

This claim guide is for national system employees in Western Australia who wish to make a general protections dismissal 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 general protections dismissal 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.

Where examples are provided they are intended to illustrate circumstances where the general protections provisions may apply, and are not exhaustive or descriptive of all relevant circumstances.

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

National system employees are protected by law against certain types of unlawful conduct by employers, so they can confidently pursue their rights at work. These are called the general protections.

If a national system employer does not comply with these protections, an employee may be able to make a general protections claim to the Fair Work Commission (**FWC**).

The general protections part of the Fair Work Act covers a broad range of conduct. Employees are protected against sham contracting, misrepresentations, and adverse action being taken against them for a prohibited reason.

This claim guide only covers general protections claims that involve a dismissal.

For other types of claims, see our non-dismissal general protections claim guide.

A general protections claim normally involves lodging an application form, attending a conciliation conference to try and resolve the matter, and a formal arbitration or Federal Court hearing if no agreement can be made at the conciliation.

If the matter proceeds to a Federal Court and the Court finds that the employer's actions breached the employee's rights, they can make orders, including for financial compensation (money). The Court can also order that financial penalties are to be paid by the employer and/or an individual who was involved in breaking the law.

This claim guide explains who can make a claim, what the prohibited reasons are, and the procedure of making a claim. If you have received legal advice and you are very confident that you are able to make a claim and that your employer dismissed you for a prohibited reason, you may wish to skip to the procedural information.

## Eligibility

If you are a national system employee, you may be eligible to make a general protections dismissal claim if you have been dismissed for a prohibited reason. These prohibited reasons are outlined in the Fair Work Act and some examples are given below.

The prohibited reason does not have to be the only reason you were dismissed – it can be sufficient to make out the claim even if it was part of the reason your employer dismissed you. However, if your employer can demonstrate that they dismissed you for another lawful reason, you may not be successful in your claim.

Unlike claims for unfair dismissal, there is no minimum period of employment you need to have completed before you can make a general protections claim.

You cannot make a general protections claim if you have already made another dismissal-based claim, such as a claim for unfair dismissal. You need to choose which claim best suits your circumstances.

If there is a dispute over whether or not you were “dismissed”, your employer might raise a jurisdictional objection. In this context, a jurisdictional objection means the employer objects to the claim being determined because the adverse action, dismissal, never occurred. If a jurisdictional objection is raised, the FWC might schedule a preliminary hearing to determine if you were dismissed. In claims involving a forced resignation, it's common for an employer to raise a jurisdictional objection, arguing that the employee resigned voluntarily.

If you haven't yet figured out which claim is best for you, or you aren't sure whether or not you were dismissed, or you have other questions about eligibility, you might want to read our publication: ["Q&A: Dismissal for WA employees"](#) from the workplace resources section of our website and consider seeking further information and assistance.

## Time limits for making a claim

For dismissal-based general protections claims, you need to make the claim to the FWC within **21 days** of the date your dismissal took effect.

It is only in exceptional circumstances that the FWC will consider an application made out of time. If you are outside the 21-day time limit, you will need to file an out of time application alongside your claim explaining why the FWC should accept your late claim.

It can be very difficult to make an out of time application successfully. Reasons such as not knowing about the time limit or stress relating to being dismissed are generally not accepted as being sufficient to grant an out of time application.

For more information on out of time applications, see our publication ["Q & A: Dismissal for WA employees"](#).

## What are the protections and prohibited reasons?

General protections cover a range of unlawful conduct, including where an employer takes adverse action against an employee for a prohibited reason.

For the purposes of a dismissal-based claim, the adverse action is dismissal. In your claim, you need to show that you were dismissed, and that you were dismissed for a prohibited reason.

The prohibited reasons are:

- workplace rights;
- industrial activities;
- discriminatory reasons;
- temporary absence due to illness or injury; and
- other behaviour as set out in the Fair Work Act.

