



# AED Legal Centre

Human Rights for  
employees with a disability:

Does the justice system get it right?

Funded by the Australian Government through  
the Department of Families, Housing, Community Services and Indigenous Affairs



# AED Legal Centre

## AED Legal Centre provides:

- ❑ Individual legal advocacy in employment or education where the issue is linked to a disability
- ❑ Training in disability discrimination and employment law
- ❑ Projects aimed at increasing access to employment, education and/or training
- ❑ Provide Information to: employees, employers, disability professionals, government, school principals and universities
- ❑ Provide hands-on opportunities through student placement or as volunteers for students to learn about human rights issues either during the day or evening service.



# AED Legal Centre

## Aims

- (a) Protect and advance the human, civil and legal rights of persons with a disability;
- (b) Empower persons with a disability who experience discrimination or disadvantage in the workplace or through education;
- (c) Advocate for the inclusion and participation of persons with a disability in employment and education; and
- (d) Increase community awareness and promote better community attitudes towards persons with a disability.



# AED Legal Centre

## How do we achieve our aims?

- Negotiate workplace solutions with employers, employees & HR Professionals
- Negotiate solutions for students with disability with education providers
- Educate people with a disability about their rights
- Draft complaints of discrimination or unlawful dismissal
- Provide legal representation to people with disability in a number of jurisdictions



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## Supported Employment

Employment provided by Australian Disability Enterprises (ADE's) formerly known as Business Services. ADEs are commercial enterprises providing employment to people with disabilities in the following circumstances:

- (a) Employment at or above the relevant award wage is unlikely;
- (b) Substantial ongoing support is required by the person to obtain or retain employment, due to the nature of their disabilities



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## Priorities

- (a) Unlawful termination of employment
- (b) Jobs in Jeopardy
- (c) Poor working conditions and/or entitlements
- (d) Bullying or harassment being experienced in the workplace, as a consequence of a person's disability
- (e) Wage assessments under the Business Services Wage Assessment Tool (BSWAT) or Supported Wage System (SWS)



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## Assessing wages under the BSWAT

$$\frac{\text{Competency Score (\%)} + \text{Productivity Score (\%)}}{2} = \text{Assessment Score (\%)}$$

$$\text{Assessment Score (\%)} \times \text{Applicable Hourly Rate} = \text{Wage (per hour)}$$

Under the Relevant Award



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*In the following core competency checklists, 'C' indicates competent, NYC indicates not yet competent and N/A indicates it is not applicable.*

<b>FOLLOW WORKPLACE HEALTH AND SAFETY PRACTICES</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<i>Conduct Work Safely</i>	
• Protective clothing or equipment is identified and used appropriately	NYC
• Basic safety checks on equipment are undertaken prior to operation	NYC
• Set up and organise work station in accordance with OH&S standards	NYC
• Follow safety instructions	NYC
• Manual handling tasks are carried out accurately to recommended safe practice	C
• Waste is disposed of safely in accordance with the requirements of the workplace and OH&S legislation	C
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<b>What do you do if you or someone else hurts themselves at work?</b>	C
<ul style="list-style-type: none"> <li>• Tell supervisor</li> <li>• Get help e.g. Nurse, ring ambulance, get first aid officer</li> <li>• Turn off machinery, remove from danger</li> </ul>	C
<b>Why do you use/wear protective clothing or equipment?</b>	C





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<b>COMMUNICATE IN THE WORKPLACE</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<i>Gather and respond to information</i>	
<ul style="list-style-type: none"> <li>• Instructions are correctly interpreted</li> </ul>	NYC
<ul style="list-style-type: none"> <li>• Clarification is sought from appropriate personnel when required</li> </ul>	C
<ul style="list-style-type: none"> <li>• Workplace interactions are conducted in a constructive manner</li> </ul>	C
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<b>What work have you been asked to do today?</b> <ul style="list-style-type: none"> <li>• Clarify work requirements with supervisor</li> </ul>	C
<b>In what order should the work be completed?</b> <ul style="list-style-type: none"> <li>• Clarify work requirements with supervisor</li> </ul>	C
<b>What do you do if you are unsure about what work needs to be done?</b> <ul style="list-style-type: none"> <li>• Clarify with appropriate person</li> </ul>	C
<b>What workplace meetings do you attend?</b> <ul style="list-style-type: none"> <li>• OH&amp;S</li> <li>• Work performance/review/Individual Employment Plan</li> <li>• Work group/staff meetings</li> <li>• Union meetings</li> </ul>	C
<b>What are these meetings for?</b> <ul style="list-style-type: none"> <li>• Worker to describe role and function of different meetings</li> </ul>	C



