

EMPLOYMENT LAW

SESSION 1 ANSWERS

WAGES AND OTHER ENTITLEMENTS

Please note: these materials are educational resources. They are not intended to constitute legal advice and should not be relied upon as such. Last reviewed April 2015.

ACTIVITY A

Watch the video and answer these questions:

1. Jill is happy because she has been employed for six months and has just had a promotion.
2. On a 'quiet night' Andrea is provided with a meal.
3. Jill says that Andrea should be paid the Award rate.
4. The three things that Andrea's employer is doing that are against the law are:
 - a. Andrea is not being paid the Award rate;
 - b. Andrea is not being paid overtime, penalty rates, superannuation or holiday entitlements;
 - c. Andrea is not being provided with a pay slip.
5. If Andrea wants to find out about her legal pay rate she will need to check the Award that applies to her employment. This can sometimes be difficult, however as a starting point Andrea could talk to her boss (if she feels comfortable to do so), another colleague, or contact the Fair Work Ombudsman and request assistance.

In the event that it is not possible for Andrea to obtain assistance through the Fair Work Ombudsman, she could contact the Footscray Community Legal Centre (Footscray CLC), or another relevant Community Legal Centre. If Andrea is a member of her union, she should contact her union.

6. If Andrea is owed money by her employer and she knows what her salary and entitlements are, she may:
 - a. Discuss the money and/or entitlements owed to her with her employer. This approach would only occur if Andrea had a good relationship with her employer and felt comfortable in raising these matters.
 - b. Write a letter of demand to her employer, seeking outstanding payments.
 - c. Request the assistance of Footscray CLC, the Fair Work Ombudsman, or another relevant Community Legal Centre. Footscray CLC may be able to provide information or assistance with negotiating with the

employer, drafting a letter of demand, attending a mediation or initiating proceedings in the appropriate Court.

Note: calculating money and/or entitlements owed to Andrea may be complicated and it may be necessary to seek advice and guidance in ensuring calculations are correct. People have six years from the date of the first underpayment to start proceedings in the Federal Circuit Court or Federal Court of Australia.

ACTIVITY B

Match the words with the meanings:

- A – 3
- B – 6
- C – 1
- D – 2
- E – 7
- F – 5
- G – 4

ACTIVITY C

Read the statements and circle true or false:

1. False
2. False
3. False
4. False
5. True
6. True
7. True
8. True
9. True
10. False

ACTIVITY D

Discussion. Andrea seems reluctant to enforce her rights. What barriers are there for Andrea? How could she overcome these barriers?

Answers will vary, however you may like to cover the following. Andrea may be reluctant to enforce her rights for the following reasons:

- 1) She is concerned at her language skills.
 - Community legal centres and the Fair Work Ombudsman can provide interpreters free of charge.
- 2) She does not understand the law.
 - She can seek help from Footscray CLC, another relevant Community Legal Centre, or the Fair Work Ombudsman.
- 3) She is concerned that if she questions her employer, she may lose her job.
 - All employees have legal rights. It is unlawful for an employer to treat an employee badly because the employee made a complaint or enquiry about their workplace rights. If an employee is treated unfairly as a result of questioning or demanding their rights, they should seek advice.

ACTIVITY E

TIPS:

1. Arrange a time to speak to your boss privately
2. Be clear about the problem
3. Let your boss explain her/his point of view
4. Be assertive and specific about your problem
5. Don't be rude or aggressive
6. Set a timeline for when the issue will be discussed further or resolved
7. Make sure both you and your boss leave the conversation with a clear understanding of what has been decided and when the issue will be resolved or discussed again

ACTIVITY F

Watch the video and identify where free help is available.

ACTIVITY G: WHO SHOULD BE PAID?

Note: for more information, please visit the Fair Work Ombudsman website.

- a Workers working for a specified task or for a specified period – **Yes**

A worker who works for a specified task doesn't necessarily have to be an employee –s/he can be a contractor. Usually the specified task is directly linked to the worker's employment or engagement. They are paid for working the specific task they are employed or engaged to perform. For example, a construction firm project where a person is engaged/hired to work on that specific project. Once the project is over, their services are no longer required.

A contract of employment for a specified period of time clearly specifies the commencement and completion of the term of the contract. At the end of the specified period set by the contract of employment, the employee's employment will terminate. For example, a person was hired for twelve months to replace a pregnant staff member whilst on maternity leave. Their contract with the employer will specify an end date. Once the contract end date has been reached, their services are no longer required.

b Casual employees – Yes

Casual employment is not defined in the Fair Work Act 2009 and is generally given no further clarification by Modern Awards or Enterprise Agreements. Generally, a casual employee is an employee who only works according to the needs of employer without guarantee of regular shifts or employment.

