Circle Green Community Legal

Unfair 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 an unfair dismissal 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 System for WA Employees" from the workplace resources section of our website.

The information below has been written to assist you with the practical process of making an unfair 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 publications on our workplace resources page 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

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

In the national system of employment law, certain employees are protected from unfair dismissal. If such an employee is unfairly dismissed, they can apply to the Fair Work Commission (**FWC**) for help.

An unfair dismissal claim involves lodging an application form, having a conciliation conference, then having a formal hearing if no outcome can be agreed in conciliation.

If the FWC determines that the dismissal was unfair, they can order that the employee is reinstated into their old job. If that can't be done, then they can order that the person receives financial compensation (money) for lost income.

A dismissal is unfair if it is harsh, unjust, or unreasonable. In deciding whether a dismissal was unfair, the FWC must consider whether there was a valid reason for the dismissal and whether a fair process was followed.

A dismissal will not be considered unfair if it is the result of a genuine redundancy, or if the employer is a small business and complied with the Small Business Fair Dismissal Code.

This claim guide explains who can make a claim, when a dismissal will be considered unfair, 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 your dismissal was unfair, you may wish to skip to the procedural information.

Eligibility

Only certain employees can make unfair dismissal claims. To be able to make a claim you need to fit certain circumstances. If you fit these circumstances then you are "eligible" to make a claim.

To be eligible to make a national system unfair dismissal claim, you must meet the following criteria:

- be an employee;
- be covered by the national system of employment law;
- be dismissed or forced to resign by your employer;
- Have completed the minimum period of employment with the employer who dismissed you (6 months, or 12 months if the employer employs 15 or fewer employees); and
- earn less than (or equal to) the high income threshold OR be covered by an award or registered agreement.

If there is a dispute over whether or not you were "dismissed", your employer might raise a jurisdictional objection. This means they are arguing that you aren't eligible to make the claim, and the FWC might schedule a 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.

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

If you haven't yet figured out which claim is best for you, 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" first 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 makes a dismissal unfair?

A dismissal will be unfair if it is harsh, unjust, or unreasonable. It only needs to be one of those things for the dismissal to be unfair.

The FWC publishes an unfair dismissal "bench book" which is freely available on their website and designed to be accessible for non-lawyers. Below we provide an overview of unfair dismissal, however we recommend you also read the bench book for a more detailed analysis of the law. You can find the bench book here:

www.fwc.gov.au/benchbook/unfair-dismissals-benchbook

When the FWC considers whether the dismissal was unfair, it must consider and weigh up several factors. "Weighing up" the factors means that the FWC makes its decision by taking them into account and thinking about whether one is more persuasive than another, but no single factor determines that the dismissal was unfair.

1. Was there a valid reason for the dismissal?
    - a valid reason is one that is sound, defensible or well-founded. It cannot be capricious, fanciful, spiteful, or prejudiced. In ordinary terms, it should be what a reasonable person would consider a "good" reason. It should be based on facts and not just opinion, and it should be "proportional". In other words – did the punishment fit the crime? Was dismissal an appropriate action or could another approach have been taken?
2. Was the employee notified of the reason and given an opportunity to respond?
    - It is not enough that there is a valid reason – the employer must clearly notify the employee of the valid reason.
    - If there is a valid reason and the employee has been notified of it, an employee must have an opportunity to respond to the reason before a final decision is made to dismiss them. The employer should genuinely consider the response before making a final decision.
3. Did the employer unreasonably refuse to allow the employee to have a support person?

- An employer doesn't have to ensure that an employee brings a support person to discussions prior to dismissal. However, if an employee asks to bring a support and it's unreasonably refused, this might suggest the dismissal was unfair.

4. If the dismissal is because of unsatisfactory performance, did the employer warn the employee about their performance and give them an opportunity to improve?

    - If a person is dismissed because they were not reaching a required standard of work, they should first be warned that they are not meeting the required standard. The purpose of the warning is to allow them to improve, so there should be a period of time between the warning and the dismissal that would reasonably allow them to improve.

