



Your Levy at Work

## Questions and Answers from Dairy NSW *Unpacking the ESKi* workshops

Sources: [People in Dairy website](#) and [ESKi](#)

24 Sep 2015 Upcoming Public Holidays

18 Sep 2015 Employment Webinar Series

15 Sep 2015 DairyBase Farmer Webinar: 25 September 2015

26 Aug 2015 Overtime and Ordinary Hours rosters explained



<p><b>A PEOPLE APPROACH</b></p> <p>Engaging people People efficiency People strategy</p> 	<p><b>FARM SAFETY &amp; POLICIES</b></p> <p>Farming system Operating procedures Safety &amp; Policies</p> 	<p><b>RECRUITMENT</b></p> <p>Attracting employees Selection process Induction</p> 	<p><b>EMPLOYMENT &amp; REWARD</b></p> <p>Pay rates The law Agreements &amp; Entitlements</p> 
<p><b>PERFORMANCE &amp; EDUCATION</b></p> <p>Appraisals Retention Training &amp; Mentoring</p> 	<p><b>WORKING TOGETHER</b></p> <p>Teamwork Communication Positive culture</p> 	<p><b>PLANNING FOR THE FUTURE</b></p> <p>Career Planning Transition Succession &amp; Share farming</p> 	<p><b>EMPLOYEES</b></p> <p>Getting Started Navigating the dairy industry Employees from overseas</p> 

### EMPLOYMENT AND REWARD

**Question:** Do [Fair Work](#) have different information than the [Pastoral Award 2010](#)?

Answer: Fair Work Australia will interpret the appropriate award for a given situation. This is why it is better to call the State farming organisations.

**Question:** Where do I get information around group supply workers to farms?

**Comment:** Be very careful of labour hire firms in the farming industry – this could have the potential for the industry to be ill reputed. The basic rule is if you are paying the labour hire firm a cheap rate, then it is highly unlikely that they will be remunerating the employee properly.

## EMPLOYING SOMEONE

**Question: What is the practice and subsequent legalities around “casual” probation prior to commencing a fulltime position even though the hours are set and constant?**

Answer: Workers engaged in a dairy farm business need to be categorised as either: 1. Full time permanent employee, 2. Part time permanent employee or 3. Casual employee. The award states that: A full-time employee is an employee who is engaged to work 38 hours per week, A part-time employee is an employee who is engaged to perform less than the full-time hours of 38 per week at the workplace, has reasonably predictable hours of work; and receives, on a pro rata basis equivalent pay and conditions to those of full-time employees who do the same kind of work and an employee who does not meet the definition of a part-time employee and who is not a full time employee will be paid as a casual employee. If you are considering engaging a casual employee, have a read through the FAQ sheet entitled “What is the difference between part time and casual workers?” to determine if your employee really is a casual employee. As such there should be no “casual” probation.

**Comment: There has been a recent case which has relaxed the interpretation of permanent casual-type arrangements and there may be further cases on this matter. Part time work can be casual which means the 152/4 overtime provision applies, of the part time overtime provisions which have it for all hours more than the agreed part time hours.**

**Question: Can someone be employed under two structures? eg. permanent part-time and casual?**

Answer: No – they must be engaged in a dairy farm business as either: Full time permanent employee 2. Part time permanent employee or 3. Casual employee

The award states that:

- A full-time employee is an employee who is engaged to work 38 hours per week
- A part-time employee is an employee who is engaged to perform less than the full-time hours of 38 per week at the workplace, has reasonably predictable hours of work; and receives, on a pro rata basis equivalent pay and conditions to those of full-time employees who do the same kind of work
- An employee who does not meet the definition of a part-time employee and who is not a full time employee will be paid as a casual employee. If you are considering engaging a casual employee, have a read through the FAQ sheet entitled “What is the difference between part time and casual workers?” to determine if your employee really is a casual employee, a copy is included with these notes.

## PAYROLL

**Question: Is there a maximum or minimum requirement for pay intervals?**

Answer: The *Pastoral Award 2010* allows for either a weekly pay interval or a fortnightly pay interval. Non-Award employees could be paid weekly, fortnightly or monthly.

**Question: Can a farm employee work a public holiday at x2 rate but just receive normal pay and a normal x1 payday off in lieu?**

Answer: Yes clause 26.2 allows substitution of another day.

**NOTE (7) PUBLIC HOLIDAYS. The National Employment Standards (NES) and the *Pastoral Award 2010***  
The NES provides for employees to be absent from work on specified public holidays.

Payment is the employee’s base rate of pay for ordinary hours of work.

Full-time employees are entitled to a paid day off for public holidays if they would normally work on that day.

Part-time employees are entitled to be paid for the hours they would normally work on public holidays. If they do not normally work on the day of the public holiday they are not entitled to public holiday pay.

