



Employment Law Centre of WA (Inc)

Working for WA Workers

**Unfair dismissal
in the
Western Australian Industrial
Relations Commission**

Information Kit

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



Unfair dismissal in the WAIRC

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

This information kits is current as at February 2010.



How to use this guide

This guide has been prepared to assist you in considering or commencing proceedings in the Western Australian Industrial Relations Commission (**WAIRC**) in relation to unfair dismissal.

Unfair dismissal

What is unfair dismissal?

Unfair dismissal occurs when an employee is terminated in a harsh, oppressive or unreasonable manner. For example, a termination may be:

- harsh because of its impact on an employee or because it is disproportionate to the employee's misconduct or poor performance;
- oppressive because the employee was not guilty of the alleged misconduct or poor performance; or
- unreasonable because there was no evidence to support a termination.

Are you eligible to make a claim?

To make a claim for unfair dismissal in the WAIRC you must be:

- an employee;
- employed under the state system (eg not an employee of a constitutional corporation (for example a company with Pty Ltd or Inc)); and
- earning less than \$122,900 per year (this is recalculated on 1 July each year) if you are not covered by an award.

Proving unfair dismissal

To prove unfair dismissal you must show 3 things:

- you are an employee;
- your employment was terminated by your employer; and
- the termination was harsh, oppressive or unfair.

In determining whether there has been an unfair dismissal, the WAIRC will consider whether:

- there was a "valid reason" for the termination (see below);
- whether you were given reasons for the dismissal;
- whether you were given an opportunity to respond to the reasons;
- whether you were given any warnings relating to unsatisfactory performance; and
- any other relevant matter.

A "valid reason" relates to:

- your capacity to do the job; or
- your behaviour or conduct at work; or
- the operational requirements of the business.



To show “unfairness” you must show the employer did not

- have a valid reason; or
- follow a fair procedure in terminating your employment , where:
 - you were not notified of a reason for termination and you were not given an opportunity to respond; or
 - you had not previously been warned about your unsatisfactory performance.

How do you lodge a claim?

When lodging an unfair dismissal application you must:

- identify your employer – the legal entity who employed you; and
- show you were dismissed by your employer, and did not resign; and
- state why you believe the dismissal was unfair and what you are seeking.

What are the time limits?

- You must lodge your claim **28 days** from the date of their termination.
- A late application may be accepted in some circumstances. Any late application must include reasons as to why your application is delayed and why it would be unfair for the WAIRC not to accept the application.

What forms do you use?

- Form 2 *Notice of application* is the application form for bringing an unfair dismissal claim in the WAIRC. For the list of the people who can witness Form 4 please see the attachment at the end of this document.
- Form 4 *Statutory declaration of service* needs to be completed and lodged with the WAIRC after you sent a copy of Form 2 to your former employer.

What costs are involved?

- You are required to pay a lodgement fee of \$50.00
- This fee may be waived on the grounds that it would cause serious hardship. In order to apply for a waiver, a waiver form must be completed and submitted along with Form R27.
- Generally, you will bear your own costs.

What else should you know?

Confidentiality

- Your file will remain confidential, as will the details of any conferences held. Hearing and decisions, however, are generally public.



Do you need representation?

- You do not need representation, but you can choose to be represented if you wish. Representation can include a union representative or a lawyer.
- To have someone other than a lawyer represent you, you must give your authority by lodging a Form 18 *Warrant to Appear as Agent*.

What if you have difficulty reading and speaking English?

- You can ask a friend or community organisation to assist you. You can also request an interpreter.
- If you require assistance, you can contact the WAIRC Information Line (08 9420444) or the Translating and Interpreting Services through the Department of Immigration and Citizenship.

What will happen at the WAIRC?

- The WAIRC will help you and your employer to reach an agreement with your employer by conciliation.
- If you cannot reach an agreement, you can elect to proceed to arbitration. The outcome of arbitration is binding.

What is conciliation?

