

Breach of Standard claims

Claimant guide

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Breach of Standards

What is a breach of Standard claim?

A breach of Standard claim allows you to seek relief if you believe a decision by a public sector agency has breached a public sector Standard in human resource management and you have been adversely affected by that breach.

The Public Sector Commissioner establishes the public sector Standards and agencies must comply with them when undertaking certain human resource processes.

The Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 govern the process for how claims are lodged and managed.

How do you lodge a claim?

Speak to the agency first

Ask the agency for information about how and why the decision was made. This information may help you understand the process used and the reasons why the agency made its decision.

Decide if you wish to make a claim

Once a final decision is made on a process to which a public sector Standard applies, you may lodge a claim if you consider that:

- the agency has breached that Standard
- you have been adversely affected by the breach.

There are some situations under the regulations where you cannot lodge a claim. You should check whether you are eligible to lodge a claim with the agency that made the decision.

The Standards

Breach of Standard claims can be lodged about the following Standards:

- Employment
- Performance Management
- Grievance Resolution
- Redeployment
- Termination.

Note: Claims cannot be lodged for the Discipline Standard.

How and when to lodge a claim

You must lodge a claim in writing with the agency that made the decision.

Your claim needs to include:

- why you believe there has been a breach of the Standard
- how you have been adversely affected by the breach.

The Commission's breach of Standard claim form may help you lodge your breach of Standard claim with the agency.

You must lodge a claim within the prescribed lodgement period

- The regulations prescribe the lodgement periods for breach of Standard claims.
- The lodgement period varies depending on the process undertaken.
- For some decisions relating to the Employment Standard, the regulations require you to be provided with notification of the decision, and to have a minimum of four working days to lodge a claim.
- The regulations also require you to be provided notification for decisions relating to the Grievance Resolution Standard, and to have 10 working days' notice to lodge a claim.
- For other processes, including transfers, you have 10 working days from when you become aware of the decision or 30 working days after the decision was made, whichever occurs first. For more information about lodgement periods contact the agency where the breach is alleged to have occurred.

How can my claim be finalised?

- You reach a conciliated agreement.
- The Commissioner declines to deal with your claim.
- You withdraw your claim.
- The Commissioner finds no breach and your claim is dismissed.
- The Commissioner finds a breach.
- Your claim lapses because the Commissioner considers you are not participating (before this decision you will be informed that your claim may lapse and you will be given five days to respond).

What does the agency do?

When you lodge your claim, the agency will make a reasonable attempt to resolve the claim with you. The agency may contact you to explain its decision and try to resolve your concerns. If you consider this explanation or action resolves your claim, you can withdraw your claim by writing to the agency.

Agency refers your claim to the Public Sector Commission

If your claim is not resolved within 15 working days after lodgement, the agency must forward your claim to the Public Sector Commission.

What does the Public Sector Commission do?

The Public Sector Commission will check if your claim is within jurisdiction.

The Regulations provide for the Commissioner to decline to deal with a claim in certain circumstances, including if it is considered vexatious, lacking in substance or if it is only about your competitive merit as an applicant.

If your claim is accepted it will be allocated to a Commission employee.

Initial contact

A Commission employee will contact you and the agency to discuss your claim and determine how to proceed.

The Regulations provide for claims to be conciliated or reviewed. Conciliation is optional and both parties must agree to participate for it to proceed.

Review

The Commission employee will review the facts and circumstances of your claim as they relate to the Standard and provide a report to the Commissioner.

The review process may include:

- requesting and considering information and documents from you, the agency or any other relevant source
- interviewing you and other relevant people.

Commissioner's determination

The Commissioner will make a determination based on the review report and any other relevant information that:

- no breach is found and the claim is dismissed, or
- there has been a breach of the Standard.

The Commissioner may also decline to deal with your claim.

The Commissioner will inform both you and the agency, in writing, of the determination of your claim and reasons for that determination. The Commissioner will also write to you if the Commissioner declines to deal with your claim.

Commissioner recommends relief

Where a breach is found, the Commissioner may recommend or direct relief to be provided by the agency. Relief, if any, will vary depending on the circumstances.

Examples may include:

- recommencing a process from the start or from the point where the breach occurred
- changes to the agency's policies or practices.

