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Employers may be expected to empty their pockets to "casual employees" for leave entitlements!

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The Full Bench of the Federal Court of Australia's (**FCA**) recent decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (**WorkPac Decision**) mandates that employers need to urgently re-visit their characterisation and rostering of casual employees.

The case involved an appeal from the Federal Circuit Court as to whether an employee should have been characterised as a "casual employee" for the purposes of determining his entitlement to annual leave accruals.

The FCA was asked to consider two key issues, whether:

1. the employee was a casual employee and therefore not entitled to annual leave entitlements in accordance with the relevant industrial agreement; and
2. for the purposes of section 86 of the *Fair Work Act 2009* (Cth) (**FW Act**), the employee was in fact a casual employee for the purposes of the FW Act and therefore excluded from any such entitlements.

Historically, the term "casual employee" has been the subject of considerable scrutiny by the courts absent an express definition in the FW Act or its predecessors. Unfortunately, more recent definitions in modern awards of who are "casual employees" has obscured over the last eight years the true legal definition, with awards tending to define casual employees as simply employees who are engaged and paid as such.

As a result of a combination of employers adopting the simpler award definition of "casual employees" in all circumstances and the WorkPac Decision, employers may be exposed to increased risk of liability and scrutiny by employees, regulators and courts in respect to employee characterisation and their associated entitlements.

What does the decision mean for employers and their classification of "casual employees"?

The employee, Mr Skene, was employed by WorkPac as a mine site truck driver from 2010 to 2012. Upon initially engaging Mr Skene, WorkPac provided him with a letter of offer and an employment contract which identified him as a "casual employee".

Further, WorkPac's employees were covered by an industrial agreement, the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* (**Agreement**), pursuant to which its employees were categorised as either casual or permanent and granted, as you would expect, leave entitlements to permanent employees only.

The core argument in the WorkPac Decision revolved around whether the designation of Mr Skene pursuant to the Agreement as a casual employee was sufficient for him to be considered a casual employee for the purposes of denying him various entitlements that normally accrue to permanent employees under the Agreement and the FW Act.

WorkPac argued that Mr Skene's categorisation as a casual employee for the purposes of the Agreement was determinative and that this categorisation was reinforced by the fact that upon initial engagement Mr Skene was given a "*Notice of Offer of Casual Employment*" and executed a "*Casual or Fixed Term Employee Terms & Conditions of Employment*".

The question for the FCA was whether Parliament intended for the phrase "casual employee" to be used in its ordinary legal sense, or a specialised industrial sense. As such, the FCA was required to re-examine the relationship between the National Employment Standards (**NES**) (and therefore the FW Act), awards and industrial instruments.

Parliament's intention – a matter of hierarchy between NES, Awards and Industrial Agreements

The FCA considered in detail the intended construction of the FW Act and reinforced the intention and purpose of the NES. In summary, the NES establishes the minimum standards of employment applicable to employees which cannot be displaced. The FCA described the NES as the apex of employment standards, not to be excluded by a modern award or enterprise agreement.

The FCA expressed reservations about departing from the traditional order of priority between the NES, awards and industrial agreements. On that basis, the court concluded that the most appropriate approach to adopt to define a "casual employee" is by turning to the ordinary, legal meaning of the phrase.

Consequently, this turned the FCA's attention to an assessment of the general law's interpretation of "casual employment" and what was the underpinning "essence" of the phrase.

Determining whether an employee is a "casual employee"

Ultimately, whilst acknowledging the challenges associated with reinforcing the traditional approach to characterisation of casual employees, the FCA reverted to the approach outlined in *Hamzy v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78.

In that case, the key factors for characterising a "casual employee" included:

1. Whether or not the employer could elect to offer employment on a particular day or days and when offered, the employee could elect to work.
2. Informal, uncertain, unpredictable and irregular work patterns of engagement.
3. An absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee would work.

The court found the circumstances of Mr Skene's employment did not resemble the above characteristics and therefore did not encompass what was the "essence" of "casual employment".

As such, Mr Skene was held to be a permanent employee, despite his designation by WorkPac, and was entitled to accrued annual leave.

Does this mean that employees can double dip?

Unsurprisingly, the FAC addressed the notion of Mr Skene potentially "double dipping".

In this regard, the court firstly made clear that there was no evidence lead before the primary judge that Mr Skene had actually received a payment of casual loading when initially engaged by WorkPac (WorkPac adopted the common practice of paying an all up rate rather than separately identifying casual loading).

Regardless of this, the FCA referred again to the hierarchical position of the NES and held that irrespective of whether Mr Skene had received casual loading, this would not necessarily form a legitimate basis for characterising Mr Skene as a casual employee rather than a permanent employee under the NES.

Therefore, the FCA's decision effectively means that if an employer incorrectly characterises an employee as a casual employee pursuant, for example, to a modern award when they are not truly a casual in the strict legal sense and pays them a casual loading, this will not necessarily mean that the employee will not be entitled to leave entitlements in the future.

Interestingly, the FCA did not address the interaction of casual conversion clauses contained in many modern awards with this finding nor did it address the fact that many employees categorised as casual employees do not elect to convert to permanency because they prefer to keep the higher rate of overall pay.

That said, considering the approach taken by the FCA and that further entitlements may become owing to employees designated as casuals when they are not truly legally casuals, even when casual loading has been paid, it would seem that such clauses and employee elections will provide little in the way of safe harbour for employers.

Industry reactions to the decision

Following the WorkPac Decision, concerns have understandably been raised throughout the industry about its consequences, particularly in respect to the potential for double dipping by employees and the risk of liability employers may now face for multiple leave entitlement claims.

Following suggestions that the decision may result in around $13 billion in claims by employees in similar circumstances, calls are being made for the introduction of a new hybrid class of employee.[1]

The decision clearly highlights the gaps within the nation's workplace laws and provides an ideal opportunity for industry officials to push for change. In the meantime, employers ought be conscious of potential issues they may face in respect to existing casual employees.

Recommendations following *WorkPac*

Like the provisions of the FW Act which place the onus on employers to correctly differentiate between employees and contractors, it is now equally essential that employers revert to carefully categorising casual employees based on the traditional tests which were used prior to Award Modernisation.

Employers should now urgently consider:

- Who their employees are and under what circumstances they are engaged – do they know or think they are casual?
- Reassessing the rosters and circumstances of their employees – do they have irregular work patterns, with uncertainty and discontinuity of work and unpredictability?
- What are they relying on to characterise their employees – how does the relevant award or industrial agreement (if any) define casual employees and is this enough to protect you from having to pay further entitlements?

1 Smee, B 2018, *Call for hybrid permanent-casual workers after landmark court case, media release*, viewed 4 September 2018, https://www.theguardian.com/australia-news/2018/sep/03/call-for-hybrid-permanent-casual-workers-after-landmark-court-case

If you are concerned about the implications the *WorkPac* Decision may have on your business, now is a good time to reassess arrangements and rostering of employees and ensure you have appropriate measures in place to minimise your business' exposure.

For assistance or more information about these matters or any matters regarding Employment, Work Health & Safety services, please contact Jamie Robinson.

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