    - The warning needs to tell the employee what is wrong with their performance, and that unless they improve their employment is at risk.

5. What is the size of the employer, and do they have a dedicated HR specialist or someone with HR expertise?

    - Whether a process followed by an employer is fair will consider the capacity of the employer. A larger employer will have extensive or greater resources, often including an HR expert or department. A large employer like this might be expected to have a more formal investigation and disciplinary process. For a smaller business, it may be appropriate to only have oral meetings and to provide limited written correspondence about performance and conduct issues, if doing so adequately informs the employee and gives a proper opportunity to improve or respond.

6. Are there any other matters the FWC considers relevant?

    - The FWC can consider any other factors that they consider are relevant. This could be anything, as long as it is relevant in the context of the dismissal.

    - Other matters may be things like the length of good service of the employee, the financial or personal impact of the dismissal on the employee, or different treatment of the employee to other employees.

    - If the employee was dismissed summarily (meaning, immediately dismissed for serious misconduct without notice or payment in lieu of notice), then it will be considered whether the conduct of the employee justified a summary dismissal. For more information on serious misconduct, see our publication "Q and A: Dismissal for WA employees".

    - Other procedural fairness considerations besides notification of the reason and an opportunity to respond may be relevant, such as whether any internal policies were followed.

    - The FWC does not have to address every reason the employee gives, but it should consider any reasons that are centrally relevant to the fairness of the dismissal.

In each unfair dismissal case, the FWC will probably go through the above considerations and deal with them one by one. They will usually say whether the factor weighs in favour of the dismissal being fair or unfair, or whether it is irrelevant or neutral.

Some factors are usually given more weight than others. The existence of a valid reason and the following of a fair process are usually given the most weight. It may be the case that all the other factors weigh in favour of the dismissal being unfair, but if the reason for dismissal is good enough, then it will outweigh all the other factors. It just depends on the individual circumstances of the dismissal.

Outcomes

If you don't settle your matter at conciliation and your matter proceeds to a final hearing, the FWC will make a decision. The FWC will either find that the dismissal was fair and dismiss the application, or they will find that it was unfair and then consider whether to order a remedy.

A remedy means something that is done or given to you at the end of a legal process that is meant to repair the wrong done to you or compensate you for it. In unfair dismissal claims, the FWC's remedies are limited to reinstatement in your old job or financial compensation for lost wages.

The power to award a remedy is discretionary – this means that you do not automatically get a remedy if the dismissal is unfair. The FWC has to be convinced that they should provide a remedy.

Reinstatement is the first remedy the FWC will consider. They will consider whether it is appropriate for you to go back to your old job. Reinstatement may not be appropriate if you are not able to continue having a working relationship with your employer, or the business you were working for no longer exists, or you have developed an illness or injury that would prevent you from being able to do your old job.

If reinstatement is appropriate, then the FWC may order that your employment is restored to what it was immediately before you were dismissed, or to another position that is equal or better in terms of pay, conditions, and the actual work performed. They can order that you should be paid for lost wages. If they do, they will consider what wages you would have earned had you not been dismissed, and what wages you may have earned from other employment between the dismissal and the reinstatement.

The FWC can also order that the time between the dismissal and the reinstatement is not counted as a break in service for the purpose of calculating service-related benefits, like qualifying for certain kinds of leave.

If reinstatement is not appropriate, then the FWC will consider whether to order compensation. If they decide to order compensation, the compensation will be limited to lost wages, and the maximum that can be ordered is compensation equal to 26 weeks (or about six months) of wages.

There is no set formula for how to determine a compensation amount. The FWC will consider all of the circumstances around the claim, including:

1. the impact of an order of compensation on the employer,

2. the employee's length of service;

3. the pay they would have received if they'd continued working for the employee, considering how long the employee would have continued to work for the employer, and whether anything would have happened to reduce their earning capacity over that period;

4. whether the employee has made an effort to minimise their losses by seeking other work (this is also called mitigating your losses);

5. whether the employee has gained employment and earned any wages after their dismissal;

6. whether the employee committed any misconduct that contributed to their dismissal; and

7. any other matters that may be relevant.