The Commissioner cannot recommend that you are a better person for a job than another applicant and that you should be appointed to a position. The Commissioner may, however, direct that a specified person is not to be appointed.

Review

What is a review?

A review is part of the process for resolving a breach of Standard claim.

It may be undertaken by a Commission employee or a conciliation and review officer (CRO) appointed by the Public Sector Commissioner. Reviews are usually undertaken by a Commission employee.

This person will:

- review the facts and circumstances of your breach claim, as they relate to the Standard
- provide a report to the Commissioner.

Timing of reviews

A review occurs when either you or the agency does not agree to participate in conciliation, or where no agreement is reached during conciliation.

How is a review conducted?

The Commission employee will:

- invite you and the agency to provide information relevant to your claim
- consider information and documents provided by you, the agency and any other source, including any information provided prior to conciliation, and
- prepare a report setting out the facts and circumstances that gave rise to the claim, and explain their relevance to the Standard to the Commissioner to make a determination.

Only the Commissioner can determine if a Standard has been breached.

People involved in the review

- Commission employee
- you
- if requested, your support person. This may be a family member, friend, colleague or union official
- the agency's nominated officer
- the agency's nominated officer is also entitled to be accompanied by another person who may be able to assist the review process
- any people who have information relevant to the claim. The Commission employee may interview any person who they consider may have information relevant to the claim and you may be asked for the names of relevant people.

Note: The support person's role does not include advocating on your behalf or being a witness. If you wish to have a support person, you should give their name to the Commission employee prior to any meetings or interviews.

Information used in a review

Information used in a review may be obtained from:

- you or the agency. The Commission employee will request any information or document they consider relevant
- interviews with you or any other people the Commission employee considers relevant to the claim.

In carrying out a review, the Commission employee is not to have regard for information or documents discussed or provided for the purposes of attempting to settle the claim by conciliation, or that the Commission employee considers was said or provided confidentially for those purposes.

How do you prepare for a review?

When preparing for a review you should:

- make yourself available to discuss your claim
- consider who can provide relevant information about your claim if you are asked about it
- if you are interviewed, have with you a copy of your claim and any other documents you may wish to refer to
- make sure your support person is available to support you in any interview arranged.

What happens after the review is completed?

A Commission employee will provide the Commissioner with a report about the facts and circumstances of your claim as they relate to the Standard.

The report may also include information about the relief that you or the agency proposes, should a breach be found.

Commissioner's determination

The Commissioner will:

- consider the information in the report and any other material relevant to the claim
- determine whether or not there has been a breach of the Standard.

The Commissioner may also decide to decline to deal with the claim. The Regulations provide for the Commissioner to decline to deal with a claim in certain circumstances. These include if the Commissioner considers the claim is vexatious, lacking in substance or if it is only about your competitive merit as an applicant.

If a breach is determined, the Commissioner recommends or directs what relief, if any, is to be provided by the agency.

If an agency does not implement the directed relief the Commissioner may report this to the relevant Minister or Parliament.

Examples of relief

The recommended or directed relief, if any, will vary depending on the circumstances. Examples may include:

- recommencing a process either from the start or from the point where the breach occurred
- the agency's policies, processes or procedures be changed.

Note: The Commissioner cannot recommend that you are a better person for a job than another applicant and that you should be appointed to a position. The Commissioner may, however, direct that a specified person is not to be appointed.

Advising you of the decision

The Commissioner will inform both you and the agency, in writing, of the determination of your claim and reasons for that determination.

The Commissioner will also write to you should the Commissioner decline to deal with your claim.

If a breach is found, the Commissioner will advise you of what relief, if any, the agency was recommended or directed to take.

If relief is recommended or directed, the agency has 10 working days to notify you and the Commissioner about what action it intends to take. If the agency decides to take action other than that recommended or directed by the Commissioner, it must notify both you and the Commissioner.

Conciliation or withdrawal of your claim

Further attempts to conciliate may occur at any time prior to the Commissioner's final determination if the Commission employee considers resolution may be possible.

You may withdraw your claim at any time if you consider you have been provided with a satisfactory explanation or you no longer wish to pursue it. You can withdraw by writing directly to the Commissioner or the agency.

Conciliation

What is conciliation?