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COMPETENCY ASSESSMENT RESULTS		
Code	Competency Name	Competency
CORE	Follow workplace health and safety practices	Not Yet Competent
CORE	Communicate in the work place	Not Yet Competent
CORE	Work with others	Not Yet Competent
CORE	Apply quality standards	Not Yet Competent
RTF1004A	Support gardening work	Not Yet Competent
<b>Total number of competencies achieved by worker</b>		<b>0 Out of 8 = 0.00%</b>

PRODUCTIVITY ASSESSMENT RESULTS				
Description of task	Worker Average	Comparator Average	Time Weight %	Productive Capacity %
<i>Time taken in seconds to mow a 5 by 10 metre square of grass with catcher on correctly.</i>	850.0000	540.0000	50.00	31.76
<i>The ability to perform the tasks on weeding, pruning, hedge trimming and general gardening tasks.</i>	50.0000	100.0000	50.00	25.00
<i>Task 3</i>	0.0000	0.0000	0.00	
<i>Task 4</i>	0.0000	0.0000	0.00	
<i>Task 5</i>	0.0000	0.0000	0.00	
<b>Productivity assessment result</b>				<b>56.76<sup>0</sup>%</b>



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## WAGE CALCULATION

Enter the relevant award to which the employee's role is best suited, and the most appropriate classification level within that award.

**Award:** AW841959

**Classification:** Grade 1

Applicable hourly rate = \$13.47 per hour

*To determine the assessed wage:*

$$\frac{(\text{Competency score \%} + \text{Productivity score \%})}{2} = 28.38\%$$

$$\text{Overall Assessment Score} \times \text{Applicable Hourly Rate} = \$ 3.82 \text{ per hour}$$

CRS Australia Assessor signature: 



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## Issues with the BSWAT

In order to receive a higher wage, a person with disability must be able to imagine and communicate a description of any aspect of their work or work environment. This is regardless of the impact of their disability and requires capacity for more abstract thinking.



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“If a wage is intended to represent the value of an employee to an employer, then the testing of competency is a legitimate element of assessing that value. An employee who understands workplace safety and can respond appropriately in an emergency situation requires less supervision than an employee who lacks those understandings.”

Nojin and Prior –v- Commonwealth of Australia

[2011] FCA 1066 [93]



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## The ‘all or nothing’ approach to competency

“If a standard of competency is set, it is legitimate to take the view that someone who does not reach that standard should not be credited with the competency. Being only partially right about issues like safety is not good enough...Although this method of assessment is not as generous to disabled employees (or indeed to any employees) as it might be, that does not lead to the conclusion that it is not reasonable to adopt it.”

Nojin and Prior –v- Commonwealth of Australia

[2011] FCA 1066 [96]



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## **Double Dipping of Competencies in BSWAT**

Supported Wage System (SWS) – Productivity Only

**BSWAT = Competency + SWS (Productivity)**

**Therefore, Competency is already inbuilt  
in any Productivity assessment**



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## Competency is already assessed in Productivity

“Instead of testing for competency, particularly by question and answer, [the Supported Wage System] would determine whether an employee had the necessary competency by observation. Instead of testing for competency, particularly by question and answer, [the Supported Wage System] is to determine whether an employee has the necessary competency by observation...In my view, there are problems with this approach. One obvious one is the possibility that the person being observed might not demonstrate competency. Following someone to see if they cross the road correctly, only to observe them being killed or seriously injured as a result of failing to follow correct procedures, is obviously an untenable approach.”

Nojin and Prior –v- Commonwealth of Australia  
[2011] FCA 1066 Paragraph 91





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<b>COMPETENCY ASSESSMENT RESULTS</b>		
<b>Code</b>	<b>Competency Name</b>	<b>Competency</b>
CORE	Follow workplace health and safety practices	Not Yet Competent
CORE	Communicate in the work place	Not Yet Competent
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CORE	Apply quality standards	Not Yet Competent
RTF1004A	Support gardening work	Not Yet Competent
<b>Total number of competencies achieved by worker</b>		<b>0 Out of 8 = 0.00%</b>



# AED Legal Centre

PRODUCTIVITY ASSESSMENT RESULTS				
Description of task	Worker Average	Comparator Average	Time Weight %	Productive Capacity %
<i>Mow lawn with push mower - see special arrangements for further detail.</i>	971.7500	491.5000	90.00	45.52
<i>Raking and disposing of leaves - see special arrangements for further details.</i>	50.0000	100.0000	10.00	5.00
<i>Task 3</i>	0.0000	0.0000	0.00	
<i>Task 4</i>	0.0000	0.0000	0.00	
<i>Task 5</i>	0.0000	0.0000	0.00	
<b>Productivity assessment result</b>				<b>50.52%</b>

## WAGE CALCULATION

Enter the relevant award to which the employee's role is best suited, and the most appropriate classification level within that award.

