

Overview of LSL in A.C.T. Christian Schools¹

General Principles

Long Service Leave (LSL) is provided for generally by the *Long Service Leave Act 1976* (ACT) – the Act. Staff not covered by an award or agreement are only entitled to benefits in accordance with the Act, unless greater benefits are explicitly outlined in their contract.

You cannot ‘contract out’ (agree to waive or modify) of the requirements of the Act.² An award or agreement can, however, provide more advantageous benefits than the Act but not less (as is the case with the agreements we have covering many staff in our schools). The Act is applicable to all employees, defined to include full-time and part-time employees and a ‘casual employee’:

‘a person who is, from time to time offered regular and systematic employment on the basis that the offer of employment might be accepted or rejected and in circumstances where it could be expected by that person that further employment of the same type would or might be offered and accepted, but in respect of which there is no certainty about the period over which it would continue to be offered’.³

IMPORTANT NOTE: *The Act does not define ‘regular and systemic employment’. In considering this phrase under the Fair Work Act 2009 (Cth) the Commissioner noted that:*

- *What is important is whether the employment itself is regular and systematic as opposed to the hours/days of work being regular and systematic;*
- *Variable start/finish times and variable hours from one week/month to the next, will not necessarily mean that the employment is not regular and systematic;*
- *If there is a clear pattern or a roster for the hours/days worked, this would be strong evidence of regular and systematic employment. However, even where there is no pattern/ roster, evidence of regular and systematic employment can be established where:*
 - *the employer regularly offers work when suitable work is available at times when the employee has generally made themselves available; and*
 - *work is offered and accepted sufficiently often that it is no longer occasional or irregular;*
- *Working full-time over a lengthy period will point towards regular and systematic employment.*

Each situation will, of course, turn on its own facts, but regularly engaged casual teachers may well be caught within this definition

Ponce v DJT Staff Management Services Pty Ltd t/a Daly’s Traffic [2010] FWA 207

¹ Version: September 2022

² See s14 of the Act

³ See Dictionary in the Act

When is an employee entitled to LSL?

After completion of seven (7) years of continuous service and then at the completion of each year thereafter an entitlement to LSL vests with an employee (see below in relation to taking leave).⁴

It is important to note that the nature of the service is not relevant. Employment as full-time, part-time or a 'casual' for a year of continuous service all have the same effect for the purposes of LSL.

What is 'continuous service'

Continuous service, in relation to an employee, includes (i.e. **these count as service**):⁵

- a period of annual leave or long service leave; and
- a period of leave, not exceeding 2 weeks in any 1 year, taken because of illness or injury; and
- a period during which the service of the employee is interrupted or ended by his or her employer with the intention of avoiding the granting of long service leave; and
- for an employee who begins service with an employer within 1 year after the day the employee's apprenticeship, or an approved training contract, with the employer ends—the period of the apprenticeship or approved training contract.

Service will be continuous despite the following interruptions which do not break the continuity of service but **do not count as service**:⁶

- an interruption caused by an industrial dispute if the employee returns to the service of the employer in accordance with the terms of settlement of the dispute;
- a period when an employee is stood down by his or her employer because of slackness of trade if the employee is re-employed by the employer within 6 months after the day the employee is stood down;
- a period, other than a period of leave mentioned above, when the employee is absent with the employer's leave;
- a period when the employee is absent because of injury arising out of or in the course of the employment;
- any other interruption, including ending of service by the employer if the employee returns to the employer's service within 2 months (or longer if the interruption is caused by the seasonal nature of the work) after the day the service is interrupted;
- service by the employee as a member of the Defence Force, other than as a member rendering continuous full-time service;
- a period of service when the employee is temporarily outside the ACT if the service would be continuous service if the employee were inside the ACT.

⁴ See s3 of the Act

⁵ See Dictionary in the Act

⁶ See 2G of the Act

Staff covered by the current non-teaching staff agreement also have the period of non-term weeks during which the employee is stood down taken into account as a period of service in calculating continuous service.