Conciliation is a process where both parties (an agency representative and you, as the claimant) are encouraged to discuss the claim and reach agreement on how to resolve it. If this happens, you will both sign an agreement and the claim is concluded.

If conciliation is not possible, or fails to reach an agreement, your claim will proceed to review and the Commissioner will make a determination.

Conciliation is one option for resolving a breach of Standard claim. It is conducted by an impartial conciliation and review officer (CRO), appointed by the Public Sector Commissioner. Usually, this will be a Commission employee.

The Commission employee will help you and the agency to discuss your views about the claim and reach agreement on how to resolve your claim. A confidential outcome is generally a key point in any conciliation agreement.

Benefits of conciliation

- Both parties can discuss your claim to achieve a better understanding about the claim and the views of the other party. You and an agency representative can discuss each of your views.
- An agreement can be reached that is acceptable to both you and the agency.
- The claim can be finalised quickly and good working relationships can be maintained.

When does conciliation happen?

When your claim has been referred to the Commission you and the agency will be contacted to discuss the options for resolving your claim, including if you and the agency are interested in participating in conciliation.

If you or the agency do not agree to conciliate or the claim cannot be resolved by conciliation, the claim will proceed to review.

Further attempts to conciliate may occur at any time during the breach claim process prior to the Commissioner's final determination.

People involved in conciliation

The people who are involved are:

- a Commission employee
- yourself
- your support person such as a family member, friend, colleague, or union official (if you wish to have one)
- the nominated officer for the agency

- another person from the agency who can provide relevant information (if the nominated officer wishes to bring them).

If you wish to have a support person you should give their name to the Commission employee conciliating your claim before the process begins.

Before conciliation

Once your claim is received a Commission employee will make contact with you and the agency to:

- ask you and the agency whether you are prepared to try and reach an agreement by conciliation. Conciliation does not proceed unless both parties agree to it
- clarify the claim
- obtain any relevant documents from you or the agency.

Review of your claim

If no agreement is reached in a reasonable timeframe, the claim proceeds to review. A review involves a Commission employee reviewing the facts and circumstances of your claim as they relate to the Standard and providing a report to the Commissioner.

Withdrawal of your claim

You may withdraw your claim at any time if you consider you have been provided with a satisfactory explanation or you no longer wish to pursue your claim. You can withdraw by writing directly to the Commissioner.

How is conciliation conducted?

After the Commission employee discusses the claim with you and the nominated officer for the agency, a decision will be made as to how conciliation will be conducted. This may include:

- a meeting between you, the nominated officer and the Commission employee
- a videoconference
- a teleconference
- having one to one meetings or telephone conversations with you and the nominated officer separately.

Preparing for conciliation

You can prepare for conciliation by:

- making sure you and your support person (if you wish to have one) are available
- thinking about realistic options for resolving your claim before you arrive at conciliation
- bringing your claim and other relevant documents you may need to refer to.

Responsibilities during conciliation

The Commission employee will:

- help you and the nominated officer to identify the issues of the claim, as they relate to the Standard involved
- provide independent advice on the application of the Standards and the regulations
- help you and the agency reach an agreement.

If agreement is unlikely to be reached within a reasonable timeframe, the claim may proceed to a review.

You and the nominated officer need to:

- listen to each other
- talk about the claim
- consider options about what may resolve the claim
- keep an open mind about alternatives that might be suggested for agreement.

Support persons

You are entitled to be accompanied by a support person unless the Commission employee otherwise decides that the process cannot proceed effectively with you being accompanied by the support person.

Your support person does not act on your behalf as an advocate or a witness.

What are the possible outcomes of conciliation?

The outcomes of conciliation may be:

- Agreement is reached, documented and signed by both parties. A copy is given to you, the agency and the Commissioner. This finalises your claim.
- No agreement is reached in a reasonable timeframe and a review is conducted.

Examples of agreed action

- The agency recommences the process from the start or from a certain part in the process that both parties agree on
- The agency changes its policies and practices
- An agency agrees to other actions
- No further action is required.

The agency may not necessarily acknowledge that a breach has occurred but may be willing to resolve the claim if you both can reach agreement. A conciliated agreement will not be recorded as a breach as only the Commissioner can determine a breach has occurred. The agreement may also involve you agreeing to certain actions.