Circle Green Community Legal

Protection of employee rights for state system employees

A Circle Green Community Legal claim guide

Introduction

This claim guide is for state system employees in Western Australia who wish to make a Protection of employee rights claim (PERs Claim).

There are two systems of employment law in Western Australia: a state system and a national system. For more information, 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 PERs Claim. If you are not yet ready to make a claim and you are seeking more general information on this claim or your options overall, you may wish to view our Q&A resources first. If you need legal advice in relation to your issue, 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.

Contents

Overview

State system employees are protected by law against certain types of unlawful conduct by employers, so they can confidently pursue their rights at work.

If a state system employer does not comply with these protections, an employee may be able to make a protection of employee rights (**PERs**) claim in the Industrial Magistrates Court (**IMC**).

A PERs claim normally involves lodging an application form, attending a pre-trial conference to try and resolve the matter, and a formal hearing if no agreement can be made at the pre-trial conference.

If the IMC finds that the employer's actions breached the employee's rights, they can make orders, including for financial compensation (money). For certain breaches, the IMC 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 protected rights 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 breached the protected rights, you may wish to skip to the procedural information.

Eligibility

If you are a state system employee, you are eligible to make a PERs claim to the IMC. If you have been dismissed, you may also be eligible to make an unfair dismissal claim and/or an unlawful termination claim.

If you are not sure which claim to make, you may wish to read our publication: "Q&A: Dismissals for WA employees" and consider seeking further information or assistance.

You can't make a PERs claim for damaging action if you've already got an active claim about the same action in another court or commission. If you want to pursue a PERs claim instead of the another claim you've already made, you can withdraw the other claim and commence the PERs claim. For example, you cannot make both an unfair dismissal claim and a PERs claim for the same dismissal.

The IMC cannot provide you with compensation or any other order if there is another ongoing claim in relation to the same conduct.

Time limits for making a claim

Unfair dismissal claims have short limitation periods of 3 or 4 weeks in which claims must be made. PERs claims have much longer limitation periods and can be made within 6 years of the unlawful conduct occurring.

However, even though it's possible to make a claim within 6 years, it's still better to make the claim as soon as possible. It can become more difficult to demonstrate your argument and produce evidence after a significant amount of time.

What are the protected employee rights?

State system employees are protected against three main types of unlawful conduct:

1. **Damaging action** taken by an employer against an employee because the employee is able to make an inquiry or complaint related to their employment;

2. **Sham contracting** conduct by employers, which involves employers treating employees as contractors, often to avoid paying employee entitlements; and

3. **Advertising pay that is below the minimum wage by an employer.**

A person who is not yet an employee but who is applying for a job is also covered by these protections, as long as the potential employer is a state system employer.

Damaging action taken because of a complaint or inquiry

You can make a PERs claim if your employer has taken **damaging action** against you because you made an **employment-related inquiry or complaint**.

An obvious example is where an employee is fired from their job (damaging action) because they complained to their employer that they were being underpaid (employment-related inquiry or complaint).

However, different kinds of situations are covered by this claim. To understand which situations are covered, we need to look more closely at how these terms are defined.

What is damaging action?

Damaging action is a broad term covering actions taken by an employer that negatively affect an employee's employment.

Damaging action against an **employee** includes:	Damaging action against a **potential employee** includes:
• dismissing an employee; • altering an employee's position to their disadvantage; • refusing to promote or transfer an employee; • injuring an employee in relation to the employee's employment; and threatening to take any of these actions.	• refusing to employ the prospective employee; • discriminating against the prospective employee in the terms or conditions on which the employer offers to employ the prospective employee; and threatening to take either of these actions

In practical terms, this definition covers a broad range of conduct. Damaging action could include demotions, warnings, suspensions and other disciplinary actions. Depending on the circumstances, it might also include more subtle actions like denying opportunities, changing your hours of work or changing your work location.

If you feel you are in a worse position because of deliberate actions by your employer, then damaging action may have occurred.

Of course, you can't make a claim for damaging action alone. You must be able to show that the damaging was taken because of an employment-related inquiry or complaint that you made.

What is an employment-related inquiry or complaint?