Workplace rights including making a complaint to your employer, as well as workplace rights under laws and industrial instruments. For example; you can't be dismissed for making a workplace complaint, or for taking annual leave or sick leave, or for asking for overtime under your award.

Industrial activities cover union involvement and certain other industrial activities. Employees are protected in relation to both engaging in industrial activity and choosing not to engage.

Discriminatory reasons cover dismissals taken on the basis of your race, colour, sex, sexual orientation, age, disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The full list of prohibited reasons is set out in the Fair Work Act. If you make a claim, you will need to identify the section of the Fair Work Act that has been breached, for example, s 340 (workplace rights), s 346 (industrial/union activities), s 351 (discrimination) and s 358 (dismissing to engage as an independent contractor).

We provide further information on the prohibited reasons below.

## What is a workplace right?

You have a workplace right to make a complaint or inquiry in relation to your employment.

The Fair Work Act also states that any right or entitlement set out in a workplace law or workplace instrument is a workplace right. In most circumstances, this will be the Fair Work Act, a Modern Award that covers your industry or occupation, or an Enterprise Agreement that covers your employer. However, any law or instrument that regulates the workplace may contain workplace rights.

Common examples of workplace rights are:

- **A right to make a complaint or inquiry in relation to your employment**, for example, making a complaint about pay rates, hours of work, safety, leave entitlements to your employer.
- **A right to make a complaint or inquiry to compliance bodies**, for example, making a complaint to WorkSafe WA, the Fair Work Commission, the Fair Work Ombudsman, Wageline.
- **An entitlement to a benefit, role or responsibility under a workplace law**, for example, an entitlement under the *Fair Work Act 2009* (Cth), state and federal anti-discrimination laws, workers compensation laws, occupational health and safety laws.
- **An entitlement to a benefit, role or responsibility under a workplace instrument**, for example, an entitlement under a modern award or an enterprise agreement that covers your employment.
- **An entitlement to a benefit, role or responsibility under an order by an industrial body**, for example, an entitlement under an order made by the Fair Work Commission, Industrial Magistrates Court, Western Australian Industrial Relations Commission.
- **A right to initiate or participate in a process under a workplace law or workplace instrument**, for example, starting or participating in industrial action, conferences or hearings held by the Fair Work Commission, Industrial Magistrates Court, Western Australian Industrial Relations Commission.

*Scenario 1:* You have noticed that the hourly rate you are being paid is below the award rate applicable to your employment. You try to talk to your employer about this and ask that your hourly rate be adjusted to reflect the correct amount under the award. Your employer says they will look into it. A week later you are fired, and your employer says the reasons for your dismissal is that you complain too much and you don't fit in.

*Scenario 2:* You want to go on a two week holiday overseas. You talk to your boss about going away, submit a leave request for the relevant time, and your boss approves the leave request. You go on your holiday, but when you come back your boss berates you for not answering work-related calls or emails during your leave. You are fired for being unreliable.

In both scenarios, the employer appears to be dismissing the employee for a prohibited reason. In the first example, the employee exercised a workplace right to make a complaint or inquiry in relation to their employment. In the second example, the employee exercised a workplace right to an entitlement to a benefit under a workplace instrument or workplace law (i.e. annual leave

under the Fair Work Act). Both examples would constitute an unlawful dismissal entitling the employee to make a general protections dismissal claim, because their dismissal was at least in part because of their exercise of a workplace right.

## What is a discriminatory reason?

A person must not take adverse action, such as dismissal, against an employee for a discriminatory reason. For example, an employer must not take adverse action because of a person's race, sex, sexuality, gender identity, age, physical or mental disability, political opinion or social origin. For a full list of discriminatory reasons, see s 351 of the *Fair Work Act 2009* (Cth).

