

# Unlawful termination for WA employees

## A Circle Green Community Legal claim guide

### Introduction

This claim guide is for employees in Western Australia who wish to make an unlawful termination claim.

This claim guide is current as at 20 September 2024.

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 system for WA employees”.

The information below has been written to assist you with the practical process of making an unlawful termination claim. If you are not yet ready to make a claim and you are seeking more general information, you may wish to view our Q&A resources first. If you need legal advice before making a claim, you can [submit an application for advice to us at 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

In most circumstances, unlawful termination claims are made by state system employees. If you are a national system employee, see the section on national system employees in the section below, “Eligibility”.

Unlawful termination claims can only be made by employees who are not able to make a general protections claim. All state system employees are ineligible to make a general protections claim, and are therefore eligible to make an unlawful termination claim.

*Note that state system employees aren't generally covered by the Fair Work Act and don't generally make claims to the Fair Work Commission, however there are some exceptions – including claims for unlawful termination.*

State system employees who have been dismissed may also be eligible to make other claims. For other types of unlawful conduct or dismissal based claims, see our publications, [Q&A: Dismissal for WA Employees](#), [“Claim Guide: Unfair dismissal for state system employees”](#) and [“Claim Guide: Protection of employee rights for state system employees”](#) on our workplace resources page.

An unlawful termination 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). For certain breaches, 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

### State system

If you are a state system employee who has been dismissed, and you haven't made another claim to dispute your dismissal, you are likely to be eligible to make an unlawful termination claim.

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

### National System

In most cases, national system employees are not eligible to make an unlawful termination claim, because they can make a general protections claim instead. The unlawful termination laws specifically exclude employees who can make a general protections claim (which covers similar issues). See our publication [“Claim guide: General protections \(dismissal\) for national system employees.”](#)

In certain circumstances a national system employee is not able to make a general protections claim. For example, where a national system employee is dismissed for a discriminatory reason, that is not protected by the discrimination laws of that state – they are excluded from bringing a general protections claim on that discriminatory reason. The Fair Work Act provides that being subject to family and domestic violence is a protected characteristic. However, subsection to family and domestic violence is not a protected characteristic under WA discrimination laws.

Therefore, WA national system employees are not able to make a general protections claim if they have been dismissed for being subject to family and domestic violence, and therefore can make an unlawful termination claim.

## Time limit for making a claim

You must submit your 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”](#) and open the section, “I think I’ve missed a deadline for making a claim – what can I do?”.

## What are the prohibited reasons?

Unlawful termination claims can be made if a state system employer dismisses an employee for a prohibited reason.

Prohibited reasons include that:

- you are temporarily away from work with an illness or injury;
- you are (or are not) a member of a trade union;
- you participated in trade union activities outside of business hours;
- you participated in trade union activities during business hours with your employer’s consent;
- you are seeking office as a representative of employees;
- you have acted as a representative of employees;
- you filed a complaint or participated in legal proceedings against your employer;
  - your race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer’s responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin;
- you take maternity leave or other parental leave; and or
- you are temporarily away from work to engage in a voluntary emergency management activity (i.e. State Emergency Service (SES), Country Fire Authority etc) and the absence is reasonable in the circumstances.

## Outcomes

If you don’t settle your matter at conciliation and your matter proceeds to a final hearing, the FWC or a court will make a decision. The FWC or a court will either find that the dismissal was lawful, or they will find that it was unlawful 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.

A court may order the following remedies if it finds that you were unlawfully terminated:

- injunctions to prevent, stop or remedy the dismissal;
- compensation for loss that a person has suffered because of dismissal (both economic and non-economic);
- reinstatement (getting your job back) and other orders regarding continuity of service;
- civil penalties; and
- any other order the court considers necessary.

## Costs

You are required to pay a fee to lodge your unlawful termination claim. More information about fees can be found here: <https://www.fwc.gov.au/apply-or-lodge/fees-and-costs>

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 unlawful termination claim. You can contact the FWC for the fee waiver form, Form F80 – Waiver of Application Fee.

Generally, you and your former employer will each pay their own costs to prepare their case. The FWC can order one party to bear some or all of the costs of the other party. However, this is uncommon and is generally limited to situations where a claim is found to have been made vexatiously, without reasonable cause or where the claim had no reasonable prospect of success.

