

# Important information

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This publication outlines the entitlements of employees and obligations of employers in the Western Australian State industrial relations system regarding dismissal, termination and redundancy.

In March 2006 the Federal Government introduced major changes to industrial relations in Australia, through the *Workplace Relations Amendment (Work Choices) Act 2005*. Many employers and employees who have previously been covered by State awards, agreements and/or the Western Australian minimum conditions legislation are now covered by the federal industrial relations system.

Any employer or employee who is uncertain whether they are affected by the federal changes, should contact Wageline on **1300 655 266**, the Work Choices Hotline on **1300 363264** or their union.

# Introduction

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A range of entitlements and remedies may apply when an employee is terminated, depending on the reason for the termination and the nature and length of employment.

The following information provides an overview of entitlements due to employees on termination, and information on how to make and respond to a claim of unfair dismissal or unlawful termination.

**Section one** – outlines standard termination entitlements including notice periods.

**Section two** – outlines entitlements when an employee is made redundant.

**Section three** – provides information on unfair dismissal.

**Section four** – provides information on unlawful termination.



# Section one

## Section one - Standard termination entitlements

This section outlines notice periods and other standard termination entitlements.

When an employee's employment is terminated, for any reason except serious misconduct, the employer must provide the employee with:

- > appropriate notice periods as outlined below;
- > subject to certain conditions, up to one day's paid time off work during each week of the notice period to search for other employment if the employee is full time or part time; and
- > any leave entitlements owing.

Employers must also provide all terminated employees, upon the employee's request, with a written statement specifying the period of employment and the classification or type of work performed.

### Notice requirements

Full time and part time employees are entitled to at least the period of notice provided by the *Workplace Relations Act*, as in the table below.

Employees continuous service	Notice period
Not more than one year	One week
More than one year but not more than three years	Two weeks
More than three years but not more than five years	Three weeks
More than five years	Four weeks

Employees over 45 years of age with two completed years' continuous service are entitled to an additional week's notice. If an award, a contract of employment or an agreement contains a longer notice period the longer period will apply.

Casual employees must receive the amount of notice specified in their award or agreement, (often one hour) or other reasonable notice.

Employers may choose to provide payment in lieu of notice. The payment must equal or exceed the total amount of monies that should have been paid had the employment continued until the end of the required notice period.

If employees are not provided with the notice periods required by the *Workplace Relations Act*, this may be an unlawful termination. See the unlawful termination section for information on employees excluded from the notice provisions and on how to make a claim of unlawful termination to the Australian Industrial Relations Commission.

## Leave

Any accrued annual leave and long service leave entitlements must also be paid out on termination. Pro-rata long service leave may also be payable on termination based on the number of years of service.

Contact Wageline on 1300 655 266 regarding specific leave entitlements due on termination.

## Misconduct and summary dismissal

Dismissal without notice is called a summary dismissal. Employers may not have to provide notice when terminating an employee for serious misconduct. The misconduct must be so incompatible with an employee's obligations to an employer that complete disregard for the employment relationship has been demonstrated.

This could include conduct such as:

- causing an immediate serious safety or health risk, including being intoxicated or taking drugs in the workplace, or
- deliberate behaviour that is inconsistent with the continuation of the employment such as serious theft or fraud, or that causes imminent or serious risk to the reputation, viability or profitability of the business.

# Section two

## Section two - Redundancy

The term redundancy applies to a situation where an employee is no longer required to do a job because the employer has decided that the job will not be done by anyone. This often occurs as a result of economic difficulties for the business and the need to reduce staff. Redundancy is not related to the performance or behaviour of individual employees.

### Redundancy entitlements

If an employee is being made redundant, employers must provide:

- any relevant standard termination entitlements outlined in section one; and
- severance payments if the employee is entitled to them.

If employers are terminating employees on the grounds of redundancy they must also notify Centrelink in writing, giving the following details:

- reasons for the terminations;
- number and category of employees likely to be affected;
- number of employees normally employed; and
- period over which the terminations are likely to be carried out.



## Severance payments

An employee who is employed by an employer with 15 or more employees is entitled to severance pay when terminated on the grounds of redundancy. Where awards and agreements contain redundancy provisions that provide particular entitlements that are more favourable to employees, the award provisions will apply over these particular entitlements.

Period of continuous service	Number of weeks' pay
Less than 1 year	Nil
1 year and less than 2 years	4
2 years and less than 3 years	6
3 years and less than 4 years	7
4 years and less than 5 years	8
5 years and less than 6 years	10
6 years and less than 7 years	11
7 years and less than 8 years	13
8 years and less than 9 years	14
9 years and less than 10 years	16
10 years and over	12

Employers and employees should note that:

- > severance payments reduce after 10 years to take account of long service leave entitlements;
- > the definition of a **week's pay** excludes overtime; penalty rates; allowances, bonuses; and any other similar ancillary payments;
- > severance payments may not be applicable during a transmission of business if the employee's employment continues with the new owner, who recognises prior service; and
- > the calculation of the number of employees includes each casual and part time employee.