The following days are public holidays for the NES:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- Queen's birthday holiday
- 25 December (Christmas Day)
- 26 December (Boxing Day)

If a State or Territory substitutes another day or declares an additional day, the employee is entitled to be absent on that day. If a day is substituted then this day becomes the public holiday for the purpose of working out entitlements and not the other day.

### **Substitution of other days**

The *Pastoral Award 2010* allows for employers and individual employees or employers and the majority of employees to agree to substitute an alternative day for the public holiday.

Award free employees can agree with employers to substitute public holidays.

Enterprise Agreements can also provide for substitution of public holidays.

### **Requests to work on public holidays**

An employer may request an employee to work on a public holiday if the request is reasonable.

The request may be refused if it is unreasonable or the employee's refusal is reasonable. The NES provides list of factors to be taken into account when determining the reasonableness of a request or refusal.

### **Payment for working on public holidays**

Payment for working on a public holiday is an award entitlement which does not apply to non-award employees such as managers.

### **The *Pastoral Award 2010***

Work done on public holidays by farm and livestock hands is paid at the rate of double time.

## **LEAVE AND ENTITLEMENTS**

### **Question: What is the practice and subsequent legalities surrounding the paying out of annual leave?**

Answer: The *Pastoral Award 2010* does not provide for cashing out of annual leave. Therefore employees can only cash out accrued annual leave if it is a term of a formal enterprise agreement. Non-award employees can agree with the employer to cash out annual leave. There is an agreement on the TPID site called Elect to Cashout Annual Leave. It outlines the correct practice for cashing out annual leave for non-award employees.

**Comment: That is correct; at this stage no award employee can lawfully cash out annual leave; BUT this may change in the near future in the current 4-year review of awards.**

### **Question: Is superannuation paid to employees whilst they are on a workers compensation claim?**

Answer: No superannuation is not paid to employees whilst on a workers compensation claim as they are not performing their work duties because workers comp is NOT ordinary time earnings. If they are say for example on 'light duties' then it is payable as this makes it ordinary time earnings.

**Question: Is there a difference in rate of pay between being on sick leave and workers compensation for the same injury and associated issue?**

Answer: They receive the pay they would have received had they been working.

**Question: Is there any differences in the award for parental leave entitlement between male and female staff?**

**A Refer to NOTE (10) PARENTAL LEAVE:** The federal parental leave laws contained in the National Employment Standards (NES) apply to all employers. Parental leave involves unpaid maternity leave, paternity leave and adoption leave. Parents cannot take parental leave at the same time except for a period of up to eight weeks in total. This period of concurrent leave may be taken in separate periods but unless the employer agrees, each period must not be shorter than 2 weeks. The concurrent leave must not start before the date of birth of the child or the day of placement of the child if the leave is adoption leave unless the employer agrees. The entitlement exists once an employee has worked for the employer for 12 months. It also applies to certain long-term casual employees. The laws about parental leave are complex and there are specific requirements for notification. Employers should seek legal advice or advice from their local state farming organisation if an employee becomes eligible for parental leave.

For further information go to the Engagement and Reward section of The People in Dairy website [www.thepeopleindairy.org.au](http://www.thepeopleindairy.org.au)

**Question: Is there a notice period needed for requesting leave?**

Answer: There is no actual notice period for requesting leave – just by agreement and can be at times convenient to the farm business eg not during busy times. If an employee has accrued excessive leave then the farmer can require them to take it. In this case the notice period is not less than 4 weeks – see clause 23.5 of the *Award*.

**Question: Is long service leave payable for the deceased and is it paid at pro rata as well?**

Answer: Yes, it would be one of the entitlements that applied to the employee.

**Question: Do I have to pay 17.5% leave loading if holidays are taken in advance and before the month period it is actually completed?**

Answer: Annual leave loading is an award entitlement. There is no annual leave loading under the **National Employment Standards (NES)** but *The Pastoral Award 2010* requires payment of a 17.5% annual leave loading for all annual leave. Annual leave loading must also be paid when annual leave is paid out on termination.

**Question: Is annual leave paid off ordinary hours (base) or a standard 38-hour week?**

Answer: Annual leave is paid to award employees on the ordinary hours (38 hours per week) at the rate of pay the person is receiving at the time the leave is taken.

**NOTE (5) ANNUAL LEAVE** The National Employment Standards (NES) apply to all employment contracts as a minimum and the template enterprise agreement contains the NES terms. The *Pastoral Award 2010* contains the NES about annual leave. The *Pastoral Award 2010* applies to all national system employers in the dairy industry for all employees in the classifications set out in the award. (See note 4) Whilst the NES is a minimum, employers may wish to consider offering extra annual leave as part of a package.

**The NES & the *Pastoral Award 2010*** The National Employment Standards (NES) for annual leave is four weeks per year which accrues progressively throughout the year and from year to year. Annual leave must be paid at a rate which is no less than the base rate of pay for ordinary hours the employee is paid at the time of taking the leave. The four weeks are 38 hour weeks.