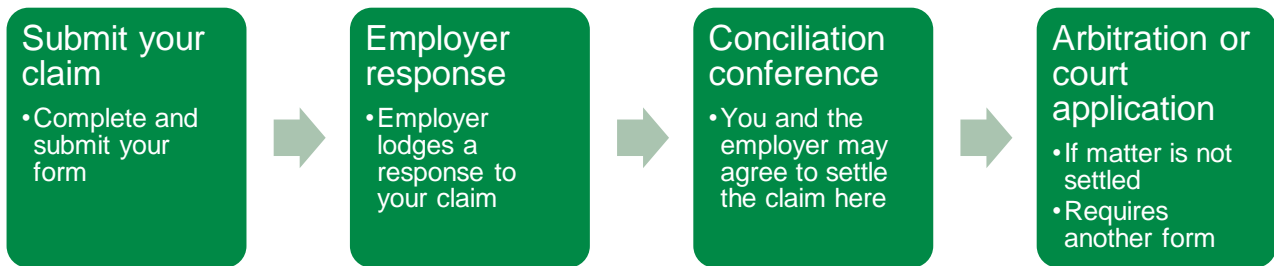
## Representation

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

If you or the employer wishes to be represented by a lawyer or a paid agent you will need the permission of the FWC, unless the lawyer or paid agent is an employee or officer of the employer, a union or employer organisation or a peak union or employer council. You must seek permission from the FWC to have a lawyer or union representative. You can do this by lodging a Form F53.

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

## Claim process



## Starting a claim

To make an unlawful termination claim, you must complete a [Form 9 – Application for the Commission to deal with an Unlawful Termination Dispute](#) and provide it to the FWC within the time limit.

You can submit your claim:

- in person at any Fair Work Commission Office (In Western Australia, between 9.00am and 5.00pm at Floor 16, 111 St Georges Terrace, Perth, WA, 6000)
- by facsimile (found on FWC website);
- by post or electronically;
- through the eFiling facility on the FWC website: <https://www.fwc.gov.au/apply-or-lodge>

## Completing the form

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

- the trading name of your former employer;
- the legal entity of your former employer;
- the ABN/ACN of your former employer;
- that you were an employee of the employer;
- when your employment started;
- when your employment ended;
- how you were dismissed;
- the reason for your dismissal and why you say that reason was unlawful (i.e. a prohibited reason); and
- what outcome you are looking for.

## Employer's response to the claim

The FWC Registry will provide your former employer with a copy of your completed form, information about the process that the FWC will follow and an employer response form. 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.

### What is a conciliation conference?

<b>Purpose</b>	To bring the employee and employer together with an independent conciliator in an informal, private meeting to attempt to reach a settlement without the need for a formal hearing.
<b>Conciliator</b>	The conciliation conference is run by a conciliator at the FWC.
<b>Date and Time</b>	<p>The FWC will contact you in writing to arrange the time and date of the conciliation conference.</p> <p>An application for the conciliation to be “adjourned” (postponed) must be made in writing and will only be granted on substantial grounds (e.g. you are overseas).</p>
<b>Location</b>	The conference will be conducted over the phone or at the FWC’s offices. The FWC’s offices in Western Australia are located at Floor 16, 111 St Georges Terrace, Perth, WA, 6000.
<b>Attendance</b>	<p>Both you and the employer are required to attend. The employer may send someone from their senior management who is authorised to agree to a settlement.</p> <p>You may have a person attend the conference in support (not as your agent) if the FWC conciliator/Commissioner allows. If English is not your first language you can bring along someone with appropriate language skills to act as your interpreter or ask the FWC to arrange an interpreter.</p>
<b>Confidentiality</b>	Conciliations are conducted on a “without prejudice” basis (this basically means “off the record”). This means that statements made in conciliation generally cannot be used in an arbitration hearing. The details of the conciliation will remain confidential. Your file will also remain confidential.
<b>Transcripts</b>	There is no transcript or record taken of the conciliation by the FWC other than when the matter is settled by agreement of the parties and the terms are put in writing.

### How do I prepare for the conciliation?

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”](#).

If you and your former employer reach an agreement, the FWC 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.

### *1. Certificate issued*

If the matter cannot be resolved before or during the conference and the FWC is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, it may issue a certificate to that effect.

You then have 14 days to:

- agree with your former employer to arbitrate the matter within the FWC; or
- to use the certificate to commence court proceedings to resolve the dispute in the Federal Court or Federal Circuit and Family Court of Australia (FCFCOA).

If the FWC feels that arbitration or an unlawful termination court application would not have a reasonable prospect of success, it must tell you and your former employer.