If the amount reached by the FWC taking the above into account exceeds the maximum compensation amount of 26 weeks' wages, then compensation should be reduced to the cap.

You are not able to be compensated for shock, distress, humiliation, or any other kind of hurt or injury caused by the manner of the dismissal.

It is rare that the cap is awarded. More often, compensation works out to be about 4 to 12 weeks' wages.

Costs

In court proceedings, the losing party usually pays the legal costs of the winning party. This is not the case in the FWC. In the FWC, the employee and the employer are responsible for paying the costs of any representation or advice they receive to help them in the claim.

There are some exceptions. One exception is when the claim is made, or responded to, frivolously or vexatiously. A case is frivolously where there the application is so faulty or baseless that it doesn't deserve an answer. This is more than being a weak or tenuous claim, or a claim where the facts are in dispute or poorly recollected. It should be apparent on reading the application that there is no chance for it to win.

A case is vexatious when its main purpose is to harass, annoy, or embarrass the other party. If a claim is made or defended with this purpose, then it may be vexatious even if there is a reasonable basis for it.

Another exception is where a party unreasonably does something, or fails to do something, and as a result the other party incurs costs. An example might be where a party unreasonably refuses a reasonable settlement offer or fails to discontinue an application. Whether it is unreasonable depends on the circumstances, but the key thing is that there is clear evidence of unreasonable conduct.

Representation

Conciliations and hearings at the FWC are designed with the intention that they can be navigated by an ordinary person without 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.

Making an application

You start a claim by filing a Form F2 – Unfair dismissal application with the FWC. The form can be downloaded from the FWC website. You file the claim by email to melbourne@fwc.gov.au or by posting or delivering the application to the Perth commission office. In some circumstances it is possible to make an application over the phone.

Information about fees can be found here: https://www.fwc.gov.au/apply-or-lodge/fees-and-costs

Once the application is accepted, the FWC will provide the application to the employer and then invite a response. The response will usually set out the employer's version of events, any objections they have to the things said in your application, and an argument why the dismissal was not unfair.

Dismissing applications before hearing

The FWC can dismiss applications if asked to by the employer or when it decides that there is a reason to. The power to dismiss an application is used cautiously by the FWC, but it will be used when necessary.

Generally, the FWC will dismiss an application if it is not made correctly, including if the employee does not pay the proper filing fee. It may also dismiss the application if it has no prospects of success, or if it is frivolous or vexatious. Frivolous or vexatious has the same meaning here as it does above – a claim that is either baseless or intended to harass or annoy.

Generally speaking, if you are eligible to make a claim, you have an arguable case that your dismissal was unfair, you follow the FWC processes correctly and you respond to their communications with you, your case should not be dismissed before it gets to conciliation or hearing.

Conciliation

If your claim is accepted, the first step is to hold a conciliation conference to see if the claim can be settled by a negotiated outcome.

Most claims are resolved in conciliation rather than proceeding to a formal hearing. Hearings are time and resource intensive, and can be challenging to navigate for ordinary, unrepresented people, even though the FWC is a more relaxed jurisdiction than a court of law. It is in everyone's interests for a claim to be conciliated rather than determined by a hearing, including yours. Regardless of how strong your claim might be, success at hearing is never guaranteed, so you are generally better off saving the time and expense of a hearing and avoiding the gamble of losing.

A conciliation conference is usually held over telephone between a conciliator or commissioner, the employer or their representative, and the employee or their representative. In conciliation, both parties will get an opportunity to present their case and respond to things the other party has said. The conciliator may ask questions of the parties and may speak to each of the parties separately about their case and what they might be willing to accept as a negotiated outcome. The parties may then come to together to discuss settlement.

Settlement

Settlement means an agreement between the parties that will end the dispute that has led to the claim. In an unfair dismissal 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 FWC 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".