Casual employees normally receive a higher rate of pay to permanent full time or part time employees because casual employees do not generally have an entitlement to paid annual leave, personal/carer's leave or public holidays. Casual employees' employment may also be terminated without notice. For example, a retailer who needs extra staff for Christmas may hire casuals to work for the Christmas period. They are called on an ad hoc basis, and their shifts may be irregular.

c Volunteers – No

A volunteer is a person who freely offers to undertake a task without expectation of payment.

A volunteer is not an employee and does not have to be paid for the work they do. Key characteristics of true and genuine volunteer arrangements include the lack of intention for the parties to create a legally binding employment relationship; no obligation for the volunteer to attend or perform work for the organisation; the volunteer does not expect to be paid for the work. For example, a person may volunteer in the CFA as a volunteer fire fighter.

d Contractors – Yes

Contractors are not employees but are engaged by a principal to provide goods and/or services.

Contractors are paid according to the goods and/or services they provide to the principal. For example a plumber who is engaged for a particular job (e.g. fitting a dishwasher). The plumber will provide a quote and if they are engaged, then once the job is completed, they will forward an invoice and be paid accordingly.

e Apprentices – **Yes**

An apprentice is someone who is paid to learn a skilled trade from a skilled employer (eg electrical, plumbing, cabinet making, motor mechanical trades). Apprentices are also required to complete off-the-job training component during their apprenticeship.

Apprentices are normally paid a lower wage while completing their qualification. Modern Awards and Enterprise Agreements may provide specific wages payable to apprentices.

f Employees on probation – **Yes**

The purpose of a probationary period is to determine an employee's suitability to the position and/or employer's business.

A probationary period does not generally affect the wages of an employee or the other terms and conditions of employment

g Workers on trial – **Maybe**

Workers may undergo a trial in order to demonstrate the skills required for a job.

Unpaid work trials are rarely legal. They may be appropriate when they are used by a prospective employer to assess a person's skills that are relevant to a vacant position. When assessing whether a worker should be paid for a trial, employers should consider what is a reasonable period for a worker to demonstrate the skills required for the job. For example, it is likely to be reasonable for a person applying for a trades assistant position at a panel beater to be required to briefly demonstrate knowledge around a car and panel beating workshop as it is a minimum requirement for the job. On the other hand, it is not going to be reasonable for a worker who is applying for a kitchen-hand job to be required to complete an unpaid 8 hour trial to demonstrate capabilities for a role that does not require any specific skills. See "work experience" below for further details about when a trial/work experience position may be paid or unpaid.

h Trainees – **Yes**

Trainees are similar to apprentices, but they are being trained in vocational areas (eg hospitality, information technology) rather than in a specific skilled trade.

Trainees will generally receive certification in their vocational area. Trainee wages are also referred to in modern awards and enterprise agreements. To be a trainee, there must be a formal agreement.

i Permanent employees – **Yes**

Permanent employees are employed on a permanent basis meaning they have continuity of employment and access to entitlements such as annual leave.

Permanent employees can be full time (meaning their ordinary hours are for at least 38 hours per week) or part time (with ordinary hours of less than 38 per week).

j Students doing work experience – **Maybe**

Work experience is generally a short term experience of employment that is arranged for students to have the opportunity to be exposed to their chosen workplace or occupation.

Unpaid work experience is ok provided the arrangement is not indicative of employment. In assessing whether a student should be paid for work experience, it is important to look at who gets the principal benefit of the work experience arrangement. Unpaid work experience that is primarily observational with no expectation for students to do productive work is likely to primarily benefit the students and be less indicative of an employment relationship. Where work experience should be paid is in circumstances where the primary benefit is for the employer. For example, a law student who does a 3 week seasonal clerkship with a law firm where the student completes work that is billed to firm clients should be paid for the hours worked as it is more indicative of an employment relationship. Similarly, where an employer asks the person to do menial tasks such as picking in a factory, this is more beneficial to the employer who also has other employees doing the same thing except he does not have to pay the student.

ACTIVITY H THE FAIR WORK SYSTEM

Activity 1

The National Employment Standards are minimum standards that apply to the employment of employees in the Fair Work system. There are 10 minimum employment standards.