### *2. Arbitration or proceed to Court*

If conciliation has failed and the certificate has been issued, you have the options of:

1. Discontinuing (ending) the matter.
2. Asking for your former employer's consent to arbitrate the matter within the FWC; or
3. Making a general protections court application to the FCFCOA or the Federal Court of Australia.

### Arbitration

Once FWC has issued a certificate following conciliation, you can make an application for the FWC to arbitrate the matter if:

- you make the application within **14 days** of the conciliation certificate being issued; and
- your former employer agrees to the matter being arbitrated.

You must make your application by filing [Form F9B – Notification of agreement for consent arbitration of an unlawful termination dispute](#), completed and signed by both you and your former employer.

You can ask for FWC to accept an application for arbitration after 14 days, but your application may not be accepted.

Your former employer does not have to agree to proceed to arbitration. However, arbitration within FWC is likely to be quicker, cheaper and less formal than a hearing in the FCFCOA or the Federal Court of Australia. For this reason, your former employer may agree that it is the most efficient way to resolve the matter.

The decisions at an arbitration hearing are binding on all parties. Hearings and decisions are made publicly available on the FWC website.

### Electing to proceed to court

If your employer does not agree to the matter being arbitrated, or you don't want to arbitrate the matter, then you can make an application to the FCFCOA or the Federal Court for a hearing to determine the matter.

If you make this type of court application, your employer does not have a choice and must participate in the hearing. Note that you have **14 days** from the date of the issue of the conciliation certificate (mentioned above) to proceed to court. So, if your employer has not signed



Form F9B and it is nearing 14 days since the issue of the certificate, you may need to lodge a court application, or risk not having an option to proceed at all.

This claim guide will only deal with how you may make an application to the FCFCOA. If you make a decision to make your application to the FCFCOA, you must [pay a filing fee](#) and provide the FCFCOA Registry with the following:

- [Application – Fair Work Division](#); and
- [Form 3 – Claim under the Fair Work Act 2009 alleging unlawful termination of employment](#); and
- The certificate issued by the FWC.

Your employer can file a response to your application by completing and lodging a Response – General Federal Law form. This must be lodged within 14 days of receiving your application.

When filing the documents, you should file the original documents, together with a copy for each party to the matter (i.e. your employer). The Registry will keep the original and return to you a sealed copy to be served on your employer. You should make a copy of the documents for your own records.

Note that there are strict rules on how documents should be served on your employer in the FCFCOA.

You may be exempt from paying filing fees if you are:

- under 18 years of age on the day you would otherwise be required to pay the fee;
- a holder of a Centrelink health care card, health benefit card, pensioner concession card, or Commonwealth seniors health card;
- a holder of a card issued by the Department of Veterans' Affairs of the Commonwealth that certifies entitlement to Commonwealth health concessions;
- an individual in receipt of youth training allowance or benefits under the Commonwealth student assistance scheme; or
- an individual who has been granted legal aid.

You may be able to apply for the filing fee to be waived if you cannot afford to pay it. All individuals wishing to have the filing fee waived must lodge an application specifying why the fee should be waived:

- [General form – Application: Exemption from paying court fees.](#)
- [Financial hardship – Application: Exemption from paying court fees.](#)

### Discontinuance

If at any time before or during your FWC or court proceedings you and your employer agree to settle the dispute, you should discontinue your proceedings.

You may discontinue proceedings with the FWC at any time after lodging your application form and prior to being issued with a certificate from the FWC by completing a [Form F50 – Notice of Discontinuance](#), lodging it with the FWC and serving it on your employer.

You may discontinue proceedings with the FCFCOA up to 14 days before your hearing date by completing a Notice of Discontinuance and lodging it with the court and serving it on your employer. To discontinue the proceedings after this time will require “leave” (i.e. permission) of the court.

### **Difficulty reading or speaking in English?**

You can ask a friend or community organisation to assist you. You can also request for the FWC to provide an interpreter either when lodging your application or before the day of the conference. There is no cost to you if you require an interpreter.

If you require assistance, you can contact the FWC on 1300 799 675 or the Translating and Interpreting Service on 131 450.

## 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
<b>Fair Work Commission</b>  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>	<b>Fair Work Ombudsman Info Line</b>  Phone: 13 13 94 <b>Web:</b> <a href="https://www.fairwork.gov.au/">https://www.fairwork.gov.au/</a>
<b>Federal Circuit and Family Court of Australia</b>  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>	<b>Wageline</b>  Phone: 1300 655 266 Web: <a href="https://www.dmirs.wa.gov.au/contactwageline">https://www.dmirs.wa.gov.au/contactwageline</a>
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