

Unfair dismissal 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 an unfair 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: National system employee or state system employee”](#) on our workplace resources page.

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 state system of employment law, certain employees are protected from unfair dismissal. If an eligible state system employee believes they have been unfairly dismissed, they can make an application to the Western Australian Industrial Relations Commission (**WAIRC**) for help.

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

If the WAIRC 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.

Although the claim is called an unfair dismissal claim, the WAIRC will consider whether it is harsh, oppressive, or unfair. The WAIRC must consider if there was a valid reason for dismissal, as well as if a fair procedure was followed.

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.

For general information on dismissals, please see our resource [“Q&A: Dismissal for WA employees”](#).

Eligibility to make a claim

To make a claim for unfair dismissal in the WAIRC you need to meet the following criteria:

- be a state system employee. If you are not sure which system you fall under, you can contact Wageline or see our publication: [“Q&A: State or national system for WA employees”](#)
- have been dismissed from employment or forced to resign.
- be earning less than the state system high income threshold if you are not covered by an award or enterprise agreement.

Casuals can be eligible for unfair dismissal, but it depends on how your casual employment was set up:

- **CASUALS THAT MAY BE ELIGIBLE FOR UNFAIR DISMISSAL:** If you were a casual with a continuing or ongoing employment relationship of indefinite duration without definite or regular hours fixed in advance, then you may be able to make an unfair dismissal claim.
- **CASUALS THAT MAY NOT BE ELIGIBLE FOR UNFAIR DISMISSAL:** If you were a casual that worked under separate and distinct contracts of employment each for the fixed period of a shift then you may not be able to make an unfair dismissal claim, if your employment ended due to the passage of time (i.e. your shift ending).

To work out if you are this type of casual you can check your contract, award, and industrial agreement to see if your employment relationship is set up to be a very short duration e.g. each shift being a separate engagement or contract of employment, each week being a separate engagement.

Note if you are found to be eligible for unfair dismissal and were on your probationary period or are a casual, the WAIRC will take this into account when determining compensation.

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 WAIRC might schedule a hearing to determine if you were dismissed. The WAIRC might also determine the jurisdictional question at the same hearing date as the substantive hearing. 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 protection of employee rights 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

You must submit your claim to the WAIRC **within 28 days** from the date your dismissal took effect.

It is only in exceptional circumstances that the WAIRC will consider an application made out of time. If you are outside the 28-day time limit, you will need to fill out part of the unfair dismissal application form asking you to explain why you couldn’t make the application in time, what steps you’ve taken to dispute the dismissal, and any reasons why your application should be accepted.

It can be 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. The WAIRC may choose to accept the application out of time if there is no substantial inconvenience or detriment to the employer of doing so, but this should not be taken for granted.

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

What makes a dismissal unfair?

In deciding a claim of unfair dismissal, The WAIRC will consider whether or not the right to dismiss has been exercised so harshly or oppressively as to amount to an abuse of that right. For example, a dismissal may be:

Harsh because of the impact it has had on you or because it is disproportionate to any of your misconduct or poor performance.

Oppressive because you were not guilty of any alleged misconduct or poor performance.

Unfair because there was no evidence to support the decision to dismiss you. The words “harsh”, “oppressive” and “unfair” are given their ordinary meaning and you are free to make any arguments you choose as to why you weren’t given a “fair go all round”.

However, there are some common factors taken into account by the WAIRC, and it can be helpful to consider these when making your argument. These factors address both the reasons for the decision (substantial fairness) and the process that was used (procedural fairness).

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. 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.
4. 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.

Outcomes

If your unfair dismissal claim is successful, the primary remedy is reinstatement – getting your job back. However, the WAIRC may not order reinstatement where your relationship with your former employer has broken down to the extent that it’s not practical for you to go back to work there.

The WAIRC can also order compensation (money) which is normally limited to lost wages. The compensation you can seek is a maximum of 6 months’ wages. The maximum is rarely ordered.

It is important to be aware that you have an obligation to reduce the loss you have suffered because your employment ended. This means you need to be able to provide records that you have been trying to find other employment following the end of your employment. You should keep records of your job applications and job searches.

Apart from the remedies that can be ordered by the WAIRC, you can also get an outcome through conciliation or settlement negotiations. You can ask for other things as part of the conciliation, such as an apology, a reference, a statement of service, or your termination being re-characterised as a resignation to help you get a new job.

Costs

You are required to pay a fee to lodge your unfair dismissal claim. Fee information can be found here: <https://www.wairc.wa.gov.au/about-us/fees/>.

This fee may be waived on the grounds that it would cause serious hardship. To apply for a waiver, a waiver form must be completed and submitted together with the unfair dismissal form. You can contact the WAIRC for the fee waiver form.

Generally, you and your former employer will each pay their own costs to prepare their case, unless the WAIRC orders otherwise. It can be difficult for your former employer to recover legal costs they incur from you.