## Exclusions from severance payments

The following types of employees are excluded from these severance payments:

- employees being terminated for serious misconduct;
- employees with less than one year's service;
- probationary employees;
- apprentices and trainees;
- employees engaged for a specific period of time or for a specified task; and
- casual employees.

## Making a claim for unpaid severance entitlements

Employees who believe that they not received appropriate severance pay or other entitlements should contact Wageline on 1300 655 266 for assistance.

In situations where employees believe they have not been paid correctly, the Department of Consumer and Employment Protection (DOCEP) may assist by providing an impartial assessment of the matter, with intervention to ensure that industrial laws are correctly complied with.



# Section three

## Section three - Unfair dismissal

When an employee's employment is terminated, the employer must not terminate the employee in a manner that is harsh, oppressive or unfair. If an employee believes that their termination was unfair, they may be able to lodge a claim for unfair dismissal.

In the Western Australian State labour relations system, the term unfair dismissal applies to dismissals that are found to be harsh, oppressive or unfair. There is no set definition of this term. Whether a particular dismissal was unfair can only be determined on the circumstances of an individual case.

An employee can lodge a claim of unfair dismissal in the Western Australian Industrial Relations Commission (WAIRC). An employee without State Award or agreement coverage is excluded from lodging an unfair dismissal claim if they earn in excess of the salary cap as prescribed by the WAIRC.

It is the intent of the federal *Workplace Relations Act* to also exclude all employees of organisations that are constitutional corporations from accessing state unfair dismissal systems. An employer is usually considered a 'constitutional corporation' if they are incorporated, and have 'significant' or 'substantial' trading or financial activities. It is advisable for employees to gain specific advice on this issue before deciding to lodge an unfair dismissal claim with the WAIRC.

Employees of organisations that are constitutional corporations and have more than 100 employees may be able to lodge a claim of unfair dismissal in the Australian Industrial Relations Commission. Further information is available from the Commission on **1300 799 675** or at **[www.airc.gov.au](http://www.airc.gov.au)**

## Probationary employees

A probationary employee is entitled to make a claim of unfair dismissal. However, the WAIRC is required to take the special nature of probationary employment into account when deciding the fairness or otherwise of the dismissal. It is assumed that probationary employees know that their work performance is being assessed and that it is possible that an employer may decide they are not suitable.

## Making a claim

An application for unfair dismissal must be commenced within 28 days of the date of dismissal. To make a claim an employee must complete the required form and lodge it with the WAIRC Registry. It is the employee's responsibility to ensure that the application is lodged correctly and within time. The employee must state why they believe the dismissal was unfair and what they are seeking.

The required forms and information on the paperwork requirements and process of an unfair dismissal claim are available from the WAIRC or on its website at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au). WAIRC staff can provide information on procedures, but are not able to provide advice on the likely success of a claim.

A fee of \$50.00 is payable on lodgment of the forms.

The WAIRC may accept an application that is made after the 28 day period, if it believes it would be unfair not to do so. Special procedures apply when an employee lodges an unfair dismissal claim after the 28 day time period. Please see section on applications lodged after 28 days for more information.



## Responding to a claim

Employers have 21 days after receiving the application to lodge a response with the WAIRC. The response is called a Notice of Answer and Counter Proposal. The response must be lodged with the WAIRC Registry and a copy served on the claimant employee. There is no fee payable to lodge a Notice of Answer and Counter Proposal.

## The process of a claim

The employer is given an opportunity to respond in writing to a claim and then if the applicant employee wishes to proceed with the claim the Registrar of the WAIRC will list the matter for mediation.

The required forms and information on the paperwork requirements and process of an unfair dismissal claim are available from the WAIRC or on its website: [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au). WAIRC staff can provide information on procedures, but are not able to provide advice on the likely success of a claim.

Mediation is an opportunity for employers and employees to discuss issues and attempt to resolve matters without the need to go to a hearing. The Registrar or a representative conducts the mediation. There is a further opportunity to informally resolve matters before a Commissioner at a conciliation conference.

If a matter cannot be resolved by informal conference, the matter proceeds to arbitration. This is a formal hearing where the parties can argue and present evidence in support of their respective cases, and the Commissioner makes a formal determination of whether or not the dismissal was unfair.



## Possible outcomes

The unfair dismissal application may be dismissed or granted. If the application is granted and the dismissal is found to be unfair, the remedies available are reinstatement, re-employment or compensation. Reinstatement is the primary remedy and, if practicable, will be ordered by the WAIRC. Reinstatement requires that the employee must resume in the same position held at the time of the dismissal.

Instead of reinstatement, a Commissioner may make an order for re-employment to another comparable position with the same employer.

The WAIRC also has the ability to make an order for continuity of service for the purpose of leave entitlements. In addition to the above, the WAIRC may order that the employer pay lost wages between the date of dismissal and the date of reinstatement or re-employment.

If the WAIRC determines that reinstatement or re-employment is not practical, monetary compensation may be ordered, but compensation must not exceed an amount equal to six months remuneration of the employee. Employers do not have the ability to elect payment of compensation instead of reinstatement or re-employment.