*Example* : You have worked for your employer for some time. You have always had great feedback on your work and gotten along well with your manager. You inform your manager that you are 12 weeks pregnant and plan to take maternity leave later in the year. Soon after you share this news your manager starts uncharacteristically picking apart your work. After a few weeks, you are fired.

In this example, it appears that a dismissal may have occurred due to a protected characteristic, in this case pregnancy. Of course, for the claim to be successful, the court or commission would have to be satisfied that the dismissal occurred because of the pregnancy, and not for another reason.

## Industrial activity

A person must not take adverse action, such as dismissal, against someone because they are or are not an official or member of an industrial association – for example a union. There is also a prohibition on adverse action such as dismissal taken against someone for engaging or not engaging in industrial activity.

*Example*: your employer introduces a new policy requiring all staff to work longer hours during busy periods. You are not sure about this and organise a meeting of your colleagues to discuss approaching the employer to collectively negotiate the longer hours. You discuss that it may be helpful to join the union, for assistance in future with negotiations.

hours. Your employer finds out you organised this meeting, and you are fired.

Organising this meeting could constitute engaging in industrial activity, within the prescribed meaning under s 347(a) or (b) of the FW Act. Being dismissed for organising this meeting, or for proposing to join the union, is likely to be unlawful.

## Temporary absence or illness

It is unlawful for your employer to dismiss you because you are temporarily absent from work due to illness or injury of a prescribed kind.

Your absence will be considered “temporary” if it lasts for less than three months, or if the total absences you have taken within a twelve-month period have been less than three months (whether based on a single illness/injury or separate).

You need to have complied with obligations in the Fair Work Act, including obligations in relation to reasonable evidence of your illness. For example, if you had been asked for a medical certificate and not provided it, you may not be successful in your claim.

*Example:* You become unwell with a flu and are unable to work for a week. You have a medical certificate for the dates you could not attend work because you were unwell, and you provided this to your employer on the morning of the second day you were away from work. When you return to work, your boss says you slacked off, and dismisses you for being absent.

## **Sham contracting**

A worker under an employment contract is an employee. A worker under a contract for services is typically called a “contractor”.

There is a difference at law between a “contractor” and an “employee”. Significantly, contractors are not entitled to benefits under employment laws like minimum wages, overtime rates, annual and sick leave, and unfair dismissal protections (among many others).

For more information on the difference between employees and contractors, see our publication: [“Q&A: Contractor or employee for WA workers”](#).

It is unlawful for an employer to dismiss you, or threaten to dismiss you, for the purpose of re-engaging you as an independent contractor to perform the same, or mostly the same, role that you were employed in previously.

*Example:* you are employed as a cleaner for a hotel. The hotel wants to save money on staffing costs. The hotel tells you that your employment is terminated, but you can still work as cleaner for the hotel as a contractor under your own ABN.

## **Reverse onus of proof**

General protections claims are subject to a reverse onus of proof.

This means that, provided you can establish the basic facts, it is then up to your employer to show that they didn’t dismiss you for the prohibited reason.

For instance, if you are arguing your employer dismissed you because of your exercise of a workplace right, you would need to show that you had exercised the right. If you are contending you were dismissed because of a disability, you would need to show you have that disability.

The onus is then on your employer to prove that they did not dismiss you because of the prohibited reason.

In a lot of cases, the employer will say that the dismissal occurred for a different reason – such as poor performance or poor conduct.

## Outcomes

If you proceed to a final hearing in court, the main remedy for a dismissal-based general protections claim is reinstatement to your role, though in some circumstances this will not be appropriate, particularly if the relationship between you and the employer has broken down to too great an extent.

Compensation can also be awarded. Unlike unfair dismissal claims, which are capped at 26 weeks wages, there is no cap on compensation for general protections claims.

Compensation can be sought for lost wages, as well as for non-financial losses such as hurt, stress and humiliation. If you are claiming for mental distress, you should be prepared to show losses flowing from that – for example the medical bills you incurred seeing a medical professional, or other losses you can identify.

