

General protections (non-dismissal) for national system employees

A Circle Green Community Legal claim guide

Introduction

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

There are two systems of employment law in Western Australia: a state system and a national system. If you are unsure which system you fall under, please see our publication: [“Q&A: State or national for WA employees”](#).

The information below has been written to assist you with the practical process of making a general protections dismissal claim. If you are not yet ready to make a claim and you are seeking more general information, you may wish to view our Q&A resources first.

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

If you need legal advice before making a claim, you can [submit an application for advice to us here](#) or see our [private solicitors list here](#).

This claim guide is provided as general information only and is not intended to be a substitute for legal advice. By using the information on this page, you agree to our full [disclaimer](#).

Key terms used

This information resource uses a number of key terms. You can click on our glossary in a new window and read what the key term means. See our glossary here:

<https://circlegreen.org.au/resource/glossary-workplace-law/>

We encourage you to read this claim guide from start to finish. If you are looking for a specific piece of information, you can click on any heading below to skip to that section.

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Overview

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

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

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

This claim guide doesn't cover the situation where the adverse action is a dismissal. That type of a claim has a slightly different claim form and process, so we have a separate claim guide for general protections claims involving a dismissal.

A general protections claim normally involves:

- lodging an application form;
- seeking a conciliation; and
- proceeding to court if conciliation is unsuccessful, or if the employer doesn't agree to participate in conciliation.

If the matter proceeds to 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

If you are a national system employee, you may be eligible to make a general protections claim if you have been subject to adverse action due to a prohibited reason. The prohibited reason does not have to be the only reason the action was taken – it can be sufficient to make out the claim even if it was part of the reason the action was taken against you. However, if your employer can demonstrate that they took the adverse action you for another reason, you may not be successful in your claim.

If you are a state system employee, you cannot make a general protections claim. However, you may be able to make other claims. For more information, see our:

- [Claim Guide: Protection of employee rights for state system employees](#)
- [Claim Guide: Unlawful termination for state system employees](#)
- [Claim Guide: Australian Human Rights Commission for WA employees](#)
- [Claim Guide: Equal Opportunity Commission for WA employees](#)

Time limits

For general protections claims not involving dismissal, you need to make the claim to the FWC or the Federal Circuit and Family Court of Australia (FCFCOA) within **6 years** of the date your employer took the adverse action against you.

However, it can become more difficult to demonstrate your argument and produce evidence after a significant amount of time. So, if you intend on making a general protections non-dismissal claim, in most circumstances, it's better to make it quickly, within a few weeks of the unlawful conduct.

The FWC will only consider late applications in exceptional circumstances. To make a late application, you must include the reasons why the application is late and why it would be unfair for the FWC not to accept the application.

What are the protections and prohibited reasons?

National system employees are protected against a number of different types of unlawful conduct:

1. **Adverse action** taken by an employer against an employee because of a prohibited reason; and
2. **Sham contracting** conduct by employers which involves employers treating employees as contractors, often to avoid paying employee entitlements.

Potential employees of national system employers are also protected against these types of unlawful conduct.

Adverse action

You may be eligible to make a general protections non-dismissal claim where you have had **adverse action** taken against you because of a **prohibited reason**.

Adverse action against an employee	Adverse action against a potential employee
altering an employee's position to their disadvantage such as: <ul style="list-style-type: none"> • being given a written warning; • being demoted; • being removed from the work roster; • having shifts or hours reduced or changed to a financial disadvantage (weekend to weekday work) etc 	refusing to employ the prospective employee;
injuring an employee in their employment such as: <ul style="list-style-type: none"> • being removed from the worksite; • being transferred to another worksite; • being stood down; • being suspended from work etc. 	discriminating against the prospective employee in the terms or conditions on which the employer offers to employ the prospective employee; and
discriminating against the employee compared to other employees.	threatening to take either of these actions.
threatening to take any of these actions.	

What is a prohibited reason?

A national system employer is prohibited from taking adverse action against an employee *because*:

- the employee has a workplace right;
- the employee has, or has not, exercised a workplace right;
- the employee proposes to exercise, or not exercise, a workplace right;
- the employer seeks to prevent the employee's exercise of a workplace right;
- the employee has exercised a workplace right for the benefit of another person or a group of persons to which the second person belongs;
- of the employee's:
 - race;
 - colour;
 - sex;
 - sexual preference;
 - age;
 - physical or mental disability (including temporary or permanent illness or injury);
 - marital status;
 - family or carer's responsibilities;
 - pregnancy;

- religion;
- political opinion;
- national extraction; and or
- social origin.
- the employee is, or is not, a member or officer of an industrial association or union;
- the employee is represented, or not represented, by an industrial association or union;
- the employee participates, or does not participate, in industrial action; and or
- the employee is temporarily absent from work due to an illness or injury.

