

RE: sample of letter to AAG

Lena Muscat

Sent: Friday, 20 March 2020 5:08 PM

To: Rita Milan [rita.milan@mtansw.com.au]

Cc: David Berlusconi

I think you have but I will discuss with David regarding all the information you have just provided and if need be I will give you a call early next week
Thank you so much Rita.
Have a great weekend.

Kind regards

Lena Muscat

Payroll Manager

Australian Automotive Group

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From: Rita Milan [mailto:rita.milan@mtansw.com.au]

Sent: Friday, 20 March 2020 4:52 PM

To: Lena Muscat

Cc: David Berlusconi

Subject: RE: sample of letter to AAG

Hi Lena,

I will firstly address the issue regarding the record of actual hours worked which I disagree with the advice of the Fair Work Ombudsma
Reg 3.46 of the Fair Work Regulations 2009 states payslips must specify the following:

FAIR WORK REGULATIONS 2009 - REG 3.46

Pay slips--content

(1) For [paragraph](#) 536(2)(b) of the Act, a pay slip must specify:

- (a) the employer's name; and
- (b) the employee's name; and
- (c) the period to which the pay slip relates; and
- (d) the date on which the payment to which the pay slip relates was made; and
- (e) the gross amount of the payment; and
- (f) the net amount of the payment; and
- (g) any amount paid to the employee that is a bonus, loading, allowance, penalty rate, in separately identifiable entitlement; and
- (h) on and after 1 January 2010--the Australian Business Number (if any) of the employee

(2) If an amount is deducted from the gross amount of the payment, the pay slip must also include the number, of the fund or account into which the deduction was paid.

(3) If the employee is paid at an hourly rate of pay, the pay slip must also include:

- (a) the rate of pay for the employee's ordinary hours (however described); and
- (b) the number of hours in that period for which the employee was employed at that rate;
- (c) the amount of the payment made at that rate.

(4) If the employee is paid at an annual rate of pay, the pay slip must also include the rate as to which the payment relates.

(5) If the employer is required to make superannuation [contributions](#) for the benefit of the employee,

(a) the amount of each contribution that the employer made during the period to which the name and number, of any fund to which the contribution was made; or

(b) the amounts of [contributions](#) that the employer is liable to make in relation to the period, the name, or the name and number, of any fund to which the [contributions](#) will be made.

Additionally, Reg 3.33 and Reg 3.34 of the Fair Work Regulations 2009 state with relation to pay and overtime records:

FAIR WORK REGULATIONS 2009 - REG 3.33

Records--pay

- (1) For [subsection](#) 535(1) of the Act, a kind of employee record that an employer must make is:
- (a) the rate of remuneration paid to the employee; and
 - (b) the gross and net amounts paid to the employee; and
 - (c) any deductions made from the gross amount paid to the employee.
- (2) If the employee is a casual or irregular part-time employee who is guaranteed a rate of pay worked, the record must set out the hours worked by the employee.
- (3) If the employee is entitled to be paid:
- (a) an incentive-based payment; or
 - (b) a bonus; or
 - (c) a loading; or
 - (d) a penalty rate; or
 - (e) another monetary allowance or separately identifiable entitlement;

the record must set out details of the payment, bonus, loading, rate, allowance or entitlement.

FAIR WORK REGULATIONS 2009 - REG 3.34

Records--overtime

For [subsection](#) 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime, a kind of employee record that the employer must make and keep is a record that specifies:

- (a) the number of overtime hours worked by the employee during each day; or
- (b) when the employee started and ceased working overtime hours.

Based on the above Regs, you are **only** required to keep a record of actual hours worked if:

1. The employee is remunerated for the actual hours worked; and/or
2. The employee is paid a loading or penalty rate for the additional/overtime hours worked.

Now the reason the above doesn't apply to vehicle salespersons is because:

1. They are excluded from the overtime clause and penalties in the Vehicle award (see clause 28.1(a));
2. They are excluded from the Saturday clause and penalties in the Vehicle Award (see clause 38.1(a));
3. They are excluded from the Sunday clause (see clause 39.1(a)) but instead clause 44.5 applies for Sunday work;
4. They are excluded from the ordinary hours of work and rostering clause (see clause 37.1); and
5. They are excluded from the meal and rest breaks clause (see clause 26.1).

