



Employment Law Centre of WA (Inc)

Working for WA Workers

Adverse Action (General)

Information Kit

**Advice Line 1300 130 956 or 9227 0111
RRR Advice Line 1300 520 054 or 9227 0185**



Adverse Action Claims

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

This information kit is current as at January 2010

How to use this guide

This guide is to assist you in considering or commencing proceedings in Fair Work Australia against your employer for adverse action.

What is adverse action?

A person may be protected from a range of adverse action from an employer or prospective employer. 'Adverse action' includes dismissing or refusing to employ a person, and also includes discriminating against them or otherwise injuring them in their employment (for example, by demoting them). This information kit will deal only with how you may commence an action against your employer for a general adverse action claim, in other words where the action complained of is not in relation to a dismissal.

If your adverse action claim is in relation a dismissal, please see the information kit on Adverse Action (Dismissal).

When is an employer prevented from taking adverse action?

An employer cannot take adverse action against an employee just because:

- that person has a workplace right;
- that person has, or has not, exercised a workplace right;
- that person proposes to or not to exercise a workplace right;
- that person prevents the exercise of a workplace right by the other person; or
- a third person has exercised, proposes or has at any time proposed to exercise a workplace right for the second person's benefit, or for the benefit of a group of people to which the second person belongs.

An employer also can not take adverse action against an employee due to the employee's:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin

What is a 'workplace right'

A 'workplace right' that is protected by the law from adverse action includes:

- a right to make a complaint or inquiry in relation to employment;
- an entitlement to a benefit, role or responsibility established under a workplace law or instrument; and
- a right to initiate or participate in a process established under a workplace law or instrument.

Rights established under a 'workplace law' or 'workplace instrument' include not only rights established under statute, but also those established under instruments such as awards, and through processes such as protected industrial action, conferences and hearings held by Fair Work Australia (**FWA**), and court proceedings.

Are there any circumstances in which adverse action is permissible?

Adverse action may be permissible in certain circumstances. Adverse action may be taken where it is necessary due to the inherent requirements of the job. It may also be taken where the action is authorised by any federal law and certain state anti-discrimination laws.

Adverse action can also be taken against an employee on the basis of religion of an institution that has doctrines, tenets or beliefs, or that is a religion, if:

- the adverse action is taken in good faith; and
- the adverse action is taken in order to avoid injury to the religion.

Are you eligible to make a claim?

A person is eligible to make an application for a remedy to adverse action if that person is:

- an employee under the federal industrial relations system;
- a prospective employee under the federal industrial relations system;
- a contractor who has entered into a contract with a corporation that comes under the federal industrial relations system; or
- a prospective contractor with a corporation that comes under the federal industrial relations system.

To find out whether your employer comes under the federal industrial relations system call Wageline on 1300 655 266. If you do not fall under the federal industrial relations system you cannot make an adverse action claim; however there may be other anti-discrimination claims that you can make. For example, the Unlawful Termination Fact Sheet on the ELCWA website may be useful.

How do you make an application?

If you decide to make a general adverse action claim against your employer, you should apply to FWA within 6 years of the adverse action. You do this by completing and lodging Form F8 with a \$59.50 filing fee with FWA. This form is available on the FWA website: http://www.fwa.gov.au/documents/forms/form_f8.doc.

FWA 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 FWA not to accept the application. FWA will then consider if an extension of time should be granted. You should contact the ELC Advice Line for legal advice on how to apply out of time.

If paying the filing fee will cause you serious financial hardship, you may lodge an application to FWA to waive the application fee.

What happens after you make an application?

When you lodge the documents, FWA will keep the original and give you a copy of the documents bearing FWA's stamp (sealed copy). After making an application, you must 'serve' the sealed copy on your employer as soon practicable. This means that you or someone you appoint should deliver by hand the sealed copy to your employer. You are only required to deliver the document to your employer's principal place of business and do not need to deliver the document to your boss personally. You may want to call the ELC Advice Line for help in working out what is your employer's principal place of business.

FWA will also inform the other party of the application. If the parties agree to participate, FWA must convene a private conference to deal with the dispute.

FWA may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. A mediation and conciliation are procedurally similar in that both are a confidential process which helps the parties identify issues in dispute, think of ways to resolve the issues, consider alternatives and work together to reach an agreement. Further, the processes involve an independent third party who will assist the parties, in the case of a mediation, it is a mediator and for conciliation, it is the conciliator. This information kit provides information on conciliation below; the information can be applied similarly where the dispute is dealt with by mediation.

What is a conciliation conference?

Conciliation is an informal, private and generally confidential process where a FWA conciliator assists employees and employers to resolve a dispute by agreement. The object of conciliation is for the parties to agree to a remedy for the dispute without the need for a formal hearing.