What is a workplace right?

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

When can adverse action be allowed?

Adverse action may be allowed in certain circumstances. Adverse action that would otherwise be in breach of discrimination-based rights may be taken where the employee cannot meet the inherent requirements of the job or where the action is authorized by an federal or state anti-discrimination laws.

Adverse action may also be lawfully taken against an employee of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed if that action is taken:

- in good faith; and

- to avoid injury to the religious susceptibilities of followers of that religion or creed.

Reverse onus

If your matter ends up proceeding to the Federal Circuit and Family Court of Australia (**FCFCOA**) or Federal Court of Australia (**FCA**) 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 you to your employer to demonstrate that it didn't happen. For example, if you made a general protections non-dismissal claim arguing that you were demoted for making a complaint, you would need to show that the demotion occurred and that you made a complaint. It would then be up to your employer to demonstrate that there was another reason for the demotion.

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

While the reverse onus is helpful to you, in most circumstances employers will present an alternative reason or argument, so you will likely have to still present evidence in favour of your own argument.

Obviously written evidence including emails and texts is helpful. However, even if your only evidence is your version of events, you may still be able to persuade a court, if you are considered a more reliable and trustworthy witness than the witness or witnesses of the employer.

Examples

Example 1:

You are a permanent full-time employee who has been working with the employer for 1 year. You have accrued 4 weeks of annual leave under the Fair Work Act and you would like to take 2 weeks' annual leave at the end of June to go on holiday. You put in a request for annual leave one month before you want to take the leave to your boss, John. John approves your leave and you and John make arrangements for coverage of your role while you will be on leave.

You take your two weeks of annual leave in July and return to work. Upon your return, John calls you into his office and yells at you for not getting any work done for the last two weeks and calls you a "slacker". John tells you that he doesn't think you take your role seriously and that you will be demoted to your previous role which has less responsibility, seniority and pay.

John and your employer cannot demote you because you exercised your workplace right to take annual leave. You have a workplace right to take annual leave. Annual leave is a benefit that you are entitled to under a workplace law, the Fair Work Act, as a national system employee. You gave notice of your request to take annual leave and John approved your request for leave.

Example 2

One day at work, you spot a safety hazard that could cause serious harm to you or other employees. You speak to your line manager, Sam, to raise your concerns about the safety hazard. Sam yells at you and calls you a "troublemaker". Sam tells you that if you keep making complaints, your shifts will be cut. You attend for work on your next rostered shift and you spot the same safety hazard. You don't feel comfortable speaking to Sam about the issue again so you make a report to a more senior manager, Greg about the safety hazard. Greg tells you that he was not aware of the

hazard and that he will arrange for the hazard to be removed from site. Sam becomes aware that you made a complaint to Greg about the safety issue. Sam cuts your shifts in the next roster.

Sam and your employer cannot cut your shifts because you exercised your workplace right to make a complaint about your employment. You have a workplace right to make a complaint.

What is sham contracting?

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

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

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

Sham contracting is when an employer:

- tells a worker that they independent 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).

Misrepresentation

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

This type of general protections non-dismissal claim can be used where an employer knows the worker is an employee but tells the worker they are a contractor to avoid their obligations under employment law. 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.

False statements

An employer must not make a statement that if 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.

Outcomes

The outcomes that you can ask for as part of a general protections non dismissal claim are:

- compensation (money) for your economic loss;
- compensation (money) for your non-economic loss, for example the hurt, humiliation or distress the action has caused; and or
- an injunction to require an employer do something (which could include reversing the action).

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. The court does not have to apply penalties, it is up to their discretion. You can ask that any penalties be paid to you.

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

There are a number of outcomes that a court cannot order but you can negotiate with the employer as part of a settlement. These include:

- an apology;
- the employer reverses the action taken;
- the employer pays the entitlements they owe the employee;
- the employer provides a statement of service or a reference;
- the employee agrees to resign for a financial settlement;
- both parties agree to keep the details confidential and not criticise the other (called a non-disparagement agreement).

Costs

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

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

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

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

Claim process

What should I do before making a claim?

Before making a legal claim, you should consider whether you can approach your employer informally or through a letter to outline your concerns about how they have treated you and why they have taken that action against you.

Which forms to use?

To start a general protections non-dismissal claim, you need to complete and submit a Form F8C – General protections application not involving dismissal to the Fair Work Commission. The form is available on the FWC website. You will need to pay a fee when you submit the form.