A breach of a general protections provision of the FW Act is a breach of a civil penalty provision. You can seek that your employer (and any individuals involved in the breach) be penalized for the breach. You can ask for penalties to be paid to you, however penalties are discretionary (i.e. up to the Court).

In conciliation, you are free to negotiate for any outcome you want. Conciliation is discussed further below.

## Costs

A filing fee applies to lodge your application with the FWC. More information about fees can be found here: <https://www.fwc.gov.au/apply-or-lodge/fees-and-costs>

If paying this filing fee will cause you serious financial hardship, you can lodge Form F80 (waiver of application fee) alongside your application to request the filing fee be waived.

Generally, each party will bear their own legal costs, meaning they will pay their own legal fees. However, there is a limited range of circumstances in which one party can be made to pay some or all of the legal costs of the other party.

Costs can be awarded where a claim has been made or defended “frivolously or vexatiously”. For example, if you made a claim even though you knew it had no chance of succeeding, this might be considered frivolous or vexatious. This is a fairly high bar and only occurs in rare circumstances. However, if you are unsure as to whether or not your claim might be frivolous or vexatious, you may wish to seek legal advice, as legal costs can be a significant amount of money.

## Representation

Conciliations and hearings at the FWC are designed to be navigated by an ordinary person without a lawyer or other representation. However, a person can be represented by a lawyer or an agent if a member of the FWC grants permission. Being represented by a lawyer or agents means that they speak and act on your behalf at the proceedings. An employee must notify and seek permission from the FWC before they can be represented at conciliations or hearings. Permission is only granted if:

1. the complexity of the matter means that a representative would help it to be dealt with more efficiently;
2. the party is unable to represent themselves so it would be unfair to refuse permission for them to be represented by someone else; or



3. it would be unfair not to allow the person to be represented, considering fairness between the party and other parties in the same matter.

You can review the FWC Benchbook for further details about permission to be represented and information about how an employer can be represented. This can be found here: <https://www.fwc.gov.au/benchbook/general-protections-benchbook>

## Starting a claim

You start a claim by filing a Form F8 – General protections application involving a dismissal with the FWC. This is the form for general protections claims involving a dismissal.

You will need to lodge the Form F8, together with the filing fee to the FWC registry either:

- in-person at Floor 16, 111 St Georges Terrace Perth, WA, 6000 (9:00AM to 5:00PM Monday to Friday);
- by pre-paid post to GPO Box X2206, Perth, WA, 6001. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
- by email to [melbourne@fwc.gov.au](mailto:melbourne@fwc.gov.au); or
- by using the online portal system.

Application details and rules can change over time. If you are having trouble making your application, you can call the Perth registry on 1300 799 675.

If you are very close to the limitation period, you can ask the registry if you can commence a claim over the phone.

## Completing the form

You will need to fill in your details and the details of your employer who is the “Respondent”. You should make sure you are using your employer’s legal name and not their trading name.

You can find your employer’s legal name on the Australian federal government’s business register.

Go to <https://abr.business.gov.au/> and enter your employer’s ABN. You can find the ABN on a payslip or group certificate.

On the Form F8 you will also need to indicate which of the general protections provisions you believe your employer has contravened by dismissing you. It’s up to you to make sure you are ticking the correct boxes, and if you are not sure you may wish to seek further information or assistance. Below is a summary of which types of actions are likely to be covered by which section. You can tick more than one section if you think your dismissal occurred for more than one of the prohibited reasons.

The examples listed above are certainly not exhaustive. Depending on your situation, more than one provision may be relevant.

You will need to explain in your claim how the action your employer has taken against you has contravened the provisions you have identified as applicable. For instance, if you are alleging your employer has dismissed you because of your exercise of a workplace right as protected by s 340. You would first need to explain your exercise of a workplace right, then your understanding of how your dismissal is linked to you exercising your right.