**Question: Is there loading on Long Service Leave?**

Answer: Long Service Leave is not Annual Leave, so there is no loading. See the [NSW state law](#) on long service leave.

**Question: Parental/Carers Leave: Should this appear on a payslip by law?**

Answer: Parental Leave is different from Personal/Carers Leave. Page 5 & 6 of the Payroll Section in the ESKi outline the information that must be on a payslip so that it conforms with the *Pastoral Award 2010*. While it is best practice to show an employee's leave balances on their pay slip, it is not a requirement. Employers need to tell employees their leave balance if they ask for it.

**Question: Do we pay leave loading on a day during leave which also falls on a public holiday?**

Answer: **Public holidays.** If a public holiday falls when an employee is on annual leave, the employee is taken not to be on paid annual leave on that day. Instead the NES about public holidays will apply and the employee will be entitled to be paid for the public holiday at the employee's base rate of pay for ordinary hours of work  
<<http://www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=16595>>

## **INDIVIDUAL FLEXIBILITY AGREEMENTS**

**Question: Is there a requirement pertaining to split shifts and fuel allowances?**

Answer: There is no requirement. However there is provision for payment of use of vehicle clause 17.2(b).

**Question: The issue of houses and rent – is it different for more isolated areas?**

Answer: The NSW residential tenancies laws may apply to accommodation on farms where the accommodation is not a part of the wider lease of the farming property. These laws lay down notice periods for ending the tenancy, whether bonds can be required and how much can be charged as well as rules regarding repairs and inspection and agreements with specific terms. Breaches of these laws attract fines.

Whilst residential tenancy laws can protect both the tenant and the landlord, the notice periods for ending the tenancy can be problematic when accommodation has been part of a remuneration package and an employee leaves as a result of their employment being terminated either with notice but particularly when dismissed summarily for misconduct. Notice periods will continue to apply (usually 60 days) and the only avenue the farmer will have to reduce this is to make an application to one of the tenancy tribunals on the grounds of hardship.

Residential tenancy laws do not usually apply where the tenancy is not 'for value' which means that no rent is paid for the accommodation. However, farmers should be aware that making accommodation a part of a formal workplace agreement where the accommodation is used as a part of the Better Off Overall Test (**BOOT Test**) may have the effect of making the tenancy 'for value' and the residential tenancy laws may then apply.  
<<http://www.thepeopleindairy.com.au/eski/ifa.htm#Boot?>>

For more information on NSW residential tenancies laws, visit NSW Department of Commerce  
<[http://www.fairtrading.nsw.gov.au/Tenants\\_and\\_home\\_owners.html](http://www.fairtrading.nsw.gov.au/Tenants_and_home_owners.html)>

**Comment: This is a fraught issue – no FBT if in a remote region – other issues like care of the house problematic and the question as to whether it should be a part of the contract of employment or separate and the need to show the employee that they are receiving a substantial benefit which does not show in their group certificate.**

## **TERMINATION**

**Question: Fair dismissal (or unfair) – How should you handle it if you have a family member who wants to return to the farm, or this to happen you need to let go an existing employee?**

LINK: [Putting Someone Off](#)

**Comment: This is actually a redundancy – you need to handle it very carefully and consider re-deployment to another position if available on the farm. This means that you offer any free position to the person even if you think that they will not want it. You also need to CONSULT as per clause 8 of the award if it is an award employee – failure to do either or both of these renders the redundancy an unfair dismissal. If you have 15 employees or less, you do not have to pay redundancy pay BUT you DO need to do the other things.**

**Question: Is it redundancy when there's a change in business structure and an existing staff member is taking on more work?**

LINK: [Putting Someone Off](#)

**Comment: You CAN split someone's role up amongst other employees and it will still be a redundancy.**

**Question: "Warning Letter" template in the ESKi - is there a First Warning Letter and a Record of Employee Warning? What are the number of warnings? In the ESKi template, it says three.**

Answer: Yes. All these templates can be downloaded from the People in Dairy website – [Termination](#).

The number of warnings depends on the situation. Good practice would suggest that the three warning process is reasonable. Read the [Small Business Fair Dismissal Code](#).

## **CONTACT US**

**Question - Who can be contacted at Dairy Australia for specific advice on the ESKi and People in Dairy website?**

Tracy Lloyd ([TLloyd@dairyaustralia.com.au](mailto:TLloyd@dairyaustralia.com.au)) or Sally Roberts ([SRoberts@dairyaustralia.com.au](mailto:SRoberts@dairyaustralia.com.au)) or 03 9694 3777

**Question - Besides Dairy Australia, which organisations give industrial relations and human resource services in the dairy industry?**

Most of the State Farmer Federations have industrial units. The contact for NSW Farmers Association is 02 9478 1000.