



Employment Law Centre of WA (Inc)

Working for WA Workers

Unpaid entitlements claim in the Industrial Magistrates Court

(Minor Cases)

Information Kit

Advice Line 1300 130 956 or 9227 0111

RRR Advice Line 1300 520 054 or 9227 0185

Unpaid entitlements claim in the Industrial Magistrates Court (Minor Cases)

Disclaimer	3
How to use this guide.....	4
What are unpaid entitlements?	4
To make a claim you must:	4
What are the time limits?.....	4
What costs are involved?	4
What do you do if your employer has not paid (or has underpaid) your entitlements?	4
Determine what sort of contract or legislation governs your employment	4
Calculate your underpayment or non-payment	5
Approach your employer	5
Commencing legal action.....	6
What forms do you lodge?	6
Serving the claim form	7
Affidavits	7
Employer's response to your claim	8
Pre-trial conference.....	8
Can you discontinue the claim?	9
What should you do before the IMC hearing?.....	9
What happens at the hearing?	9
Witnesses	10
In the Courtroom	10
Courtroom etiquette	10
The Industrial Magistrate's decision	11
Enforcing a court order.....	11
Further Information	11

Disclaimer

By using this publication and the information* contained within it, you agree that:

- The Employment Law Centre of WA (Inc.), and its directors, employees and agents (**ELC**), do not accept responsibility for any consequences, including loss and/or damage, arising from your access to, or use of, the information contained in this publication, or from your reliance on any materials contained within this publication.
- While the information has been formulated with all due care, ELC does not guarantee the accuracy, currency, reliability or correctness of any of the information, nor that the information provided is exhaustive. This publication, and all the information therein, is intended to be for informational purposes only and is not intended to provide or replace specialist legal advice.
- ELC does not accept responsibility for the accuracy, currency, reliability or correctness of any information included within the publication that has been provided by third parties, including third party website links.
- None of the information or materials provided within this publication may be used, reproduced or transmitted, in any form or by any means, without written permission from ELC.
- Ultimately, you use this publication, and the information contained within it, at your own discretion and risk. You accept as a condition of your use of this publication and the information contained therein that you will make no claim for any loss, damage or expense that may arise from your use of this publication, or your reliance on any of the information contained within it.

If you have concerns or questions about any of the above, you should contact ELC for assistance on 1300 130 956 or 9227 0111.

*Information includes any and all data, documents, pages and images”.

This information kit is current as at December 2009.

How to use this guide

This guide is to assist you in considering or commencing a claim in the minor cases division of the Industrial Magistrates Court (**IMC**) in relation to unpaid entitlements.

What are unpaid entitlements?

Unpaid entitlements are entitlements due under:

- an award;
- an industrial agreement;
- an enterprise agreement;
- an Employer-Employee Agreement;
- the *Long Service Leave Act 1958* (WA);
- the *Industrial Relations Act 1979* (WA); or
- the *Minimum Conditions of Employment Act 1993* (WA);
- the *Workplace Relations Act 1996* (Cth);
- the *Fair Work Act 2009* (Cth);

which the employee has not received.

To make a claim you must:

- be an employee; and
- specify what benefit you were entitled to and what it is you are claiming.

What are the time limits?

Claims for unpaid entitlements in the IMC must be commenced within **6 years** of the entitlement becoming payable. However, it is best to commence action without delay.

What costs are involved?

- Generally, you will bear your own costs including a \$40.00 lodgement fee when lodging your claim with the IMC.

What do you do if your employer has not paid (or has underpaid) your entitlements?

- Determine what sort of contract or legislation governs your employment.
- Calculate your underpayment or non-payment (**unpaid entitlement**).
- Approach your employer for payment of the unpaid entitlement.
- If your employer does not pay you the unpaid entitlement within a reasonable amount of time, commence legal action.

Determine what sort of contract or legislation governs your employment

Your employment can be regulated by a range of instruments, including:

- an award;
- an industrial agreement;
- an Employer-Employee Agreement; or
- a common law contract of employment (written, oral or partly written and partly oral).

If you signed an Employer-Employee Agreement or a written common law contract, you should have been given a copy.

If you don't remember signing anything when you commenced employment, you need to find out what kind of arrangement covers your employment. To find out you can call Wageline on 1300 655 266 if you are employed in the state system or the Fair Work Ombudsman (**FWO**) on 13 13 94 if you are employed in the federal system.

They should be able to tell you:

- whether you are covered by an award;
- whether the award is state or federal; and
- the name of the award.

Wageline or FWO may also be able to send you a copy of any award which applies to your employment.

You can call ELC on 1300 130 956 or 9227 0111 (or 1300 520 054 if you are in a rural, regional or remote area) to get advice about which system is likely to apply to you.