If paying the fee will cause you serious financial hardship, you can submit an additional Form F80 – Waiver of application fee to the FWC at the same time that you submit your application to ask that the fee be waived.

Once you have submitted your claim to the FWC, the FWC will provide your employer with a copy of your claim and a blank response form for the employer to complete.

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

Starting a claim

You will need to lodge the form F8C, together with the filing fee to the FWC registry either:

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

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

Employer's response to your claim

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

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

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

For example, a jurisdictional objection could be made on the basis that you are not a national system employee.

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

Conciliation

For general protections claims that don't involve a dismissal, it is not compulsory for the employer to attend a conciliation conference. Because of this, you are entitled to proceed directly to court (see Step 2 below) without first participating in a conciliation conference.

If your employer agrees to participate, then both you and your employer are required to attend the conference. In addition:

- your employer may send an appropriate person from senior management who has authority to agree to a settlement;
- you may have a person attend the conference in support (not as your agent) if the FWC conciliator allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

A conciliation conference is private and confidential, and will usually include you, your employer, and a third-party conciliator.

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

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

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

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

Resolution at conciliation

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

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

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

If you are making an agreement to settle, it's important to be clear whether the agreement is settling just your general protections claim, or all possible claims. It is quite common for

employers to want to settle all claims. If you don't deal with this specifically, it's often assumed that the settlement covers all claims.

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

No resolution at conciliation

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

The FWC will tell you if they think that your claim would not have a reasonable prospect of success.

Court proceedings

If no agreement is reached between you and your employer or the employer does not agree to attend a conciliation conference, you can consider whether you would like to continue your claim in the FCA or the FCFCOA (Fair Work Division). This claim guide only deals with how you may make an application to the FCFCOA (Fair Work Division).

If you decide to make an application to the FCFCOA, you must do so **within 6 years** after the date on which the alleged adverse action occurred.

How to make the application?

To make your claim in the FCFCOA, you must submit:

- an Application – Fair Work Division form; and
- a Form 4 – Claim under the Fair Work Act 2009 alleging contravention of a general protection.

When you lodge the forms, you must pay a filing fee. More information about fees can be found here: <https://www.fcfcOA.gov.au/gfl/gfl-fees>

You may be exempt from paying the filing fee or may be able to apply for the filing fee to be waived if you cannot afford to pay it. You can submit an Application for Exemption from Paying Court Fees or Reduction – Financial Hardship or Application for Exemption from Paying Court Fees – General to apply for the filing fee to be waived.

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 Court Registry will keep the original and return to you a stamped copy to be served on your employer. You should make a copy of the documents for your own records. Note that there are stricter rules on how documents should be served on your employer in the FCFCOA.

Forms for the FCFCOA can be found here: <https://www.fcfcOA.gov.au/gfl/forms>

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.

Related resources

- [Q&A: State or national system for WA employees](#)
- [Q&A: Contractor or employee for WA workers](#)
- [Claim Guide: General protections for national system employees](#)
- [Claim Guide: Unfair dismissal for national system employees](#)
- [Claim Guide: Unlawful termination for state system employees](#)
- [Claim Guide: Stop workplace bullying or sexual harassment in the WAIRC for state system employees](#)
- [Claim Guide: Australian Human Rights Commission for WA employees](#)
- [Claim Guide: Equal Opportunity Commission for WA employees](#)
- [Fair Work Commission General Protections Benchbook](#)

Further information and assistance

Circle Green Community Legal

WA employees can request free and confidential legal assistance with employment and workplace discrimination issues from Circle Green Community Legal.

Complete an online request: circlegreen.org.au/get-help

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

Courts and Commissions	Government departments & other supports
<p>Fair Work Commission</p> <p>Phone: 1300 799 675 Email: perth@fwc.gov.au (enquiries only) Email: melbourne@fwc.gov.au (to lodge a claim form) Web: https://www.fwc.gov.au</p> <p>Federal Circuit and Family Court of Australia</p> <p>Phone: (08) 9268 7100 Email: waregistry@fedcourt.gov.au Web: https://www.fccoa.gov.au/</p> <p>Federal Court of Australia</p> <p>Phone: 1300 720 980 Email: perth.registry@fedcourt.gov.au</p>	<p>Fair Work Ombudsman Info Line</p> <p>Phone: 13 13 94</p> <p>Wageline</p> <p>Phone: 1300 655 266 Web: https://www.dmirswa.gov.au/contactwageline</p> <p>WorkSafe</p> <p>Phone: 1300 307 877 Web: http://www.dmirswa.gov.au/worksafe</p>

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