1. Maximum weekly hours of work = 38 hours + reasonable additional hours

The maximum weekly hours an employer can require a full time employee to work is 38 hours per week plus reasonable additional hours.

When considering whether additional hours are "reasonable", the following must be taken into account.

- a) any risk to an employee's health and safety from working the additional hours*
- b) the employee's personal circumstances (including family responsibilities)*
- c) the needs of the workplace or enterprise in which the employee is employed*
- d) whether the employee is entitled to receive overtime/penalty rates or a level of remuneration that reflects an expectation of working additional hours*

- e) *any notice given by the employer of any request or requirement to work the additional hours*
- f) *any notice given by the employee of his/her intention to refuse to work additional hours*
- g) *the usual patterns of work in the industry (or part of) in which the employee works*
- h) *the nature of the employee's role and level of responsibility*
- i) *whether the additional hours are in accordance with any averaging terms / arrangement agreed to by the employee*

2. Annual leave = 4 weeks (pro rata for part time)

Permanent employees are entitled to the equivalent of 4 weeks' of paid annual leave for each completed year of service based on their ordinary hours.

Shift workers are entitled to the equivalent of 5 weeks of paid annual leave for each completed year of service. Generally, shift workers are employees who are employed in an enterprise in which shifts are continuously rostered 24/7 and are regularly rostered to work those shifts and Sundays and Public Holidays. However, an employee's award or enterprise agreement may say what a shift worker is for the purposes of the extra week of annual leave.

3. Public holidays (provided you normally work on that day)

An employee is entitled to a paid day off when a designated public holiday (determined by relevant State or Territory the employee works in) falls on a day that the employee is ordinarily required to work.

4. Notice of termination / redundancy pay

The Fair Work Act 2009 sets out the minimum entitlement to notice of termination for permanent employees based on continuous service as illustrated by the following table.

<i>Employee's continuous service at the end of the day notice is given</i>	<i>Notice period</i>
<i>Not more than 1 year</i>	<i>1 week</i>
<i>More than 1 year but not more than 3 years</i>	<i>2 weeks</i>
<i>More than 3 years but not more than 5 years</i>	<i>3 weeks</i>
<i>More than 5 years</i>	<i>4 weeks</i>

If the permanent employee is over 45 years old, and has completed at least 2 years of service at the end of the day notice is given, the employee receives an additional 1 week of notice.

Employment contracts may contain notice provisions that are not based on continuous service, but they cannot be less than the minimum provided for by the Fair Work Act 2009. Employment contracts may also provide for more

favourable notice periods than those contained in the NES in which case the notice period in the contract applies.

Redundancy occurs where an employee is dismissed because their employer no longer requires the job done by the employee to be done by anyone (e.g. for operational reasons) or because the employer's business goes bankrupt or is shut down. The Fair Work Act 2009 requires larger businesses (those that employ 15 or more employees) to pay redundancy pay where an employee is dismissed due to redundancy. Small businesses (those that employ 14 or less employees) are not required to pay redundancy pay. The Fair Work Act 2009 prescribes the amount of redundancy pay employees are entitled to based on their continuous service as follows.

Employee's continuous service with the employer on termination	Redundancy pay
<i>At least 1 year but less than 2 years</i>	<i>4 weeks</i>
<i>At least 2 years but less than 3 years</i>	<i>6 weeks</i>
<i>At least 3 years but less than 4 years</i>	<i>7 weeks</i>
<i>At least 4 years but less than 5 years</i>	<i>8 weeks</i>
<i>At least 5 years but less than 6 years</i>	<i>10 weeks</i>
<i>At least 6 years but less than 7 years</i>	<i>11 weeks</i>
<i>At least 7 years but less than 8 years</i>	<i>13 weeks</i>
<i>At least 8 years but less than 9 years</i>	<i>14 weeks</i>
<i>At least 9 years but less than 10 years</i>	<i>16 weeks</i>
<i>At least 10 years</i>	<i>12 weeks</i>

An employee's contract or enterprise agreement may say they are entitled to more redundancy pay.

5. Requests for flexible working arrangements

An employee may request to change their working arrangements (ie make a request for a flexible working arrangement) in prescribed circumstances for reasons relating to the employee's circumstances.