Calculate your underpayment or non-payment

Regardless of the type of entitlement you are claiming, you can calculate the amount of your unpaid entitlement by comparing the amount which you should have been paid (**entitlement**) with the amount which was actually paid to you by your employer.

The general calculation is as follows:

- $\text{unpaid entitlement} = \text{entitlement} - \text{amount paid}$.

Your entitlement for:

- **unpaid wages for hours worked** is calculated by multiplying the number of hours that you worked with the rate of pay set out in your pay slip.
 - $\text{entitlement (unpaid wages)} = \text{hours worked} \times \text{ordinary rate of pay}$
- **unpaid wages for payment below the minimum rate of pay** is calculated by multiplying the number of hours that you worked with the statutory rate which applies to you.
 - $\text{entitlement (underpayment)} = \text{hours worked} \times \text{statutory rate of pay}$
- **unpaid long service leave** is calculated by multiplying the amount of long service leave you are entitled to (determined under *Long Service Leave Act 1958* (WA) by the amount of continuous service you have completed) with the rate of pay set out in your pay slip. You can call ELC to get advice in relation to what is your long service leave entitlement.
 - $\text{entitlement (LSL)} = \text{statutory LSL hours} \times \text{ordinary rate of pay}$

The amount your employer paid you should be set out in your payslip.

Approach your employer

As a formal claim in the IMC may be time consuming and expensive, before commencing the claim, you may decide to informally approach your employer and make him or her aware that you do not think you have been paid correctly.

You should give your employer a copy of your calculations in order to give him or her a chance to go over them. Your employer may agree with you and pay you the amount outstanding.

If your employer disagrees with you, or you don't feel comfortable informally approaching your employer in person, you may write a demand letter to your employer. In your letter, you should make it clear that you believe that you have been underpaid the amount you calculated, attach a copy of the calculations and ask that your employer either pay the amount or commence negotiations with you within 14 days of the date of the letter. You may also wish to state in the letter that if the payment is not made or negotiations have not begun by the date stated, you will commence legal action to recover the amount owed. A sample demand letter is attached at the end of this document.

This letter serves two purposes. First, it may result in your employer paying you the amount owed. Second, it shows that you attempted to recover the amounts owed.

When sending the demand letter to your employer, remember to keep a copy of the letter for your own records.

Commencing legal action

Generally, if you are covered by:

- an award;
- an industrial agreement;
- an enterprise agreement;
- an Employer-Employee Agreement;
- the *Long Service Leave Act 1958* (WA);
- the *Industrial Relations Act 1979* (WA); or
- the *Minimum Conditions of Employment Act 1993* (WA);
- the *Workplace Relations Act 1996* (Cth);
- the *Fair Work Act 2009* (Cth);

you may commence legal action in the IMC.

If you are covered by a common law contract please see the "Denial of Contractual Benefits in the WAIRC" information kit.

Before you commence legal action, we recommend you contact the Department of Commerce's industrial inspectors on 9222 7700 (if you are in the state system) or FWO on 13 13 94 (if you are in the federal system).

What forms do you lodge?

You will need to:

- complete all the *Originating Claim* forms, (if you are enforcing a state entitlement, including Forms 1.1, 1.2, 1.3 and 2, or Forms A, B, C and D if you are enforcing a federal entitlement) (available for download at www.imc.wa.gov.au and hyperlinked on the last page of this document); and
- lodge the forms with a \$40 filing fee in the IMC Registry located at Level 16, 111 St Georges Terrace, Perth WA 6000, either:
 - in person; or
 - by pre-paid post to Industrial Magistrates Court Registry, Level 16, 111 St Georges Terrace, Perth WA 6000. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
 - electronically.

The Registry will stamp Forms 1.2 and 1.3 (or B and C if you are enforcing a federal entitlement) and return them to you. If lodging electronically, a number is automatically generated, together with the Court seal.

Serving the claim form

Once you have lodged your claim forms you will usually have 30 days to deliver Form 1.3 (or Form C) to your employer. This is called 'serving' your employer.

Form 1.3 (or Form C) can be served either by a person (it doesn't have to be you) or by pre-paid post. It is a good idea to check the company details of the employer with the Australian Securities and Investments Commission (**ASIC**) as this may be used by the Court as evidence if your employer does not respond to your claim. Any printout or information should be attached to your claim form.

The form should be served on a Director, Manager or Company Secretary.

After serving the application it is important that you make an *affidavit of service* (either Form 3, 4, or 5, depending on your employer type). Try to do this as soon as possible after serving the claim and lodge it in the Court Registry. It is lodged in the same way that your application is lodged and given the same number.

Affidavits

After serving Form 1.3 (or Form C) on your employer, you must lodge an *affidavit of service* at the Registry stating that you have served your claim on your employer. To prepare the affidavit of service, use:

- Form 3 if your employer is not a corporation;
- Form 4 if your employer is a public authority; or
- Form 5 if your employer is a corporation.