Conciliation is a process involving an independent person trying to assist parties to reach a resolution to a dispute between themselves. It should be noted that:

- the WAIRC pursues conciliation as far as possible and attempts to leave formal arbitration as a last resort;
- conciliations are conducted on a “without prejudice” basis. This means that statements made in conciliation generally cannot be used in an arbitration hearing;
- the presiding Commissioner will set out the conduct of the conciliation;
- the parties to a conciliation are required to meet their own costs; and
- there is no transcript or record taken of proceedings by the WAIRC other than when the matter is settled by agreement of the parties and the terms are put in writing.

When will conciliation be used?

- After your application has been lodged, the WAIRC conciliates the claim. The purpose of a conciliation conference is to bring the employee and employer together in an informal, private meeting to reach an agreement without the need for a formal hearing. This is usually chaired by a member of the WAIRC.

When and where will the conciliation be held?

- Conferences are generally held in the WAIRC but are also held in regional centres.
- The conference is generally arranged by the Commissioner’s Associate. The parties are usually notified by letter but, in urgent cases, may be notified by telephone or email.



Who is required to attend the conciliation?

Both you and your employer are required to attend the conciliation. 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 Commissioner allows;
- if English is not your first language you can bring along someone with appropriate language skills to act as your interpreter;
- while the parties must attend, witnesses are not required. The meeting can be over the telephone; and
- if you fail to attend a conciliation conference, your application may be dismissed.

How do you prepare for the conciliation?

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

- know your case – review what happened and prepare a summary;
- locate all relevant documents (eg medical certificates or employment contracts);
- seek advice from a legal practitioner, union or employer organisation;
- consider bringing along a support person or legal representative (the Registry can provide you with a list of possible legal practitioners); and
- conduct yourself in a polite and courteous manner.

Further, you may want to look at the relevant provisions of the *Industrial Relations Act 1979* and associated regulations.

What should you say at the conciliation?

- What happened/ what are the relevant facts;
- Why do you believe that the termination was unfair or unlawful;
- How was the termination carried out and whether you were given warnings; and
- What you are seeking.

What happens if your employer and you agree to a resolution?

The Commissioner may make an order (providing you both agree) that:

- gives effect to your agreement; or
- discontinues the application without disclosing the terms of the agreement.

What happens if your employer and you do not agree to a resolution?

- If the Commissioner concludes the parties cannot agree to a resolution then the matter is usually listed for arbitration, (see below) where a ruling is made as to the merits of the matter. This will take place at a formal court hearing which requires the parties to present formal evidence.
- If the WAIRC is satisfied that all reasonable attempts to reach a settlement by conciliation have been or are likely to be unsuccessful, the WAIRC will issue a written conciliation certificate.
- The WAIRC Commissioner issuing the certificate will indicate his or her assessment of the merits of the application and may also give recommendations.

Elect to proceed to arbitration

If settlement is not reached at the conciliation conference and you wish to proceed with your matter, you must elect within 28 days to have the matter arbitrated. You must lodge in the Registry the *Notice of Application* form (Form 2).

The WAIRC arbitrates unfair dismissal applications. The *Notice of election to proceed to arbitration or to begin court proceedings* form must be lodged no later than 28 days after the issue of the conciliation certificate.

An application may be made to the WAIRC to accept the form out of time, otherwise the *Notice of Application* form must be lodged 7 days after the issue of the conciliation certificate. You must service a copy of the *Notice of Application* form immediately on your employer.

Arbitration

When a party elects to proceed to arbitration the matter will be heard by the WAIRC. Following the proceedings, a formal decision is likely to be issued which is binding on both parties.

Such hearings are held in public, unless ordered otherwise, and any decision is issued in public document (www.wairc.wa.gov.au). However, you are able to reach settlement at any time before and during arbitration.

Notice and conduct for arbitration proceedings

A Notice of Listing of the date of arbitration will be sent to you and your employer. The materials included must be sent to the Registry and served on your employer.

Discontinuance

You may discontinue proceedings at any time by submitting Form 14 Notice of withdrawal or discontinuance to the WAIRC.

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).



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Web www.wairc.wa.gov.au

Hours 8:00am - 5:00pm Monday to Friday

Forms (hyperlinked)

[Form 2](#)

[Form 4](#)

[Form 18](#)

[Form 14](#)