The prescribed circumstances include where the employee:

- a) is a parent, or has the responsibility for the care of, a child who is of school age or under;*
- b) is a carer;*
- c) has a disability;*
- d) is 55 years or older;*
- e) is experiencing violence from a member of their family;*
- f) provides care or support to a member of the employee's immediate family or a member of the employee's household, who requires care or support because the member is experience violence from the member's family.*

Before making a flexible working arrangement, the employee must have completed at least 12 months continuous service with the employer, unless the employee is a casual where they must be a long term casual with a

reasonable expectation of continuing employment on a regular and systematic basis.

6. Long Service Leave

Long service leave is provided for under State and Territory laws. In Victoria, an employee will be entitled to take 13 weeks long service leave after 15 years of continuous employment with one employer, and a pro rata amount of this after 10 years of employment. An employee ceasing employment after at least seven years of continuous employment with one employer is entitled to be paid long service leave at the accrual rate of one week for each sixty weeks of continuous employment, regardless of the reason for termination of the employment.

7. Parental Leave

An employee is entitled to 12 months unpaid parental leave (including maternity, paternity or adoption leave) if the employee will have a responsibility for the care of the child and they have completed at least 12 months continuous service with the employer. If the employee is a casual employee, they must be a long term casual with a reasonable expectation of continuing employment on a regular and systematic basis to be entitled to parental leave.

8. Personal / Carers / Compassionate Leave

Full time employees are entitled to up to 10 days of paid personal/carer's leave for each year of continuous service with the employer. Part time employees are entitled to a proportionate amount of leave based on their ordinary hours.

Personal leave is leave taken by an employee because they are not fit for work due to personal illness or injury.

Carer's leave is taken by an employee to provide care or support to a member of the employee's immediate family, or member of the employee's household who requires care or support because of personal illness or injury or an unexpected emergency affecting the member.

All employees (including casual employees) may take 2 days of unpaid carer's leave for each occasion requiring care or support for illness, injury or unexpected emergency of a member of an employee's immediate family or household.

Employees are entitled to 2 days of compassionate leave for each occasion where a member of the employee's immediate family or household contracts or develops personal illness that poses a serious threat to his or her life; sustains a personal injury that poses a serious threat to his or her life; or dies. Employees, other than casual employees, are entitled to be paid for any period of compassionate leave taken.

9. Community Service Leave

Employees are entitled to take unpaid leave for designated community service activities including volunteering with emergency services. Employees who take community service leave for jury duty are entitled to take leave to attend jury service. Employees on jury service are entitled to make up pay for at least 10 days of jury service leave. Make up pay is where the employer provides the employee with payment of the difference between their ordinary salary and the money the employee receives for performing jury service.

10. Supply of Fair Work Information Statement

Employers must provide each employee with the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

Activity 2

- a maximum – the most
- b annual – yearly
- c leave – time off work
- d termination – ending
- e redundancy pay – money you get when your job ends because the business does not need your position any more (for example because the company is closing or downsizing)
- f flexible – can be changed
- g long service leave – extra leave you get after 10 years working for one organisation (or payment if your job ends after working more than 7 years with the one organisation).
- h parental leave – leave you may get if you have a baby or adopt a child
- i compassionate leave – time allowed off work if someone in your family or household dies or is very sick
- j community service – time off for some types of work for the community eg: as a volunteer fire fighter
- k supply – giving someone something
- l statement – written information to explain
- m pro rata – part of what a full time employee receives
- n right to request – right to ask your employer

- o notice - how much warning employers have to give when your employment is ending
- p` payment in lieu – payment instead of

Activity 3

- a Employees can only be asked to work ... a maximum of 38 hours per week (plus extra hours if it is reasonable).
- b Employees are generally allowed to be away from work on a public holiday and still be paid ... if they normally work on that day.
- c Full time permanent employees are entitled to take four weeks ... of paid annual leave per year.
- d If a permanent employee is fired ... they could get up to 5 weeks' notice of termination (or payment in lieu) and, if termination is by redundancy, redundancy pay.
- e An employee may ask ... to change their working arrangements to care for their child (if the child is at school or younger or has a disability).
- f If an employee volunteers to fight a bushfire ... they may take the time off as community service leave.
- g If an employee has more than 10 years continuous service with one employer ... they are entitled to take a period of long service leave.
- h Employers must give all new employees ... a copy of the Fair Work Information Statement.
- i When a member of an employee's immediate family dies ... the employee is entitled to a period of compassionate leave.
- j When a baby is born ... the mother and the father may be entitled to take a period of unpaid parental leave.

Activity 4

For discussion. See the Fair Work Ombudsman website for further resources: www.fairwork.gov.au.