How much leave is an employee entitled to?

An employee not covered by an award or agreement that provides a higher rate accrues LSL at the rate of 1/5th of a month for each year of service.⁷ Current agreements covering teaching and non-teaching staff provide for greater accrual rates. As noted above whether service is full-time, part time or 'casual' is not relevant in determining the length or period of an employee's leave entitlement.

When should leave be taken?

Leave should be taken 'as soon as practicable, having regard to the needs of the employer's business, after the employee becomes entitled to the leave' or 'if the employer and employee agree - at another time or times'.⁸

The Act also provides⁹ that the school commits an offence if leave is not taken as outlined above when an employee becomes entitled to 4 weeks or more of leave. This would be, using the accrual rates in the Act, after they have completed seven (7) years of service then after the completion of each subsequent period of five (5) years. Given that the onus is on the School to ensure that this occurs if the school agrees with an employee to defer leave this should be documented in writing to avoid potential liability for an offence. The SRS Sample LSL Documents have a template for this.

A school can direct an employee to take LSL by giving at least 60 days notice (in writing). Schools are encouraged to take an active approach to managing LSL as part of their WH&S responsibilities for staff health and the prudent administration of the school's LSL liabilities.

Payment for the period of leave

For part-time or casual staff who were previously employed full-time but in the two (2) years prior to becoming entitled to LSL was employed either part/time or casual, payment is made at an annual rate equivalent to the salary or wages for the previous five (5) years divided by five (5).¹⁰

Other part-time or casual staff are paid at a rate determined by multiplying the average number of hours worked each week by the employee during the period of 12 months immediately preceding the day on which the employee became entitled to the leave by the ordinary remuneration of the employee on that day. Of course, for staff with constant hours over this time this will equate to the current rate.¹¹

⁷ See s4 of the Act

⁸ See s6 of the Act

⁹ See s6 of the Act

¹⁰ See s7(3) of the Act

¹¹ See s7(2) of the Act

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In all other cases staff will receive as payment for the period of leave 'an amount equivalent to the ordinary remuneration the employee would have received in respect of the period of leave if he or she had not taken the leave'.¹² This would mean that if the period of leave straddles a salary increase that increase must be reflected in the payment for the LSL.

'Ordinary remuneration' is defined in the Act to include:¹³

- the salary or wages payable to the employee; and
- any allowances payable to the employee in respect of skill (including position of responsibility)^{14,15}, qualifications, board and lodging; and
- any amounts payable to the employee under a bonus, performance pay or incentive scheme, being amounts that are usually paid to the employee with his or her salary or wages; and
- where the employee is provided with board and lodging by his or her employer, an amount equal to the value of that board and lodging.

and to exclude:

- payments in respect of overtime; or
- payments at penalty rates of pay; or
- allowances which, under an award or agreement, are not to be taken into account in determining a rate of remuneration in respect of overtime.

Arguably 'ordinary remuneration' may not be what staff expect as their ordinary remuneration.

When must payment for LSL be made?

Payment for the period of LSL must be paid:¹⁶

- in advance for the whole period of the long service leave; or
- at the same times as the employer would have paid the employee if the employee had not taken the leave and, if the employee asks for it, by cheque posted to an address the employee nominates; or
- if the employer and the employee agree - in another way.

¹² See s7(1) of the Act

¹³ See Dictionary in the Act

¹⁴ Whilst the ACT Teaching Staff clause 15 links the POR to the performance of the duties rather than the teacher, and whilst these responsibilities cannot be performed when on LSL, updated legal advice directs that these allowances form part of the employee's ordinary rate on the prescribed date and therefore are included in the rate paid to the employee when on LSL.

¹⁵ Nothing in clause 29 of the ACT Christian Schools Teaching staff MEA varies the amount that must be paid to a teacher on long service leave under the *Long Service Leave Act 1976 (ACT)* (ACT Act). Therefore, teachers who are covered by the ACT Teaching Staff MEA are entitled to be paid their 'ordinary remuneration' as defined by the ACT Act.