Based on all the above exclusions, clause 44 stipulates the provisions that apply to vehicle salespersons. In saying that, clause 44:

1. does **not** indicate any payment for additional/overtime hours;
2. does **not** indicate what the ordinary hours for a vehicle salesperson are nor the maximum ordinary hours;
3. does **not** indicate any payment for Saturday work; and
4. does **not** indicate any provisions for meal and rest breaks.

As such, vehicle salespersons are only paid a **weekly** retainer, accompanied with any Sunday or public holiday or day off loadings as in clause 44.4 and 44.5.

Furthermore, the new Vehicle Award, which will come into effect on **4 May 2020**, includes a minimum remuneration clause which will set out the minimum hourly rate for their classification. This provision will also allow employers to offset any commissions paid to the employee.

The understanding has always been that additional hours worked by vehicle salespersons provide them with the opportunity to earn commission for these additional hours. This view is further reinforced by the new provisions coming into effect with the new Vehicle Award. If the employer wanted to see vehicle salesperson remunerated for all hours worked through payment of the hourly rate, then the clause would be worded to require payment of additional hours to be off set with commissions. Again, this reinforces that the opportunity to earn commissions through work is compensation. It is only when these commissions fall short that the employer will be required to make up for the shortfall.

Based on all of the above, no underpayment has been made and all payments to the employee have been in line with the Vehicle Award in line with the Fair Work Regulations because vehicle salespersons are not paid hourly and are not paid any penalties or for additional hours worked recorded on the payslip.

Secondly, with regards to the first aid allowance, the calculation made by the employee is incorrect. The employee has based their calculation on clause 19.9 of the Vehicle Award states:

19.9 First aid qualifications

An employee holding first aid qualifications and appointed by the employer to perform first aid duty will be paid 2% of the weekly [standard rate](#)

The **weekly standard rate** is defined in the Vehicle Award as:

standard rate means:

(a) for the purposes of [Section 1—Vehicle Industry RS&R Employees](#) the standard rate is wage Level R6—Vehicle RS&R industry employee

The **weekly** level 6 rate is \$862.50. 2% of this is \$17.25 per week. As such, what you have been paying the employee is correct and the

I believe I have addressed all the concerns raised by the employee in their email.

Please let me know if you require anything else.

Kind regards,

Rita Milan
Employment Relations Advisor



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The voice of the motor industry

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From: Lena Muscat [<mailto:lmuscat@austautogroup.com.au>]

Sent: Friday, 20 March 2020 10:08 AM

To: Rita Milan

Subject: RE: sample of letter to AAG

Hi Rita

I was just wondering if you have had a chance to look at the email David sent to you on the 11th March?
Are we able to discuss this early next week over the phone?

Many thanks & regards

Lena Muscat

Payroll Manager

Australian Automotive Group

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From: David Berlusconi

Sent: Wednesday, 11 March 2020 9:06 AM

To: Rita Milan

Cc: Lena Muscat

Subject: RE: sample of letter to AAG

Hi Rita,

We have had an underpayment complaint from an employee who has gone to the FWO. Can you please read the complaint and give us your thoughts?

If you can ensure Lena is CC'ed on the reply that would be great.

Regards.

David Berlusconi

Human Resources Manager

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As you are aware, all sales people are on a Salary package of differing amounts. But on our payslips, this is expressed as an hourly rate for purposes of calculations and ease of comprehension, from here on, I will refer only to 38 hours week and weekly pay etc. not fortnightly. According to the Workplace Ombudsman, regardless of any Salary agreement, the payslips still need to record the **actual hours worked**.

"Hi Marian, Thank you for your "my account" enquiry regarding accurate time records and payslips. I have attempted to contact you to discuss you. To reiterate, your employer can use a salary arrangement for your pay if it meets the minimum entitlements of your award. They may choose to do this. Regardless of this, your pay slip should accurately reflect the hours you completed this week. If it does not, this could be misleading as minimums are met. In your case, overtime entitlements. You can follow this link to see more about the time keeping obligations of your employer: <https://www.fairwork.gov.au/pay/minimum-wage-and-record-keeping/record-keeping> For the correct procedure for salary please follow this link: <https://www.fairwork.gov.au/pay/minimum-wage> when your employer chooses a salary arrangement your time records still need to be accurate to the hours you physically worked and the mirror have also included some additional information below. **To recover any owed entitlements for your wages the first step would be to make email to the employer requesting payment by a certain date (we suggest allowing 1-2 weeks).** This guide may assist you in addressing workplace issues linked below may assist you with addressing this with your employer. <https://www.fairwork.gov.au/ArticleDocuments/712/articles/issues.pdf.aspx> Kind Regards, Ella Fair Work Ombudsman"