Hearing

If the matter is not settled at conciliation, you can discontinue the matter or proceed to a hearing.

The FWC has some discretion over the process for a hearing, however a standard process is described below

the FWC will first hold a "programming" or "directions" conference or hearing, where the parties will be given dates by which they have to do certain things.

You will be asked to provide documentary evidence to the FWC, such as your employment contract, your written notice of termination, and written statements by the parties or other witnesses providing factual information to the FWC. You may be asked to collate all your documents into a "book", or a compilation of all your documents.

You and your employer may be asked to submit a statement of agreed facts and some agreed documents. Submitting these will require you to talk to your employer and see what parts of your claim they agree with, and what parts of their defense you agree with. This is known as "conferral", and the purpose is to focus the hearing on matters that are not agreed, so that the parties don't give evidence on things that are already agreed.

You will also be asked to provide an outline of "submissions" to the FWC. Submissions are legal arguments in a written form about why the facts support your case. You will normally be expected to give an outline of the submissions you intend to make, in enough detail for the employer to prepare a response.

You will then give your submissions in full orally, or verbally, during the hearing. You will usually give an opening statement where you state your overall case, including your version of events and your reasons why those facts mean your dismissal was unfair. If any oral evidence is being provided, the witnesses will do that after the opening statement, with you asking them questions and the employer asking cross examination questions. Once all your witnesses have given evidence, you will give a closing statement where you make your submissions about why the FWC should give more weight to your evidence and prefer your evidence over your employer's evidence, and why your dismissal was unfair. You may be questioned about parts of your case by the Commissioner hearing your case.

Once your case is provided in full, the employer will give their case. You will have an opportunity to ask questions of any witnesses who give evidence. Once both cases have been provided, the next step will be for the FWC to make its decision. The decision will usually not be made on the

spot, instead it will be “reserved”, meaning that the FWC will take some time to decide whether the dismissal was unfair and then deliver the decision in writing at a later date.

Enforcing an outcome

If you win the case and the FWC exercises its discretion to award a remedy, there will be an order made by the FWC for the employer either to reinstate the employer or pay them compensation. It is a criminal offence to ignore a FWC order.

An order will usually set a date by which the employer has to comply with the order. If they do not, you can seek enforcement of the order by making an application to the Fair Work Divisions of the Federal Circuit and Family Court or the Federal Court, or an eligible WA court.

Appealing an outcome

If you lose your case, you can make an application to the Full Bench of the FWC to hear the appeal by lodging a form F7 with the FWC within 21 days of the original decision. The FWC will first decide whether to grant permission to appeal, and then whether there has been an error in the original decision.

In deciding whether to grant permission to appeal, the FWC will consider whether there is public interest in doing so. The public interest may include:

- whether the matter raises issues of importance and general application;
- whether the type of matter has been decided differently in the past and it would be beneficial for the Full Bench to provide guidance;
- whether the original decision creates an injustice or has led to an unlikely or unexpected result; and
- whether the Commissioner in the original decision applied the wrong principles.

Because the FWC considers each factor, simply finding an error in the decision won’t itself lead to permission to appeal being granted.

If permission is granted, you will go through another hearing where you will have to make submissions on why the original decision was wrong.

Appeals are legally complex and time consuming. If you don’t have a strong argument, you may be at risk of a costs order. You may wish to seek legal advice before appealing a decision.

Related resources

- Q&A: Conciliation conferences for WA employees
- Q&A: Dismissal 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	Government departments & other supports
Fair Work Commission Email: perth@fwc.gov.au (enquiries only) Email: melbourne@fwc.gov.au (to lodge a claim form) Telephone: 1300 799 675 Web: www.fwc.gov.au	**Fair Work Ombudsman infoline** Telephone: 13 13 94 Web: https://www.fairwork.gov.au/ **Wageline** Phone: 1300 655 266 Web: https://www.dmirs.wa.gov.au/contactwageline

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