¹⁶ See s8 of the Act

Once again, the school commits an offence if it does not adhere to these requirements. Any agreement for an alternative payment method should, therefore, be documented in writing and retained by the school.

What if a public holiday falls during the period of leave?

The period of leave is extended by one day for each public holiday.¹⁷

What if a staff member is sick during the period of leave?

This is irrelevant, similar in many ways to a staff member being sick on a weekend or public holiday¹⁸. There is no provision in the Act to allow for 're-crediting' of LSL.

What happens if staff leave before becoming entitled to LSL?

If staff leave before having completed 5 years of service no LSL is payable. Staff covered by the current agreements who have completed 5 years of service will get a pro-rata payment under those agreements.

Staff not covered by the current agreements who have completed five (5) years of service (but less than seven (7) years of service will get a pro-rata payment under the Act when:

- The employee terminated the employment because of illness or incapacity or a domestic or other pressing necessity of such a nature to justify the termination;
- The employee terminated the employment upon or after reaching 65 years of age; or
- The employer terminated the employment for any reason other than serious and wilful misconduct.

Can LSL be 'cashed out' rather than taken as leave?

The Act does not allow LSL to be 'cashed out' – it is intended and required to be taken as leave.

The current agreements covering many teaching and non-teaching staff in Christian schools provide for a limited 'cashing out' of entitlements in excess of those that would be applicable under the Act and in accordance with the terms of those agreements.

Is LSL 'portable' between employers?

The Act does not allow LSL to be transferred between employers. Informal arrangements between employers may give rise to unintended taxation consequences for staff and should be avoided.

The current agreements covering many teaching and non-teaching staff in Christian schools provide for a form of portability in accordance with the terms of those agreements.

¹⁷ See s9 of the Act

¹⁸ Fair Work Act 2009 (Cth) s98

Portable LSL Scheme for child care workers

The ACT Government has introduced a portable LSL Scheme through the *Long Service Leave (Portable Schemes) Act 2009* (ACT) which applies to the 'community sector industry', which is defined to include 'the industry of providing child care services' – potentially impacting Christian schools.

The Act is vague on what constitutes the 'child care industry'. Unfortunately, the Long Service Leave Authority does not have any interpretation making powers under the Act – so it is limited in what it can do to provide greater clarity. Against that background the current practice of the Authority is to exclude from the 'child care industry' any early learning program involving the delivery of a structured curriculum. On that view:

- Teachers working in an early learning context would be excluded;
- 'Childcare Assistants', Directors, Room leaders etc when involved in a structured program would be excluded;
- Before and After School Care and Vacation Care would be included;
- Childcare from babies to toddlers would be included.

What is payable for child care workers under the Portable LSL Scheme

Under the portable LSL Scheme LSL accrual commences immediately and employees receive long service leave upon 5 years of recognised service. Recognised service is deemed to be 365 days for each year, applying the following formula

$$\text{Weeks} = 0.8667 \times \text{Recognised service} / 365.$$

LSL cannot be taken for less than 2 weeks, and the employer must grant the accrued leave formalised by a written statement of when the leave starts and ends. This statement needs to be provided 2 months before the leave is to be taken, unless agreed otherwise with the employee.

Payments for LSL are determined by the highest of the weekly average of the employee's ordinary remuneration for each of the following periods (that is, whichever of the following yields the highest average is the one applied)

- The most recent 2 quarters before the designated day
- The most recent 4 quarters before the designated day
- The most recent 20 quarters before the designated day

The following formula is applied

$$0.8667 \times D / 365 \times R$$

D – number of days of service to which payment relates

R – highest of the weekly average of ordinary remuneration.

IMPORTANT NOTE: *This overview is in the nature of general information and is not a substitute for professional advice. Such advice should be sought at the time of making a decision in relation to the matters covered in this document.*