

# Factsheet No.3

## Underpaid at work



This factsheet looks at what you can do if you are being underpaid at work.

If you are:

- not being paid properly or not being paid at all
- not being paid for working late at night or on weekends (penalty rates), or
- not being paid for entitlements such as annual leave, sick leave, long service leave or redundancy pay

you have the legal right to recover what you are owed.

### What you need to do

**Step 1.** Work out exactly how much you are owed

**Step 2.** Raise the issue with your employer

**Step 3.** Write a letter of demand

**Step 4.** Make a complaint to the Fair Work Ombudsman; and/or

**Step 5.** Make a claim at court.

### Step 1: Work out exactly how much you are owed

- a) Work out your correct rate of pay. You can do this by checking your contract of employment or how much you should be paid under your Award, if you are covered by an Award. An Award sets out how much you should be paid. The Fair Work Ombudsman (FWO) can help you check your Award and your correct base rate of pay, at [www.fairwork.gov.au](http://www.fairwork.gov.au) or by calling 131394.
- b) Work out how much you have actually been paid. You can do this by checking your payslips, group certificate and bank statements.
- c) Work out the difference between the amount that you should have been paid, and the

amount that you were paid. The difference is amount that you are owed as an underpayment.

There is a sample underpayment calculation in the FWO's Small Claims Guide at: <https://bit.ly/fwo-small-claims>. If you are having difficulty working out your underpayment, you may wish to seek legal advice.

### Step 2: Raise the issue with your employer

Speak with your employer about the underpayment and ask for the problem to be sorted out. Often, an underpayment is the result of an administrative error. Your employer may have not intended to underpay you; they may have made a genuine mistake. In this situation, talking to your employer will often be enough to resolve the problem.

Take notes! ✍ It is a good idea to make a note about any discussions that you have with your employer about underpayment, including the date on which you spoke about the issue, the name of the person you spoke to, and what was said.

If speaking to your employer doesn't work, you may need to consider Step 3.

### Step 3: Write a letter of demand

Write a letter of demand to your employer setting out the amount you are owed and how that was calculated. Ask that your employer pay you the amount owing within a reasonable period of time (usually 14 days), and let your employer know the steps that you will take if the payment is not made (see below). A template letter of demand is available in the FWO's Small Claims Guide.

#### **Step 4: Make a complaint to the Fair Work Ombudsman**

If your employer refuses to pay the amount you are owed, you can ask the FWO for help: <https://bit.ly/fwo-how-we-help>. The FWO may assign a workplace inspector to investigate your complaint, and help you work through the complaints process.

#### **Step 5: Make a claim in Court**

You can also apply to a court to recover your money. The Federal Circuit Court of Australia and the Local Court of New South Wales both have a small claims procedure to help people seek underpayments using a relatively informal and quick process.

#### **Federal Circuit Court and Federal Court**

Small Claims Division: If the amount that you are claiming is an entitlement under an Award or under the *Fair Work Act 2009* (Cth), and it is less than \$20,000, you may be able to recover the amount owing by bringing a small claim in the Federal Circuit Court. The FWO's Small Claim Guide may offer you guidance in bring such an application.

General Division: If the amount that you are claiming is more than \$20,000, you will be unable to use the small claims procedure. Your options will be to bring a general application to the Federal Circuit Court or Federal Court of Australia. The process for bringing these claims can be more complex and the filing fee is more expensive than the fee in the small claims division.

For claims brought under the *Fair Work Act 2009* (Cth) in both the Small Claims Division and the General Division, if your claim is unsuccessful, the court will only order you to pay the legal costs of the other side in exceptional cases.

#### **NSW Local Court and other State Courts**

Small Claims Division: If the amount that you are claiming is an entitlement under a contract only, and it is less than \$10,000, you can bring a small claim in the NSW Local Court. If your claim is unsuccessful, there are limits on the amount of costs that can be awarded against you. <http://www.localcourt.justice.nsw.gov.au/>.

General Division: If the amount that you are claiming is more than \$10,000 (for a contractual entitlement) you will need to make an application to the General Division of the Local Court, the District Court, or the Supreme Court. If you make such a claim and are unsuccessful, you can be ordered to pay your employer's legal costs, which can be **substantial**. It is therefore very important that you seek legal advice before you take this type of action.

**IMPORTANT:** you have **6 years** to bring your unpaid wages claim from the date you were underpaid.

#### **Where can I get Legal Advice?**

The information contained in this fact sheet is general information only. It is not a substitute for getting legal advice about your individual situation. If you want to take action to recover an underpayment, we recommend that you get legal advice, by contacting:

- Redfern Legal Centre on 9698 7277 or online at <https://bit.ly/free-legal-RLC>. We help international students and can arrange an interpreter to assist
- LawAccess NSW can help you find your local CLC. Go to [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au) or call 1300 888 528.

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*This factsheet is not a substitute for legal advice. If you have a problem, please seek legal advice from your local community legal centre.*