You will also need to include the outcome you are seeking by making the claim – this can be compensation, re-instatement, penalties or other outcomes that are available.

At this stage, you don't need to set out the amount you are seeking, you can simply write what you are seeking, for example compensation for losses and penalties to be applied against the employer.

You only need to submit the Form F8, you do not need to attach supporting documents or evidence at this stage, though you can attach any relevant letter of dismissal or separation certificate.

Sections of the Fair Work Act	Some examples of relevant circumstances
Workplace rights (protected under s 340)	Approaching your employer about your pay or hours, taking annual or personal leave, making a complaint about your employer to an external body like WorkSafe, reporting bullying or harassment to your employer.
Industrial activities (protected under s 346)	Joining a union, not joining a union, organizing a meeting of colleagues to discuss taking a collective approach to an issue at work
Discrimination (protected under s 351)	Telling your employer that you are pregnant, being dismissed for being too old for a role, being dismissed as a result of a disability (physical or mental health)
Temporary absence due to illness or injury (protected under s 352)	Taking time off work because you were sick or injured
Dismissing to engage as independent contractor (protected under s 358)	Being dismissed from your employee position and asked to do the same work under a contracting arrangement

### Employer's response

The FWC will then send a copy of your application to your employer, who will be given 7 days to respond. Your employer may respond outlining why they believe the action they have taken was not unlawful. Any response sent by your employer will be forwarded to you.

If your employer objects to your application on the basis that it's out of jurisdiction, there may need to be a jurisdictional hearing before your claim can progress.

This type of an objection isn't arguing the facts of the matter, it's arguing that you don't have standing to make the claim at all.

For example, a jurisdictional objection could be made on the basis that you are not a national system employee, or that you weren't dismissed from employment.

This could be if it is not clear which system of law covers your employment, or if there is an argument whether or not you have actually been dismissed (for instance, if you are arguing that you were dismissed because you were forced to resign and your employer is arguing you resigned voluntarily and thus no dismissal has taken place.)

You can continue to discuss the matter with your employer before any scheduled conciliation conference. It is fine if you come to an agreement with your employer before attending conciliation, though you should ensure you have a written copy of any agreement you come to.

## Conciliation

Generally the next step the FWC will take once the employer has sent a response is to schedule a conciliation conference. A conciliation conference is private and confidential, and will usually include you, your employer, and a third-party conciliator.

The FWC conciliator is a neutral party and is there to assist you and your employer to come to an agreement, and avoid the more formal process of a hearing. They are not there to advocate for one side but to assist with the process.

Your employer may say things that you do not agree with in the conciliation, or things that are upsetting to hear. You should not interrupt when your employer or the conciliator is speaking, but you may like to take notes so you can address these points when you have a chance to respond.

At certain points the conciliator may speak to each party alone to assist with the negotiation process.

Conciliation can be a good opportunity to try and resolve the matter outside of the more stressful and formal process of a hearing. It is a good idea to approach the conciliation with an open mind and be prepared to negotiate.

### Resolution at conciliation

It may be that you are able to come to an agreement with your employer in conciliation. If this happens, the conciliator can write a deed or agreement with agreed terms of settlement.

It is possible that a settlement agreement could be drawn up on the spot and become binding when accepted and signed by both parties.

It may be that your employer wants a lawyer to draw up a settlement agreement which will be sent to you after the conciliation, so even though an agreement has been reached there is not an opportunity to close the matter on the spot.

If you are making an agreement to settle, it's important to be clear whether the agreement is settling just your general protections claim, or all possible claims. It is quite common for employers to want to settle all claims. If you don't deal with this specifically, it's often assumed that the settlement covers all claims.

Settlement is usually concluded with a deed, which will often include standard clauses like non-disparagement and confidentiality, as well as mutual release from further legal action. Signing a deed will likely mean you are bound by all clauses within the deed.

