



# Wage assessment tools for Australian Disability Enterprises and supported employees

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- No clear framework to decide which wage assessment tool an ADE must use in assessing employee wages
- Important to keep in touch and comply with relevant legislation and awards, and to inform employees of wage assessment processes in advance
- Guidelines for application of wage assessment tools

**This article reviews the wage assessment tools available to Australian Disability Enterprises (ADEs) to assess capacity of disabled employees and offers guidance to employers in adhering to best practice in supported employment contracts. ADEs are commercial enterprises that provide employment for people with disabilities.**

There are approximately 20,000 individuals in the Australian workforce who have a moderate to severe disability and require substantial ongoing support from ADEs to maintain their employment.

ADEs are funded by the Department of Families, Housing, Community Services and Indigenous Affairs to assist disabled employees engage in the workforce through 'supported employment'. This is distinct from disabled employees who are employed by general employers in the open employment market.

A number of ADEs and their employees are covered by the *Supported Employment Services Modern*

*Award 2010* (SES award), which provides criteria to assist employers in assessing the type and level of work that their employees are capable of performing. The SES award provides for levels of employment which are graded, with different standard pay rates for each level.

Where a disabled employee is assessed as being unable to perform to a similar capacity or productivity output as an average worker for their grading level, the SES award allows the wage of the disabled employee to be assessed as a percentage of the applicable base pay rate through the use of one of 30 wage assessment tools.

## Wage assessment tools — when to use them

There is no clear framework as to which wage assessment tool an ADE must use in assessing employee wages. ADEs are able to choose the tool they wish to use from an approved list contained in the SES Award. It is therefore important for ADEs to have regard to the fact that some tools assess employee productivity, some assess employee competency and others use a hybrid of these two assessments.

Two examples of the most commonly used tools within the supported employment sector are the Business Services Wage Assessment Tool (BSWAT) and the Supported Wage System (SWS).

## The Business Services Wage Assessment Tool

This hybrid tool assesses both the productivity and competency levels of employees. The two components are evaluated individually, then

combined to determine an overall wage for the individual based upon the minimum rate of pay for the relevant modern award grading level.

The competency component includes a question and answer portion which assesses the employee's ability to understand workplace scenarios. The productivity component compares an employee's output with an industry benchmark or a comparator illustrative of the expected level of output required in order for the employee to be entitled to the full rate of pay applicable for the relevant grading level.

### The Supported Wage System

Unlike the BSWAT, the Supported Wage System is based upon a productivity based assessment only. The SES assesses disabled employees' productivity output in performing certain tasks against a set of 'basic performance standards' of co-workers without a disability undertaking the same duties in the workplace. The process involves creating a list of duties for the employee and assessing their ability to perform those duties against time-weighted standards set for each.

### Implications of wage assessment tools

The result of using a tool is that the disabled employee will then receive a percentage of the relevant hourly rate for their grading level depending on their assessed capacity and/or productivity output. In some cases, after assessment an employee may receive as little as \$2 per hour, depending upon their productivity percentage.

That said, a large portion of supported employees working in ADEs are on some form of governmental support, such as a Disability Support Pension and receive additional benefits relating to that pension.

### Example — the Nojin case

In 2011, the Federal Court of Australia heard the case of *Nojin v Commonwealth of Australia* [2011] FCA 1066. A claim was brought against two separate ADEs on behalf of their respective intellectually disabled employees. It was argued that the requirements and conditions of the BSWAT used to assess the employee's work capabilities discriminated against people with intellectual disabilities, as they are likely to have greater difficulty satisfying the requirements of the competency based assessment than persons whose disabilities are not intellectually based.

The judge ultimately dismissed the case as it was found that, by using the BSWAT tool, the ADEs in question did not impose any unreasonable requirement or condition on the applicants within the definition of s 6(b) of the *Disability Discrimination Act 1992* (DDA).

Although the ADEs were successful in defending the matter, the case brought negative publicity for the enterprises involved.

### Guidelines for employers when applying wage assessment tools

To minimise the potential of being perceived to be unfair, below are some useful recommendations for ADEs to consider before applying an assessment tool.

#### Ensure a wage adjustment is necessary

The presence of disability in itself does not automatically justify the payment of a pro-rata wage. Only when it is clear that a person with a disability is unable to work at the full productive capacity required for their relevant grading level is a tool to be considered and used. Similarly, an assumption should not be made that the employee will automatically be reviewed at the lowest award grade level.

#### Ensure the industrial award permits the use of a tool

ADEs should consult their employee's relevant modern award before selecting a tool and undertaking any wage assessment.

The tools may be considered where an employee is commencing a new job and the employer is required to grade the worker's abilities based on their skills, experience and qualifications. If an ADE intends to apply an assessment tool to an existing employee, contractor, short-term employee or temporary employee, it must ensure that there are applicable circumstances permitting its use.

#### Comply with maximum review time periods

Most tools have a set period in which the employee's assessed wage level must be reviewed. Failure to review an employee's rates of wage on a regular and systematic basis opens up exposure to potential discrimination allegations.

The type of tool chosen by the ADE and the employee's applicable modern award will govern how often the review must take place. An employee

assessed under the BSWAT, for example, must have their wage reviewed every three years or earlier if requested by either the employer or the employee in cases where the employee's circumstances have changed, resulting in a significant and permanent difference in their performance. The SWS, in contrast, requires an employee's productivity to be reviewed every 12 months.

The review process may result in no change or either an increase or decrease in the employee's wages. ADEs must be careful when reducing the assessed capacity percentage of an employee, however, as the SES award makes strict provision for such a reduction.

### Transparency — keep records of the application of wage assessment tools and review process

Any wage assessment made should be clearly documented and a copy provided to the employee and/or the employee's representative. Similarly, when employing any new disabled employee, ADEs should consider providing a detailed information pack regarding the wage assessment process to the individual so that they are aware in advance of the potential for their pay rate to be reduced. The pack should also clearly identify other independent information sources regarding wage assessment to reduce the potential risk of the employee later claiming they were provided with insufficient information about the process.

### Consider the application of disability legislation

ADEs should ensure they keep abreast of the relevant disability discrimination legislation and

guidelines. The DDA requires an employer to attempt to make adjustments (where reasonable) to the duties of an employee prior to reducing the wages. For example, an employer might be obliged to insert a ramp for a wheelchair-bound individual. The provision of an appropriate modification to the workplace could mean the difference between an employee being assessed as being at 60 per cent capacity of their relevant grading level and 80 per cent capacity.

### Disability enterprises need more than good intentions

In an increasingly litigious age, ADEs need to do their utmost to avoid having legal action brought against them by employees, former employees and their advocates out of the belief that the ADE has discriminated against a person on the basis of their disability.

Even a case which has little merit can be expensive to defend. Furthermore, the negative publicity generated even by an unsuccessful claim can do enormous and long-term damage to a disability employer's reputation.

Keeping up to date with relevant legislation, complying meticulously with legal requirements and ensuring that employees are fully informed in advance of the wage assessment process provides the best safeguard against claims from employees who believe that they have been treated unfairly.

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