As discussed above, the conciliator is independent and does not take sides, but works to bring the parties to an agreed resolution. The conciliator will usually be a Commissioner appointed by FWA, who can make a decision that is binding on both the employee and employer.

When and where will the conciliation conference be held?

The conference will take place at a location agreed between you, your employer and FWA. This will most likely be at the FWA offices, which in Perth is located at 111 St George's Terrace, Perth. It may also be by telephone conference.

Who is required to attend the conciliation?

You and your employer are both 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 FWA conciliator allows; and
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter.

What happens at the conciliation conference?

During the conciliation, the conciliator will ask both parties to put forward their case, and also respond to any allegations made against them. Generally, the steps of a conciliation conference will be as follows:

- the conciliator will explain his or her role and the manner in which the conciliation is to be run;
- each side briefly then outlines their version of events, any relevant facts and what remedies they seek;
- the conciliator may then allow or ask questions;
- the parties will discuss the circumstances of the complaint and relevant issues;
- the conciliator may then talk separately to the parties; and
- the conciliator will assist the parties in trying to reach agreement by identifying common grounds, suggesting possible options and sometimes by making recommendations and assisting the parties in drafting an agreement in writing.

How do you prepare for the conciliation conference?

It will help you to be well prepared for the conference. You should:

- know your case – review what happened and prepare a summary;
- locate all relevant documents (e.g. medical certificates or employment contracts);
- seek advice from a legal practitioner or union;
- consider bringing along a support person or legal representative, if allowed; and
- conduct yourself in a polite, courteous manner.

What should you say at the conciliation?

At the conference, you should be prepared to answer the following questions.

- What happened (i.e. what are the relevant facts)?
- Why do you think the action was prejudicial to you?
- What are you seeking (i.e. employment, reinstatement, compensation)?

Once you allege that your employer has taken adverse action, your employer has the burden of proving that they did not take adverse action against you.

What happens if the parties agree to a resolution in conciliation/ mediation?

If you and your employer agree on a resolution, FWA may make a binding order that gives effect to the agreement.

What happens if the parties do not agree to a resolution in conciliation/mediation?

If no agreement is reached between you and your employer, you may consider whether you would like to continue your claim in the Federal Court or Federal Magistrates Court (**FMC**) (adverse action court application).

Note that if FWA feels that an adverse action court application would not have a reasonable prospect of success, it must advise the parties accordingly.

Elect to proceed to court and making a claim

You may bring an adverse action application in the FMC (Fair Work Division) or the Federal Court (Fair Work Division) depending on the amount of your claim. This information kit will only deal with how you may make an application to the FMC (Fair Work Division).

If you decide to make a small claim application to the FMC, you must bring your application within 6 years after the day on which the purported adverse action occurred. You do this by completing and filing at the FMC registry with the \$59.50 filing fee:

- Application Fair Work Division form, including ticking the small claims procedure box; and
- FMC (Fair Work Division) – Form 4.

When filing the documents, you should file the original documents with a copy for each party to the matter (ie 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 stricter rules on how documents should be served on your employer in the FMC. You may want to contact the ELC Advice Line about how to serve the documents on your employer.

What happens after you have made and served a claim?

After you have filed your claim, the registry will set and notify the parties of a date for a hearing. Before the hearing, your employer is required to file and serve on you a response to your claim within 14 days after you served your employer with your claim.

You should be aware that there are some legal rules and technicalities that apply to court proceedings. You can access a copy of the rules on the FMC website: <http://www.fmc.gov.au>. If you need assistance, please call the ELC Advice Line for further assistance.

Discontinuance

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

You may discontinue proceedings with FWA at any time after lodging your application form and prior to being issued a certificate from FWA by completing a Notice of Discontinuance form (F50) and lodging it with FWA and serving it on your employer. If you discontinue your application before your application is listed for a conference or, if it is listed for conference, at least 2 days before the date of the conference, you may be refunded your filing fee.

You may discontinue proceedings with the FMC 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 of the court.



Forms

- [Form F8 – Application for Fair Work Australia to deal with a General Protections Dispute](#)
- [Application for waiver of fees \(FWA\)](#)
- [Application Fair Work Division \(FMC\)](#)
- [FMC – Form 4](#)

These forms could not be attached to this document due to difficulties with formatting. If you cannot access them using the hyperlinks above, please call the ELC Advice Line and ask for them to be posted to you.

More Information

The Employment Law Centre of WA (Inc)

Tel 9227 0111
Advice Line 1300 130 956
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 Australia

Address 111 St George's Terrace
PERTH WA 6000
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Email perth@fwa.gov.au

Federal Magistrates Court

Address Peter Durack Commonwealth Law Courts Building
1 Victoria Avenue
PERTH WA 6000
Tel 92687100
Web www.fmc.gov.au
Email waregistry@fedcourt.gov.au