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LAWYERS

EMPLOYMENT LAW UPDATE

Casual Employees

When is a casual employee <u>not</u> a casual employee?

You may have heard about a recent decision concerning the definition of casual employment that was handed down in the Full Court of the Federal Court of Australia ('FCAFC'). The case is *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

Essentially, the decision of the FCAFC was that a fly in, fly out worker was not a casual employee for the purposes of the *Fair Work Act 2009* (Cth) ('the Act'), and was therefore entitled to annual leave even though the worker was employed as a casual.

This decision has sent shockwaves through many organisations and has left employers scratching their heads as to whether their casual employees are *actually* casual employees.

The following information provides a brief outline of the facts of the case and the reasoning behind the FCAFC's decision. It will also provide practical tips on how to ensure your casual employment contracts meet the requirements of genuine casual employment.

THE FACTS

- Paul Skene worked for Workpac as a dump truck operator at a coal mine for approx. 2 years.
- Mr Skene's work arrangements involved driving or flying in and out of the coal mine, then working on set rosters for a number of days.
- Mr Skene was given a 'notice of offer of casual employment' each time he worked, but the terms of the offer did not otherwise designate him as a 'casual'.
- Mr Skene was paid an all-in rate, with no specific designation of casual loading.
- Mr Skene claimed that he was a permanent full-time employee of Workpac and was entitled to annual leave and consequential entitlements.
- Workpac is a labour hire company that supplies labour to various mining companies. It contends that Mr Skene was a <u>casual employee</u> and not entitled to annual leave and other entitlements that he claims are owed to him.
- In the initial proceedings, Mr Skene sought:
  1. The imposition of pecuniary penalties for contravention of:
     - s.44 of the Act; and
     - s.45 item 2 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth);
  2. compensation for Workpac's contraventions of those Acts in the form of payment to him of annual leave and annual leave loading.

Two issues to be determined in the case:

1. The first was whether Mr Skene was entitled to annual leave pursuant to cl.19.1.1 of the *Workpac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* ('EA').
2. The second is whether Mr Skene was <u>other than a casual employee</u> for the purposes of section 86 of the Act.

Outcome of the case:

- The FCAFC held that Mr Skene <u>was</u> entitled to annual leave under both Workpac's EA and the Act as there was no evidence he'd been 'engaged' as a casual.
- Workpac appealed this decision.

On Appeal:

- The FCAFC dismissed the appeal and interpreted section 86 of the Act as using 'casual' in its general legal sense.
- The FCAFC endorsed the view in *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38] that *[t]he essence of casualness is the <u>absence of a firm advance commitment</u> as to the duration of the employee's employment or the days (or hours) the employee will work.*

The fallout of this decision:

- There have been calls for the Government to pass a legislative 'fix' to enshrine the classic award definition of 'casual' in the Act as it currently has no general definition.
- There are reports of follow-up claims for payment of annual leave entitlements in the mining industry.
- Employers are asking whether they can 'set off' or recover previous casual loading payments if they are required to back pay annual leave entitlements.
- Employers are also asking how far back their liability extends for these payments, particularly where the Act is ambiguous on its 6-year limit of its liability.

GETTING IT RIGHT

1. Review how casual employees are engaged at work

- Offer "Casual Conversion"

Award-covered casual staff who have worked an equivalent full time or part time pattern of hours on an ongoing basis during a period of casual employment for the preceding 12 months, may, at their election, request to be converted to part time or full time employment.

- ➢ Casual staff making such a request must acknowledge that, as a result of any conversion of their employment, the 25% casual loading will no longer apply to be paid where employment is converted to full time or part time employment (essentially this means that their hourly rate of pay will be reduced by 25%).
- ➢ An employer must reasonably consider the request for casual conversion.
- ➢ Casual conversion has been an established feature of some awards since the early 2000s.
- ➢ However, in the past at least, few casuals have sought casual conversion – it's hard to see this changing in the future as most casuals don't want to give up their 25% loading.

2. Consider full-time or part-time employment instead

- Only employ casuals where there is uncertainty and irregularity in the work.

3. Review contracts of employment

Ensure contracts of employment for casuals clearly state that:

- ✓ the staff member is employed on a casual basis;
- ✓ specify that each occasion of work is a separate contract of employment which ceases at the end of that engagement;
- ✓ there is no guarantee of ongoing or regular work;
- ✓ ensure the staff member acknowledges they are employed as a casual and have no expectation of ongoing work and that their hours may vary; and
- ✓ make specific reference to 25% loading in the employment contract.

4. Adopt a policy for casual employment

- Adopting a policy that outlines the specifics of what makes a casual employee a *genuine* casual is good practice in these uncertain times.

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Please contact us if you require any assistance with ensuring your casual employment contracts meet the criteria of a genuine casual or if you require any other employment advice within your organisation.

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