This has prompted further investigation as to what the Minimum wage is for an Adult Sales Person employed in the motor vehicle industry **Services and Retail Award 2010** and we have found it to be \$22.70 per hour plus \$172.50 Sunday load and here in lies the problem. (As you are aware, we are required to work 8.30am to 5.30pm (with 30 minute Lunch break) on an 11 day roster. (See attachment 2 – hi day x 5.5 days per week which is 46.75 hours per week and not 38 hours. Now, as we have been told till now, because we are on Salar of hours. But from the Fairwork Website and reiterated by the ombudsman - Payslips need to record the actual hours worked and the h This means that to get to the desired Annual Salary (see attachment 4 – highlighted Pink), divided by actual hours worked (46.75) the h on the payslip and in my case - Falls below the minimum wage. An employment contract may be used to set out salary etc but must not current payslip (see attachment 6) (I received a pay rise as of 1st Jan, 2020) my hourly rate is quoted as being \$27.83395 x 38 hours per payslip needs to reflect the actual hours worked and the hourly rate. So, \$1057.69 divided by 46.75 = \$22.62 per hour or 08 cents below

This is made worse if we look at a sample payslip (attachment 7) from December 2019 (before my pay-rise). The hourly rate is quoted as \$926.93 per week. However, if we now divide that number by 46.75 hours, you will note that the real hourly rate is actually \$19.827 per

Minimum wage of	\$22.70 per hour minus
Paid wage of	\$19.827 per hour
Shortfall of	\$2.87 per hour, below minimum wage.

Plus that figure is not representative of other payslips prior to a pay-rise received in approx. 2017/18 but I can't recall the date of payslips and employment contract

Now the bad news:

\$2.87 per hour x 46.75 hours per week x 52 weeks per year x 5.5 years (since July 2014) = \$38,373.34 plus Sunday load, plus annual I payment as per the award. This will more than likely also have an impact on superannuation contributions made. Then there is also the matter of being First Aid officer. For which I am currently paid \$34.50 per fortnight (\$17.25 pw). (See attachment that this allowance should be 2% of the minimum wage which is \$22.70 x 46.75 = \$1061.23 x 2% = \$21.25 per week. \$21.25 - \$17.25 = \$4.00 per week x 213 weeks (since Sept 2015) = \$852.00 underpayment

This is just my personal situation but there are also many others who have worked with AAG for many years and all pay slips v hourly rate minimum wage, will need to back payed. Some who are on a certain wage now, may not have always received that amount.

Before sending this email we again consulted the Ombudsman along with actual payslips and workplace agreement, to clarify we were the award and payslip requirements.

This is the final response received.

Hi Marian, Thank you for the enquiry. We do not do calculations, you may seek for an accountant's assistance. However you should be paid a for **all the hours worked**. If you work 46.75 hours each week you should be paid at least \$22.70 for 46.75 hrs. In regards to the First Aid Officer to perform first aid duty will be paid 2% of the weekly standard rate (\$22.70) per week extra. Regards, Victoria Fair Work Ombudsman

So how was this error made?

The problem is that we are required to work 46.75 hours per week but in calculating our annualised salaries you have divided by 38. Then paid above the award but in real terms, because of the hours required to work, in many instances we are being paid below the minimum

How do we solve this situation?

The first thing is to back pay all underpayments in accordance with the law. The Suggestion by the ombudsman is that this should be paid accompanied by a hefty fine for being in breach of the award, although till now, all enquiries to the ombudsman have been without name

The next thing to do would be to either re calculate the actual hourly rates per person and have all future payslips correctly reflect the real ideal, because no one will want to work for a reduced hourly rate, even if it is just on paper and this would also make attracting new staff

OR

Reduce the required working hours (preferred) to just 38 hours per week as per your calculations and payslip records. Requiring staff to worked to just 42.5 and much closer to the desired outcome, with minimal adjustment to the hourly rates on the payslips.

Thank you for your attention to this very serious matter and we trust you will move swiftly to rectify the situation, both monetarily and in of work.

Kindest Regards,

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