Inquiries or complaints can be internal or external:

- **Internal inquiries or complaints** are those made or raised by an employee to their employer; and
- **External inquiries or complaints** are those made or raised by an employee with a workplace authority, such as Wageline or WorkSafe.

An employee has to be "able to make" the inquiry or complaint and it has to have a connection to their employment.

What this means in practical terms is that your complaint or inquiry has to be linked to an instrument that covers your employment. So, the complaint has to be about something covered by your employment contract, an industrial award that applies to you, or an industrial law. There are other instruments that might be relevant like registered industrial instruments or general orders made by the Western Australian Industrial Relations Commission.

Complaints or inquiries about pay rates, hours of work, safety, and leave entitlements are likely to be covered.

Example 1*:* You have recently moved offices and you are not a huge fan of the furniture that has been bought for the new office. You are frustrated that everyone has worked hard to make a record profit for the business, yet they are not investing in staff. You approach your boss and complain that the new office chairs are cheap and inferior to the previous furniture, which is unfair given how hard everyone has worked. You are fired shortly afterwards for being a "complainer".

This is unlikely to be an enquiry you are "able to make" for the purpose of a PERs claim because employment contracts and other instruments don't normally deal with the quality of office furniture or general notions of respect and investment in staff.

Note that in this type of situation you may instead be able to make an unfair dismissal claim.

Example 2: You have recently moved offices and you are concerned with the furniture that has been bought for the new office. There is a ladder to access files from the higher shelves of a bookcase. You are required to use this often, but the ladder appears to be old and flimsy and shakes when you are at the top. You approach your boss and complain that the ladder is dangerous and you are worried about falling. You are fired shortly afterwards for being a "complainer".

This is likely to be a complaint that you are "able to make" because your complaint is linked to workplace health and safety laws.

Of course, for your claim to be successful, the inquiry or complaint will have to be considered one of the reasons for your employer taking the damaging action. This means your employer would have to know about the inquiry or complaint, and have factored it into the decision to take the action against you. It doesn't have to be the only reason, or even the main reason, but you do have to be able to demonstrate that it was one of the reasons.

Reverse onus

If your matter ends up proceeding to the IMC for a final hearing, you will have the benefit of a reverse onus of proof. What this means is that, after you make your initial argument, it's up to your employer to demonstrate that the claim is faulty. For example, if you made a PERs claim arguing that you were dismissed for making a complaint, it would be up to your employer to demonstrate that there was another reason for the dismissal.

Note that you still need to make your initial argument successfully. If you can't show all the elements of the claim, you won't be successful, even if your employer doesn't have a good response.

While the reverse onus is helpful for you, in most circumstances employers will present an alternative reason or argument.

For example, you may argue that you were dismissed for making a complaint, but your employer may argue that it was due to your poor performance.

In this type of a situation, provided your employer has some basis for their position, you will have to still present evidence in favour of your own argument.

Written evidence including emails and texts is helpful. However, even if your only evidence is a verbal statement or written statement, you may still be able to persuade the court. It will depend on whether you are considered a more reliable and trustworthy witness than the witness or witnesses of your employer.

What is sham contracting?

Under these provisions, an employer must not:

- tell a worker they are a contractor, when they are in fact an employee (misrepresentation);
- dismiss (or threaten to dismiss) an employee so that they can re-engage them as a contractor; or;
- make a false statement to convince someone to become a contractor.

A worker under an employment contract is typically called an employee while 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 differences between employees and contractors, see our publication "Q&A: Contractor or employee for WA Employees".

Misrepresentation

Under the sham contracting provisions, an employer must not represent to an employee that a contract for employment is a contract for services.

This type of PERs claim can be made where an employer knows that their worker is an employee but tells the worker they are a contractor to avoid their obligations under employment laws. Note however, that the employer doesn't necessarily have to deliberately lie to the employee. If the employer *should* have known that their worker was an employee, they may still be in breach of the law.

Dismissal to re-engage as a contractor

An employer can't dismiss an employee, or threaten to dismiss an employee, so that they can then re-hire them as a contractor to do the same job, or a very similar job. This type of claim also has a reverse onus of proof, meaning that it will be up to your employer to show that that they didn't dismiss you for this reason.