You can check the details of your employer with ASIC online (www.asic.gov.au).

In the affidavit you state:

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

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

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

If you are having difficulty serving your employer or if you are unsure about how to serve your particular employer, you can contact the Clerk to the Industrial Magistrate for assistance on (08) 9420 4415.

Employer's response to your claim

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

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

- less than 1000 km from Perth, your employer has 21 days in which to lodge a response; or
- more than 1000 km from Perth, your employer has 28 days within which to file a response.

Your employer then has a further 14 days after lodging a response in which to serve their response on you.

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

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

Default judgment

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

- by completing Form 6 (<http://www.imc.wa.gov.au>) which is lodged in the same way as your original application and served on your employer in the same way. The lodgement fee for this is \$10; and
- by completing and lodging an affidavit of service (Form 7) in the same way as for an original application.

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

Pre-trial conference

The purpose of the pre trial conference is to allow you and your employer to sit down together with the Clerk to discuss the claim and to try and resolve it without the need for a hearing. The pre-trial conference is confidential.

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

- Carefully consider your claim, any evidence you have to support your claim and your employer's defence before attending the pre hearing conference.

- You will need to be able to briefly explain your claim to the Clerk and your employer.
- Your employer will then explain their response to your claim.
- The Clerk will try to assist you and your employer in reaching an agreement.
- If the dispute cannot be resolved at the pre-trial conference it will be listed for a hearing before an Industrial Magistrate.

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

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

Can you discontinue the claim?

If you want to discontinue your claim:

- in whole, use Form 18 (*Notice of Discontinuance whole*); or
- in part, use Form 19 (*Notice of Discontinuance part*).

What should you do before the IMC hearing?

- Get legal advice on the strength of your case;
- Try to negotiate a settlement (keep evidence of this);
- Know the costs involved in starting and proceeding with an action in this Court.
- Know which procedure you use and the Court location;
- Keep all papers related to your dispute in one place;
- Keep a copy of letters you send;
- Keep originals of any other documents;
- Keep dated records of telephone conversations with relevant people;
- Contact witnesses and ask them to swear statutory declarations; and
- Write a letter of demand and send it to your ex-employer (see the information kit page on ELC website www.elcwa.org.au).

What happens at the hearing?

Firstly, you should report to the relevant Court on the 18th Floor, 111 St Georges Terrace, PERTH, WA 6000 and advise the Judicial Support Officer that you have a claim listed for hearing on that day. If you have reached a last minute agreement with your employer you should advise the Clerk immediately.

Your case will be heard at the designated time.

How do you prepare for your hearing?

- Be familiar with your claim and your evidence so that you can present your claim to the Industrial Magistrate in a clear and concise manner.
- Practise at home with a friend or family member before the hearing day. This may help you to feel more at ease when you have to stand up in Court and tell your story to the Industrial Magistrate.

- Make detailed notes of all the facts of your claim to remind yourself of what you need to say. Make sure that these notes include times, dates, places and the names of any people involved.
- Ensure you have everything that you need before you head to Court on the morning of your hearing. Remember to bring a pen and paper.
- If you are intending to show documents to the Industrial Magistrate, you will need three copies of each document – one to give to the Industrial Magistrate, one to give your employer and one for yourself. If you are bringing witnesses make sure you have additional copies for them.
- The Court staff will help with administration matters but they cannot give you legal advice.

Witnesses

- If you have witnesses to support your claim, they will need to attend Court with you on the day.
- You will need to lodge and serve a witness summons at least 14 days before the trial.
 - The witness summons is lodged in the same manner as the original claim and must be served personally on the witness (Form 22.1).
 - You must give the witness reasonable expenses to attend the trial, and also make arrangements to facilitate their attendance. You will need to record how this has been done on the *Proof of Service of Witness Summons* (Form 22.2).
- On the day of the trial, you and your witnesses will need to be prepared to swear an oath or affirm the truth of what you or they are going to say. Note that it is a criminal offence to deliberately give false evidence in Court.

In the Courtroom

- The Industrial Magistrate will sit behind a high desk at the front of the room and there will be a long table in front of the Industrial Magistrate.
- You will sit at one end of the table and your employer will sit at the other end, with you both facing the Industrial Magistrate.
- The Industrial Magistrate will probably ask you to go first in explaining your claim before giving your employer the opportunity to respond to what you have said.
- You do not have to have an opening submission, a brief outline is sufficient. Your employer will be given an opportunity to respond.
- If you have evidence that you want to show the Industrial Magistrate or have witnesses who are at Court to testify on your behalf you should tell the Industrial Magistrate.