**Award:** AP841959

**Classification:** Grade 1

Applicable hourly rate = \$13.74 per hour

*To determine the assessed wage:*

$$\frac{(\text{Competency score \%} + \text{Productivity score \%})}{2} = 25.26\%$$

2

$$\text{Overall Assessment Score} \times \text{Applicable Hourly Rate} = \$ 3.47 \text{ per hour}$$



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## Supported Wage System Initial Wage Assessment Agreement

When completed this form must be sent by the employer to the Industrial Registrar at the following address :

Name	DEPUTY INDUSTRIAL REGISTRAR	
Address	GPO BOX 1994	
	MELBOURNE	
Postcode:	3001	Fax:

The undersigned parties agree:

to recommend a wage of:

%70 of the appropriate award or agreement rate for the relevant classification of work.

the name of the award or agreement which relates to the position is:

Drycleaning industry award 2000

the classification of the position within the award:

Group 4 others LEVEL E

the review date of the above wage rate is:

13/11/2009



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**Information for the Industrial Registrar**  
To be completed by employer

Assessment productivity %  
(from page 1)

Minimum hourly award or enterprise agreement rate for this position

Hours Employee will work per week

Employee's gross earnings per week at expected hours

Actual agreed Amount

A	B	C	D	E
70 %	\$ 14.75	8	\$ 82.60	\$ 82.60

*70% x 14.75 = 10.325*

To which Industrial Registrar will this form be sent? (e.g. Australian Industrial Registrar, Sydney):

[Empty box for Registrar name]

Date this form sent to Industrial Registrar:

1 / 1

Signature of employer

*B. Bruch*

Date

13 / 11 68

**Form completion:**

If required, original to be sent to the Industrial Registrar Copies have been provided to all signatories to the Wage Assessment Agreement and the employee's Provider of Australian Government Employment Services (PAGES) and union if required.



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## Alternative Perspectives

Willful and blatant disregard for an employee's rights

*Stevenson –v- Murdoch Community Services Inc*

[2010] FCA 648



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## Alternative Perspectives

“In my view, this is a case where a penalty should be imposed. The conduct was not innocent or inadvertent. It was a process which MCS admitted was unfair and morally reprehensible.”

*Stevenson –v- Murdoch Community Services Inc*

[2010] FCA 648 [114]



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## Alternative Perspectives

Willful and blatant disregard for an employee's rights

*Vickery –v- Assetta*

[2004] FCA 555



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## Alternative Perspectives

“I am in no doubt that the respondent terminated Mr Vickery’s employment because of his physical or mental disability. He did this when he discovered that he could no longer exploit Mr Vickery on account of his disabilities. At first the respondent exploited Mr Vickery’s work ethic and keenness to work by making him work long hours without appropriate pay. He probably thought that no one would know that he was exploiting Mr Vickery or that no one would believe Mr Vickery’s account of the long hours that he worked. When Mr Vickery’s mother and [his advocate] became involved things moved quickly. Within ten days, Mr Vickery’s employment came to an end. There is no suggestion that his employment was terminated because he could not perform his work... [this leads] me to conclude that Mr Vickery’s employment was terminated on account of his disabilities.”

Vickery –v- Assetta [2004] FCA 555 [13]





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## Alternative Perspectives

Where an employee has been placed in a situation of substantial disadvantage as a consequence of their disability

*Frank Kovacic –v- Cottage Cakes Pty Ltd t/a Cottage Cakes*

[2012] FWA 1999



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## Alternative Perspectives

Commissioner Ryan:

[17] “While there have been significant delays at various points since the date of dismissal it is clear that Ms Kovacic provided direct and relevant assistance to the Applicant to challenge the dismissal immediately after it happened.”

[21] “In the present matter there is much more than “mere ignorance” in the case of the Applicant. The delay in this matter is not “on account of ignorance of the statutory time limit” but is on account of the intellectual disability of the Applicant coupled with the several difficulties encountered by his mother in assisting him over a period of time and ultimately the difficulty AED Legal Centre had in getting instructions from and information from a client with an intellectual disability.”

*Kovacic –v- Cottage Cakes* [2012] FWA 1999



# AED Legal Centre

**The difference between AED Legal Centre  
and other Community Legal Centres in  
Australia when representing clients**

**Advocacy, Support & Legal Representation**



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## Costs – Fair Work Act

Section 570: Costs only if proceedings instituted vexatiously etc

(2) The party may be ordered to pay the costs only if:

- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- (c) the court is satisfied of both of the following:
  - (i) the party unreasonably refused to participate in a matter before FWA;
  - (ii) the matter arose from the same facts as the proceedings.



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## **Is Fair Work really a no costs jurisdiction?**

Cugura –v- Frankston City Council (No 2)

[2012] FMCA 530



# AED Legal Centre

## **Contact us**

**Suite 4 Level 5, 2-26 Elizabeth Street, Melbourne 3000**

**Tel: (03) 9639 4333**

**Fax: (03) 9650 2833**

**Email: [noni.lord@aed.org.au](mailto:noni.lord@aed.org.au)**