False statements

An employer must not make a statement that is false (or that they should know is false) to convince an employee to become a contractor doing the same job, or a very similar job.

Advertising below the minimum wage

An employer (or in fact any person) must not advertise a job with a rate of pay that is less than the minimum wage for that position. In this context, the "minimum wage" for the position might be the general "minimum wage" for state system employees, but it could also be the minimum wage under an industrial award, industrial agreement and certain other industrial instruments.

Outcomes

In certain circumstances, the IMC can make an order to reverse or undo damaging action. If you have been dismissed, they can make an order that you be reinstated. If, as a prospective employee you were not given a job, they can order that you be given the job.

Sometimes this type of order will not be appropriate, so the IMC can order monetary compensation instead.

For example, if you are making a claim for being dismissed, you may be compensated for wages lost as a result of being dismissed. You are not limited to claiming for lost wages however, and can ask for compensation for any loss or injury suffered as a result of the damaging action or sham contracting conduct.

In addition to compensation, you can ask for penalties to be applied against the employer. A penalty is like a fine that is issued for breaking the law.

You can also ask for penalties to be applied against an individual "involved" in the action. For example, if you were dismissed for inquiring about wages, a manager who made the decision to fire you could be considered to be "involved" in the action.

Penalties and compensation can also be ordered in addition to reinstatement.

Costs

You are required to pay a lodgment fee. More information about fees can be found here: https://www.imc.wa.gov.au/index.php/headingfeesandcharges

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 to clear 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.

Starting a claim

You must complete all of the Originating Claim forms, being Forms 1.1, 1.2 and 1.3. You can find the forms on the IMC website here: Applications & Forms (imc.wa.gov.au)

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 pay slip or group certificate.

You will need to tick the box for the correct law or "Act". For a PERs claim, this is the Industrial Relations Act 1979 (WA)

Lodging the claim

You start a claim by lodging the forms, together with the filing fee to the IMC Registry located at Level 17, 111 St Georges Terrace, Perth WA 6000, either:

- in person;
- by pre-paid post to Industrial Magistrates Court Registry, Locked Bag 1, Cloisters Square, Perth, WA, 6850. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
- electronically.

The Registry will stamp Forms 1.2 and 1.3 and return them to you. If lodging electronically, a number is automatically generated, together with the Court seal.

For assistance with the lodgment process, contact the Industrial Magistrates Court Registry on (08) 9420 4467.

Serving the claim

Once you have lodged your claim forms you will usually have 30 days to deliver Form 1.3 to your employer. This is called “serving” your employer. If you have named an individual who is involved in the breach, you must serve them also.

You can pay someone to carry out service for you if you don’t feel comfortable doing it yourself.

Affidavits

After serving Form 1.3 on your employer, you must lodge an affidavit of service at the Registry stating that you have served your claim on your employer. Try to do this as soon as possible after serving the claim and lodge it in the Court Registry. It is lodged in the same way that your application is lodged and given the same number. To prepare the affidavit of service, use

- Form 3 if you are serving a corporation;
- Form 4 if your employer is a public authority;

In the affidavit you state:

- that you served the employer (and any individual named) with the claim; and
- the time and place of service and the manner in which you served the claim, as set out in the form.

You must sign the affidavit in the presence of an appropriate witness. The following people can witness an affidavit:

- a Justice of the Peace;
- an experienced lawyer unless they helped prepare the affidavit, or are involved in the proceedings for which the affidavit is to be used;
- a public notary within the meaning of the Public Notaries Act 1979 (WA); or
- a registrar or Clerk of a Court, or any mining Registrar appointed under the Mining Act 1978 (WA).

If you are having difficulty serving your employer or if you are unsure about how to serve your particular employer, you can contact the Clerk to the Industrial Magistrate for assistance on (08) 9420 4467.

Employer’s response to your claim

Your employer may consent to the IMC making the final orders that you are seeking in your claim. If your employer consents, you do not need to appear before the IMC. The IMC will make the orders in your absence and your claim will be finalised. If your employer does not consent to the final orders sought in your claim, your employer must lodge a response to your claim with the IMC explaining why it disagrees with your claim or parts of your claim.