Representation

You do not necessarily need legal representation, but you can choose to be represented if you wish. Representation can include a union representative or a lawyer. If you decide to represent yourself in proceedings it will be easier for you if you are well prepared.

You must tell the WAIRC if you have a lawyer or union representative by lodging a Form 11 - Notification of Representative Commencing or Ceasing to Act.

You may consider bringing one or more individuals with you for support, but you should be prepared to tell the WAIRC member dealing with your case why you would like that individual or those individuals to be present.

Making an application

You start a claim by filing a Form 2 – Unfair Dismissal Application with the WAIRC.

You can submit your claim:

- online at <https://portal.wairc.wa.gov.au/forms> ;
- in person at Level 17, 111 St Georges Terrace Perth 6000; or
- by post to Locked Bag 1, Cloisters Square, PERTH WA 6850.

Completing the form

When completing the form, you should include the following information:

- how you were dismissed;
- the reason for your dismissal and why you say that reason was not a “valid reason”;
- if you were not given the reasons prior to your dismissal;
- if your employer did not give you an opportunity to respond to the reasons prior to your dismissal;
- if your employer unreasonably refused to let you have a support person in any discussions relating to the dismissal;

- if you did not receive any warnings about your performance (if your dismissal was related to your performance);
- if you were not guilty of the misconduct (if your dismissal was related to misconduct);
- how the dismissal has affected you personally and/or financially; and
- your ability to find alternative work.

Employer's response

The WAIRC Registry will provide a copy of the completed form to your former employer, so there is no need for you to do this yourself unless the WAIRC specifically instructs you to do so. Your former employer will then lodge a response to your claim which will be provided to you.

Conciliation

After your former employer has lodged their response, your claim will go to a conciliation conference. A conciliation conference is private and confidential, and will usually include you, your employer, and a third-party conciliator from the WAIRC.

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 WAIRC is a less formal 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.

The WAIRC 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 arbitration. They are not there to advocate for one side but to assist with the process.

Settlement

If you and your former employer reach an agreement, the WAIRC may make a binding order that gives effect to the agreement. It is also quite common for the employer to prepare a document to be signed by both parties that formalises the agreement.

Often this is in the form of a deed that releases the employer from liability from further claims by the employee in exchange for the reinstatement of the employee or the payment of compensation to the employee. 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.

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.

It's important to clarify if you are making an agreement to settle, whether the agreement is settling just your unfair dismissal claim, or all possible claims. It is quite common for employers to want to settle all claims.

Discontinuance

If you reach a settlement with your former employer, it will usually be a requirement for you that you will not take your claim any further (discontinuing it). You can discontinue your claim by lodging a Form 1A – Multipurpose form.

No resolution at conciliation

If conciliation fails and you and your employer are unable to come to a resolution, you have an option to pursue arbitration.

You can also choose to discontinue your claim if you do not want to proceed to arbitration.

To prepare for a conciliation and what to expect at the conciliation, you should have a look at our publication [“Q&A: conciliation conferences for WA employees”](#) on our workplace resources page.

Arbitration hearing

If your claim is not settled at the conciliation conference, it will proceed to an arbitration hearing. The decisions at an arbitration hearing are binding on all parties. Hearings and decisions are made publicly available on the WAIRC website.

The WAIRC has some discretion over the process for a hearing. However, a common process is outlined below.

The WAIRC 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. There may be a number of these preliminary hearings before the final hearing to deal with procedural issues that need to be resolved.

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

You will also be asked to provide an outline of “submissions” to the WAIRC. 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.

At the hearing you will then give your submissions in full orally, or verbally. 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. You may call your witnesses asking them questions. Once you have presented your submissions the employer will provide their defense to the issues you have raised. You will have an opportunity to respond to what is raised by the employer.

The WAIRC will then make a decision and issue orders at the conclusion of the hearing.

Difficulty reading or speaking in English?

If you have difficulty reading or speaking English, you can ask a friend or community organisation to assist you when speaking to the WAIRC. You can also request an interpreter.

If you require assistance, you can contact the WAIRC registry on 9420 4444, or contact the Translating and Interpreting Service on 131 450 and ask them to call the WAIRC. The WAIRC can arrange for an interpreter for you at the conciliation and formal hearing if required.

Accessibility services

Please see the WAIRC's website for more information about the WAIRC's services for hearing loops, AUSLAN interpreters, building access and other services for people with hearing, sight or speech impairment.

Forms

All relevant forms can be found on the WAIRC website here: <https://portal.wairc.wa.gov.au/forms>

Related resources

- [Q&A: State or national system for WA employees](#)
- [Q&A: Dismissal for WA employees](#)
- [Q&A: Missed the deadline for making a claim](#)

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
Western Australian Industrial Relations Commission Phone: (08) 9420 4444 or 1800 624 263 Web: https://www.wairc.wa.gov.au/	Wageline Phone: 1300 655 266 Web: https://www.dmirs.wa.gov.au/contactwageline

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