Courtroom etiquette

- The IMC is designed to be less formal than some courts, however, you still need to ensure that you behave respectfully and courteously at all times.
- The proper way to address the Industrial Magistrate is "Your Honour" and you should listen very carefully to everything that the Industrial Magistrate says.
- You should also carefully follow any directions given to you by the Court staff. For example, when an Industrial Magistrate enters or leaves the Courtroom, one of the

Court staff will ask everyone to stand up and will then announce when you are allowed to be seated again.

- You should never interrupt someone else who is talking in the Courtroom, even if your employer is saying something that you disagree with.
- If you wish to speak you should stand up.
- You will have your turn to speak and the Industrial Magistrate will let you know when you can have your say. You should make a note of what has been said that you do not agree with so that you do not forget to mention this to the Industrial Magistrate when it is your turn.
- You may feel upset towards your employer or frustrated by the Court system but you need to put these feelings aside on the day and focus on remaining calm when explaining your claim and when responding to issues raised by your employer.
- If you have a mobile telephone it must be turned off before you go into the Courtroom.

The Industrial Magistrate's decision

- After all the evidence has been given, the Industrial Magistrate will give a decision on your claim.
- The decision will be in the form of a Court order.
- In some cases, the Industrial Magistrate may need more time to consider the issues and may postpone making the decision until a later date.
- If you are successful, the Industrial Magistrate will make an order with respect to the amount to be paid. This amount may include an amount for interest.
- The decision is usually for immediate payment, but in certain circumstances the Industrial Magistrate may give the employer a period of time by which to pay the amount ordered.
- If the Industrial Magistrate "reserves" his or her decision, a Court officer will contact you on a later date to advise you when the decision is ready.
- If you are unsuccessful, you may be entitled to appeal the decision. It is recommended that you seek your own independent advice in this regard.

Enforcing a court order

- If your claim was successful but your employer does not pay you the amount specified in the Court you have a right to enforce payment of the amount (a **debt**).
- The Court order will only be enforced at your request.
- Firstly, contact the Court Registry and tell the Registry Staff that an order was made by the Industrial Magistrate that your employer must pay a certain amount of money by a certain date and that it has not been done. The Registry will provide you with a copy of an order and tell you the steps involved in enforcing the order.

Further Information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

RRR Advice Line 1300 520 054 or 9227 0185 (9.30am-1.00pm only)

Web www.elcwa.org.au

Hours 9.30am-3.30pm Mon, Tues, Thurs and Fri (as well as 5pm – 7.30pm on Tues evenings).

Department of Commerce

Wageline 1300 655 266

Fair Work Ombudsman

Tel 13 13 94

Web <http://www.fwo.gov.au>

Industrial Magistrates Court

Address 111 St George's Terrace, Perth WA 6000

Tel 9420 4415

Web <http://www.imc.wa.gov.au>

Sample Letter of Demand

Instructions: This is a sample demand letter. Please:

- a) read the letter, paying particular attention to anything in square brackets, which may be information or instructions for you to provide further information;
- b) delete anything in the square brackets after you have read the instructions or inserted the required information, including this instructions box; and
- c) make a copy of the letter for your reference before sending to your employer.

[Insert: Employer's name]

[Insert: Employer's address]

[Insert: Today's date]

Dear [Insert: Employer's name]

Unpaid entitlements

I am writing to you in an attempt to settle my claim for outstanding entitlements that you owe me.

I have calculated that there is an outstanding amount of \$.....is respect of **[Insert (which is applicable):** annual leave / long service leave / unpaid wages].

I have received legal advice in relation to this matter. I understand I can make a claim in the Industrial Magistrates Court for these outstanding entitlements.

[Choose: Please pick between the following 2 sentences and delete the alternative sentence:

Option 1 (include this ONLY IF you intend to do this, otherwise delete this sentence)

If an agreement is not reached in relation to the above amounts I will commence legal proceedings against you.

[OR]

Option 2 (say this if you are not sure you will take court action at this stage)

To avoid the expense, stress and inconvenience to you of legal proceedings, an agreement in relation to my claim is required.

Please forward the outstanding amount to me within 14 days.

Yours sincerely

[Insert: your name]

Forms (click on the hyperlink) or go to www.imc.wa.gov.au

If you are enforcing state entitlements, you should use the following forms:

[Form 1.1](#)

[Form 1.2](#)

[Form 1.3](#)

[Form 1.3 \(back page\)](#)

[Form 2](#)

[Form 3](#)

[Form 4](#)

[Form 5](#)

[Form 6](#)

[Form 7](#)

[Form 18](#)

[Form 19](#)

[Form 22.1](#)

[Form 22.2](#)

If you are enforcing federal entitlements, you should use the following forms:

[Form A](#)

[Form B](#)

[Form C](#)

[Form C \(back page\)](#)

[Form D](#)

[Form 3](#)

[Form 4](#)

[Form 5](#)

[Form 6](#)

[Form 7](#)

[Form 18](#)

[Form 19](#)

[Form 22.1](#)

[Form 22.2](#)