The time in which your employer must lodge a response depends on the employer’s address for service. If your employer’s address for service is:

- fewer than 1,000 km from Perth, your employer has 21 days in which to lodge a response; or
- more than 1,000 km from Perth, your employer has 28 days within which to lodge a response.

After lodging a response, your employer has 14 days to serve its response on you.

Upon lodgment of the response, the Clerk of the Court will list the matter for a pre-trial conference. You will be advised in writing of the date and time of the conference.

The Clerk of the Court may request additional information in respect of your claim. If this happens, any information will need to be served on the respondent, together with an affidavit. This is generally done in the same way as for the original application.

Default judgment

If your employer does not lodge a response to your claim within the appropriate time, you can apply to the Court for a default judgment in your favour against your employer. A default judgment is where the Court makes a judgment order without the parties going through the full trial process. To do this:

- complete Form 6 - Application, which is lodged in the same way as your original application and served on your employer in the same way. A lodgment fee applies; and
- complete and lodge Form 7 – Affidavit in the same way as for an original application.

If your employer does not respond to your application within 14 days of being served, the Court will set a date for the hearing to make a default judgment. Note, however, that this does not necessarily mean that the claim is finally determined, as your employer can apply to the Court to have the default judgment set aside within 14 days of the judgment being made.

Pre-trial conference

The purpose of the pre-trial conference is to allow you and your employer to sit down together with the Clerk to discuss the claim and to try and resolve it without the need for a hearing. The pre-trial conference is confidential and without prejudice, meaning that things you say in conference won't be used against you in the hearing.

To prepare for the pre-trial conference, please note the following:

- Carefully consider your claim, any evidence you have to support your claim, and your employer's defence before attending the pre-trial conference.
- You will need to be able to briefly explain your claim to the Clerk and your employer.
- Your employer will then explain its response to your claim.
- The Clerk will try to assist you and your employer in reaching an agreement.

Settlement

Settlement means an agreement between the parties that ends the dispute that has led to the claim. In a PERs application, it will usually mean that the employee agrees to withdraw the claim and not to make any further claims, and the employer agrees to pay the employee a sum of money. Because settlement is an agreement between the parties, anything can be a part of settlement, as long as the parties are willing to agree to it. This means you can ask for non-monetary things like an apology, to keep your work computer, or a positive reference.

Settlements are usually finalised in writing. They could be settled by a deed, which is like a written contract describing the actions each party agrees to take in order to bring the matter to a close. A deed will usually include a timeline of events relevant to the dispute, some definitions of terms, the terms that the parties agreed to in conciliation, and potentially some standard or

"boilerplate" terms that are generally included in deeds to make them work properly. Once agreed to, a deed is legally binding and can be enforced by making an application to a court. You should only agree to terms of settlement that you are willing to be legally bound by.

Settlement of a matter can be reached any time before the final decision is made. It is always worth reaching out and seeing if the employer is willing to settle, because it allows you to have some control over the outcome of the matter. Leaving it up to the IMC means that the outcome is out of your hands. For more information on what happens when an agreement is reached, please see our publication: "Q&A: Conciliation conferences for WA employees".

Can you discontinue the claim?

If you want to discontinue your claim. The forms can be found here: https://www.imc.wa.gov.au/index.php/appsandforms

- in whole, use Form 18 (Notice of Discontinuance – Whole of Claim); or
- in part, use Form 19 (Notice of Discontinuance – Part of Claim).

Hearing

If the dispute cannot be resolved at the pre-trial conference it may be listed for a hearing before an Industrial Magistrate. The Clerk may first consider if a further conference would be helpful, or may issue orders to ask for submissions that provide more information.

If the matter is listed for a hearing, the Clerk will prepare the matter for a hearing and outline the process to the parties. The Clerk will ask you and your employer to provide:

- dates you are unavailable;
- the estimated time required for the hearing; and
- details of any witnesses you will be bringing.

If the matter is referred to a final hearing, you will first attend an initial hearing. The purpose of an initial hearing is to make the final hearing more efficient. This could involve narrowing down the facts in dispute or identifying what evidence is needed or considering if agreement is still possible.

A directions hearing may also be scheduled at some point prior to the trial. This type of hearing is used to set out a timetable and process leading up to the final hearing, including dates for submission of important documents. Directions may also be issued at a scheduling conference.