### No resolution at conciliation

If conciliation fails and you and your employer are unable to come to resolution, you can seek a consent arbitration, proceed to court, or discontinue your claim.

## Arbitration

If all reasonable efforts to settle the matter were made at conciliation and this was not successful, the FWC will issue a certificate outlining this. The certificate will be dated, and you have 14 days from that date to progress your claim to the next steps. The certificate will also state if the FWC member who issued it does not believe you have a reasonable prospect of success.

You can make an application to have your claim arbitrated by the FWC. Engaging in arbitration requires the consent of both parties, so you cannot proceed with arbitration if your employer does not agree to do so.

Arbitration allows for a final and binding decision on the matter. A Member of the FWC makes a final decision, though either side may appeal the decision. An arbitration can be cheaper and quicker and is less formal than a court hearing, so your employer may agree to undergo this process for efficiency.

You need to file Form F8B signed by both you and your employer to proceed to arbitration. This needs to be within 14 days of the receipt of the certificate that conciliation was unsuccessful. If the employer does not agree to arbitrate, you will have to make a court application to continue the matter. This also needs to be done within 14 days of the date listed on your certificate.

So if it is nearing the 14 day deadline and your employer has not signed the Form F8B or given an indication that they will agree or not, you may want to lodge a court application, or you risk not having an option to proceed at all.

## Making an application to court

If your employer does not agree to arbitrate, or you wish to proceed to court without seeking arbitration, you can make an application to either the Federal Court of Australia (**FCA**) or the Federal Circuit and Family Court of Australia (**FCFCOA**). If you make an application to the court, your employer does not have a choice and must participate in the hearing.

You must make the application within 14 days of the date listed on your certificate.

A general protections court application can be quite time-consuming, stressful, and sometimes more expensive as it may be difficult to navigate without legal representation.

## Related resources

- [Q&A: State or National System for WA Employees](#)
- [Claim Guide: Unfair dismissal for national system employees](#)
- [Claim Guide: Unfair Dismissal for state system employees](#)
- [Q&A: Contractor or employee for WA workers](#)
- [Q&A: Dismissal for WA employees](#)
- [Fair Work Commission General Protections Benchbook](#)

## 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>Fair Work Commission</b></p> <p>Phone: 1300 799 675                      Email: <a href="mailto:perth@fwc.gov.au">perth@fwc.gov.au</a>                      (enquiries only)                      Email: <a href="mailto:melbourne@fwc.gov.au">melbourne@fwc.gov.au</a>                      (to lodge a claim form)                      Web: <a href="https://www.fwc.gov.au">https://www.fwc.gov.au</a></p> <p><b>Federal Circuit and Family Court of Australia</b></p> <p>Phone: (08) 9268 7100                      Email: <a href="mailto:waregistry@fedcourt.gov.au">waregistry@fedcourt.gov.au</a>                      Web: <a href="https://www.fcfoa.gov.au/">https://www.fcfoa.gov.au/</a></p> <p><b>Federal Court of Australia</b></p> <p>Phone: 1300 720 980                      Email: <a href="mailto:perth.registry@fedcourt.gov.au">perth.registry@fedcourt.gov.au</a>                      Web: <a href="https://www.fedcourt.gov.au/">https://www.fedcourt.gov.au/</a></p>	<p><b>Fair Work Ombudsman Info Line</b></p> <p>Phone: 13 13 94                      Web: <a href="https://www.fairwork.gov.au/">https://www.fairwork.gov.au/</a></p> <p><b>Wageline</b></p> <p>Phone: 1300 655 266                      Web: <a href="https://www.dmirs.wa.gov.au/contactwageline">https://www.dmirs.wa.gov.au/contactwageline</a></p> <p><b>WorkSafe</b></p> <p>Phone: 1300 307 877                      Web: <a href="http://www.dmirs.wa.gov.au/worksafe">http://www.dmirs.wa.gov.au/worksafe</a></p>

### Disclaimer:

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