## Enforcement of a WAIRC order

Orders for reinstatement, re-employment or compensation are enforceable in the Industrial Magistrates Court. An application for enforcement can be made by DOCEP, a relevant union or by the employee to whom the orders relate. For more information please contact Wageline on 1300 655 266 or the WAIRC.

## Representation

Employees can represent themselves during unfair dismissal proceedings, appoint any adult person as a representative, engage professional representation or be represented by their union.

Employers in unfair dismissal matters can represent themselves during proceedings, appoint another person as a representative or engage professional representation. It is recommended that employers who are members of industry associations or who belong to the Chamber of Commerce and Industry contact the relevant organisation for further information.

There are many lawyers and industrial advocates who specialise in the area of unfair dismissal. A list of legal practitioners and registered industrial advocates can be found on the WAIRC website at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au)

DOCEP does not have standing under the legislation to commence an action for unfair dismissal or to represent the interests of employees.

## Costs

Employers and employees must pay their own legal or other costs in unfair dismissal proceedings. In limited circumstances, such as if one party has acted in a frivolous or vexatious manner, costs can be awarded against the offending party.

## Applications lodged after 28 days

Special procedures apply when an employee makes an unfair dismissal claim more than 28 days after the date of their termination. When making a claim, an employee is required to provide additional information on the unfair dismissal application form, outlining their reasons for not lodging the claim on time, and justifying why they should be provided with the opportunity to have their claim heard.

After receiving an unfair dismissal claim lodged outside the 28 day time limit, the Commission will, as a first step, call a preliminary hearing. The preliminary hearing is a formal court-style proceeding at which the employee will be required to provide evidence to the Commission that it would be unfair not to allow their unfair dismissal claim to be heard. The employee must also be able to prove to the Commission that their unfair dismissal claim has a significant chance of success.

If an employee is successful at the preliminary hearing stage, the unfair dismissal claim will proceed to the mediation and conciliation stage.



# Section four

## Section four - Unlawful termination

The unlawful termination provisions are part of the federal *Workplace Relations Act*. These provisions apply to all employees in the Western Australian State industrial relations system, with some exclusions.

An employee may make an unlawful termination claim if:

- they were terminated without proper notice; or
- they believe their termination was based one or more of the prohibited reasons concerning alleged discrimination.

### Prohibited reasons for dismissal

The legislation provides that a dismissal is unlawful if done for any of the following reasons:

- membership of a union or participation in union activities outside working hours or, with the employer's consent, during work hours;
- non membership of a union;
- acting or having acted as a representative for employees;
- filing a complaint or taking part in proceedings against an employer for alleged violation of laws or regulations or having recourse to competent administrative authorities;
- race, colour, gender, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, sign, extend, vary or terminate an Australian Workplace Agreement;
- temporary absence from work because of illness or injury;
- absence from work during maternity leave or other parental leave; or
- temporary absence from work for voluntary emergency management activity.

The unlawful termination provisions relating to termination based on a prohibited reason apply to all employees.

## Proper notice requirements

Permanent employees are entitled to notice of dismissal, or payment in lieu of notice. This payment must equal the total amount the employee would receive if they had worked the required notice period.

The minimum periods of notice in the *Workplace Relations Act* are:

Employees' continuous service	Notice period
Not more than one year	One week
More than one year but not more than three years	Two weeks
More than three years but not more than five years	Three weeks
More than five years	Four weeks

For employees over 45 years of age with two completed years' continuous service, the notice period is extended by one week. It is important to note that if an award, a contract of employment or an agreement contains a greater notice period the longer period will apply.

## Exclusions

Certain types of employees are excluded from making a claim of unlawful termination based on failure to provide proper notice. These are:

- employees engaged under a contract of employment for a specified period of time or a specified task;
- employees serving a period of probation that was determined in advance of the employment;
- trainees employed under traineeship agreements or approved traineeships for a specified period;

- casual employees;
- employees who are not employed on an award or workplace agreement and who earn more than \$98,200 per year (subject to indexation);
- seasonal employees;
- employees continuing other related termination proceedings;
- daily hire employees in the construction and meat industries;
- weekly hire employees in the meat industry terminated on seasonal factors, and
- employees guilty of serious misconduct.

## Notification to Centrelink

If employers propose to terminate 15 or more employees for reasons of economic, technological or structural change, they are obligated to inform Centrelink. It is considered an unlawful termination to make employees redundant in these circumstances, without providing the proper notice to Centrelink. Exclusions may apply to this notification requirement, and employers should contact Wageline on **1300 655 266** if further information is required.

## Making a claim of unlawful termination

A claim of unlawful termination is made to the Australian Industrial Relations Commission. Claims must be lodged with the Commission within 21 days of the termination.

The first stage is conciliation, at which a representative of the Commission will attempt to help the employer and employee reach an agreement. At the end of the conciliation process, the Commission will issue a certificate on the merits of the application. The applicant employee must then decide within 28 days whether to pursue the claim further in the Federal Court of Australia. Further information is available from the Australia Industrial Relations Commission website [www.airc.gov.au](http://www.airc.gov.au)