Casual workers' rights and employer obligations

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The statistics and experience of the Young Workers Legal Service (YWLS) show that enquiries surrounding rights of casual employment frequently arise. We unfortunately hear recurring stories of employers exploiting their casual employees in addition to failing to fulfil basic obligations as prescribed by industrial legislation. With a rise in casual employment, it is crucial that employees understand what their rights are and what obligations their employers owe.

The YWLS provides free information, advice and representation to young workers in relation to industrial issues. Enquiries arising from casual employment arrangements make up the majority of our cases with issues ranging from underpayments to unfair dismissals and discrimination.

Casual work is not ongoing in nature and while employees hired on a casual basis may work the same hours as a permanent part-time employee, casual workers are not guaranteed set hours or consistent work on set days. Unlike permanent workers, casual employees are additionally not entitled to other benefits of permanent engagement such as annual leave and sick leave. So what are the entitlements of a casual worker?

One of the dominant issues facing casual employees is underpayment. An underpayment of wages often arises when workers are not paid their minimum entitlements under industrial instruments such as awards or enterprise bargaining agreements. The award which is applicable to you will depend on your occupation or industry while some workplaces are governed by enterprise bargaining agreements which are specific to that particular set of employees.

Awards set minimum pay rates for all classifications of employees, including casuals. Given the nature of casual work is not permanent, casual employees are entitled to an additional “casual loading” which is typically 25% above the minimum hourly rate. This is theoretically designed to compensate for the inherent uncertain nature of casual employment as well as for the fact that casual employees do not have entitlements to various forms of leave.

Additionally, casual employees may also be entitled to penalty rates for weekend or late night work. It is important to remember that laws are obligations, not suggestions. In our experience we often see examples of employers requiring casual employees to sign agreements which effectively state “we don’t pay penalty rates here” or “you are not entitled to penalty rates” and these are often incorrect and unlawful.

Employers are also obliged to provide pay slips, containing specific details including information on your rate of pay and hours worked, within one working day of making a payment to you. There are potential consequences to your employer if these basic obligations are not met.

A further issue we often face at the YWLS is unpaid trial shifts. This is a grey area in industrial law but the common consensus is that the duration of an unpaid trial must only be what is reasonably required for the prospective employee to briefly demonstrate their skills relevant to the role. Accordingly, depending on the nature of the role, if your employer requires you to work an extended amount of time unpaid, or multiple “trial” shifts, then you are entitled to be paid for this work.

Many casual employees are also unaware of their rights to long service leave. While this entitlement varies from state to state, in South Australia casual workers are entitled to accrue long service leave with payment based on weekly hours worked. This entitlement can only be accessed when the worker has reached a minimum of 10 years of service. Alternatively, if the employment ends after seven years of service, and the reason for cessation is not serious and wilful misconduct, then the worker is entitled to payment in lieu of taking this leave.

There is also a myth that casual employees can be sacked without recourse. This is incorrect as casuals are in fact protected from unfair and unlawful dismissals. Once a casual has worked on a regular and consistent basis for at least six months in a business with 15 or more employees, or 12 months in a business with less than 15 employees, then they are eligible to make an application for unfair dismissal. Once the eligibility hurdle is overcome, you then need to assess the issues surrounding the dismissal to determine if it was harsh, unjust or unreasonable. This includes looking at whether the dismissal related to the person's capacity or conduct, and additionally whether performance warnings were ever issued.

Likewise, if a casual employee is dismissed for a prohibited reason, such as temporary absence due to illness, or for exercising a workplace right, then they are eligible to make an application alleging unlawful dismissal, or otherwise known as general protections. This is regardless of the duration of their employment. For example, if a casual employee is terminated for raising with their boss the workplace right of not getting paid correctly, then they have an argument for unlawful dismissal. If you believe that you have been unfairly or unlawfully dismissed, then you must lodge your application within 21 days.

Casuals additionally have the right to work in a safe workplace and as such, Occupational Work, Health and Safety laws apply to all employees. Furthermore, if you are physically or psychologically injured in the workplace, you may also be entitled to the benefit of workers compensation remedies designed to assist you in returning to your pre-injury duties.

Casual employment also does not prevent someone from accessing state and
federal laws regarding anti-discrimination and sexual harassment. Therefore, if an employee endures sexual harassment within the workplace, or is discriminated against on a protected ground such as age, sex, sexual orientation or religion, then they still have the right to seek remedies for these unlawful acts.

So what can you do to protect your rights and avoid exploitation? Firstly, it is recommended that you become familiar with what your rights are. This involves finding out what award covers your industry or occupation, and the subsequent minimum rates of pay applicable to you. You can find this information through the Fair Work Ombudsman website, which has useful and easy to use pay and other entitlement calculators and tools. If you are asked to sign an individual agreement, take your time to read all the asserted terms and conditions. It is important that you compare these conditions to the minimum standards prescribed by industrial law and awards to make sure that overall you are better off.

Given the nature of casual employment, many workers feel as though they have to be at the beck and call of their employer in order to keep getting work. It is important that you are clear with your employer from the beginning about your availability and commitments to avoid conflict down the track. Furthermore, if you have upcoming events which you require time off for, it is important to notify your employer as soon as possible to enable them to make alternative arrangements.

Finally, it is important to keep copies of all your pay slips and any time and wage records. Also keep anything that you sign concerning your employment as this will make it easier to work out any potential employment issues.

If you require any further information or advice about your employment, you can contact the Young Workers Legal Service on 8279 2233.

Clerkships, work experience & working for free

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It is a requirement of admission to practice that a lawyer undertakes a vocational placement. Equally, for law firms, government agencies and other organisations, working with students who are undertaking their studies can provide both a valuable resource and also an introduction to a potential future employee.

However, the Fair Work Act 2009 (Cth) permits unpaid work only when that work is attached to a specific course that the person is undertaking or, if it is clear that no employment relationship is created by the work being done.

For law students, in order to be admitted as a practising solicitor, candidates must complete a minimum of 90 hours workplace experience, being supervised paid or unpaid work in a law firm or in law-related work. Under the Fair Work Act, students completing such vocational placements are not considered to be employees and therefore are not entitled to the minimum wage nor other entitlements provided under the Fair Work Act. Some clerkships or work arrangements are paid but many are not.

In other degrees, there is no defined requirement that a work placement be undertaken as a requirement of either the course or a professional body. However, many students actively seek out work experience in order to improve their applied knowledge and future employment prospects. It can be an expectation from prospective employers that students have undertaken an internship in the past.

When unpaid work is done outside a particular course requirement, it will be legitimate unpaid work when there is no employment relationship created.

When unpaid work is done outside a particular course requirement, it will be legitimate unpaid work when there is no employment relationship created. Some indicators of this are that the period of work is reasonably short (say, around 1 to 2 weeks), that there are clear learning benefits or outcomes for the unpaid worker, there is direct supervision and that the main benefit is to the student and not the company.

In June this year, a Sydney-based media company was fined over $270,000 for its practice of engaging in extended unpaid internships for student, including requiring one student to undertake 180 hours of unpaid work, including office cleaning. Most of the work done was not related to the student's Events Management course.

Regardless of the reason why a student is seeking work experience and whether paid or not, health and safety obligations will be owed to the student by the business. This also means that students need to take reasonable care for their health and safety and that of others while they are at work.