Witnesses

If you have witnesses to support your claim, they will need to attend Court with you on the day. You will need to lodge and serve a witness summons at least 14 days before the trial.

The Summons to Witness is lodged in the same manner as the original claim and must be served personally on the witness (Form 22.1).

You must pay the witness' reasonable expenses of attending Court, and make arrangements to enable the witness to attend Court. You will need to record how this has been done on the Summons to Witness – Proof of Service Copy (Form 22.2).

On the day of the trial, 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. Note that it is a criminal offence to deliberately give false evidence in Court.

In the courtroom

The Industrial Magistrate will sit behind a high desk at the front of the room and there will be a long table in front of the Industrial Magistrate. You will sit at one end of the table and your employer will sit at the other end, with you both facing the Industrial Magistrate.

The Industrial Magistrate will probably ask you to go first in explaining your claim before giving your employer the opportunity to respond to what you have said. You do not have to have an opening submission, a brief outline is sufficient. Your employer will be given an opportunity to respond.

If you have evidence that you want to show the Industrial Magistrate or have witnesses who are at Court to testify on your behalf, you should tell the Industrial Magistrate.

Courtroom etiquette

The IMC is designed to be less formal than some courts, however, you still need to ensure that you behave respectfully and courteously at all times. The proper way to address the Industrial Magistrate is "Your Honour" and you should listen very carefully to everything that the Industrial Magistrate says.

You should also carefully follow any directions given to you by the Court staff. For example, when an Industrial Magistrate enters or leaves the Courtroom, one of the Court staff will ask everyone to stand up and will then announce when you are allowed to be seated again.

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

If you wish to speak, you should stand up.

You will have your turn to speak and the Industrial Magistrate will let you know when you can have your say. You should make a note of what has been said – including things that you do not agree with – so that you do not forget to mention this to the Industrial Magistrate when it is your turn.

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.

If you have a mobile telephone, it must be turned off before you go into the Courtroom.

The Industrial Magistrate's decision

After all the evidence has been given, the Industrial Magistrate will give a decision on your claim. They may not make the decision on the same day as the final hearing. The decision will be in the form of a Court order.

In some cases, the Industrial Magistrate may need more time to consider the issues and may postpone making a decision until a later date (this is called "reserving" the decision). If you are successful, the Industrial Magistrate will make an order with respect to the amount to be paid. This amount may include an amount for interest.

The decision is usually for immediate payment (note that this may include payment by instalments), but in certain circumstances the Industrial Magistrate may give the employer a period of time by which to pay the amount ordered. If the Industrial Magistrate "reserves" his or her decision, a Court officer will contact you on a later date to advise you when the decision is ready.

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

Enforcing a court order

If your claim is 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 (a debt).

The Court order will only be enforced at your request.

Firstly, contact the Court Registry and tell the Registry staff that an order was made by the Industrial Magistrate that your employer must pay a certain amount of money by a certain date and that it has not been done. The Registry will provide you with a copy of an order and should be able to tell you the steps involved in enforcing the order.

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.

How can you prepare for your hearing?

Be familiar with your claim and your evidence so that you can present your claim to the Industrial Magistrate in a clear and concise manner.

Practice 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 Industrial Magistrate.

Make detailed notes of all 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.

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

If you are intending to show documents to the Industrial Magistrate, you will need three copies of each document – one to give to the Industrial Magistrate, one to give your employer and one for yourself. If you are bringing witnesses make sure you have additional copies for them.

The Court staff will help with administration matters but they cannot give you legal advice or tell you what to put in your claim.

On the day of your hearing, you should report to the relevant Court and advise the Judicial Support Officer that you have a claim listed for hearing on that day.

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

If you have reached a last-minute agreement with your employer you should tell the Clerk immediately.

Related resources

- Q&A: Dismissal for WA employees
- Q&A: Conciliation conferences for WA employees
- Q&A: State or National System 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

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

Commissions and Tribunals	Government departments & other supports
Industrial Magistrates Court Phone: 08 9420 4467 Email: electroniclodgementIMC@wairc.wa.gov.au (for electronic lodgment only) Web: https://www.imc.wa.gov.au/	