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Workplace Relations

Frances has considerable experience in workplace relations, having practiced exclusively in this area since 1989, both in Australia and overseas. She has advised employers across several industries and business sectors in both industrial relations and employment law.

Frances has given comprehensive advice in relation to a broad range of workplace relations issues in Australia, including employment related litigation; discrimination complaints; enterprise bargaining; employment contracts; and workplace policies.

Frances has also advised on the employment related implications of sale of business/sale of shares transactions.

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Being too casual with casual employees? A warning to employers

Is the hiring of casual employees a "precarious employment practice"? The ACTU thinks so and has been advocating a push towards employers offering permanent employment instead of casual positions.

Employers on the other hand, find casual employment useful as it fulfils an operational need without many of the more onerous (and costly) obligations of permanent employment. Some employees also find casual employment attractive in view of the 25% casual loading which is in lieu of certain benefits such as annual leave and personal leave.

In this edition of Employment Alert, we review what casual employment really means and some of the risks employers face in this area.

What does "casual" mean?

The most common perception of a 'casual' employee is a person who works irregular hours and not on a systematic basis, or alternatively, someone who works regular hours but only for a limited period.

However, what if a casual employee continues to work regular hours but for an indefinite period or for an appreciable period of time? Is the relationship still one of casual employment or has it, through the passage of time, become one of permanent employment, entitling the employee to the benefits such as annual leave and personal leave? Will a court look beyond the mere words of a contract (assuming there is one) which specifies that the employee is a casual?

In the recent decision of *Williams v MacMahon Mining Services Pty Ltd*, the Federal Court upheld the findings of the trial court which found that Mr Williams, a mining worker who was employed as a casual on a fly-in/fly-out basis, was not a casual and as a result, was entitled on termination to pay in lieu of notice and payment for accrued annual leave. One of the key factors to support this conclusion was the regularity of Mr Williams' employment. The Federal Court also upheld the trial court's finding that the employer could not offset the casual loading against the annual leave entitlements. Finally, the Federal Court upheld the trial court's imposition of a penalty of \$14,850 on the employer for breach of the *Workplace Relations Act 1996*, noting that penalties are there to remind employers that it is their responsibility to ensure that their employment arrangements are compliant with the law.

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How casual employees are protected under the *Fair Work Act*

As employers will be aware, the *Workplace Relations Act 1996* has been replaced by the *Fair Work Act 2009* ('Act') which provides various protections for casual employees, including:

- "Long term casuals" who would have had a reasonable expectation of continuing employment on a regular and systematic basis, are now entitled to parental leave. Long term casuals are casual employees who have been employed by the employer on a regular and systematic basis for periods of employment of at least 12 months;
- All casual employees are entitled to unpaid compassionate leave of 2 days per occasion;
- All casual employees are entitled to unpaid carer's leave of 2 days per occasion;
- Casual employees who have been employed on a regular and systematic basis and who have a reasonable expectation of continuing employment on the same basis, have the same unfair dismissal rights as permanent employees.

"Regular and systematic"

"Regular and systematic" is not defined in the Act and when asked to consider this term, courts have been inclined to give it a broad meaning.

In *Ponce v DJT Staff Management Services Pty Ltd t/a Daly's Traffic*, Fair Work Australia was required to consider whether Mr Ponce, who was employed as a casual, was entitled to bring an unfair dismissal claim.

In finding for Mr Ponce, the Commissioner made a number of observations, including:

- 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 matter will, of course, turn on its own facts.

In this case, Mr Ponce, a casual traffic controller who had worked as a casual for approximately 21 months, was found to have been employed on a regular and systematic basis. His times and dates of work were not determined by a published roster and availability of work depended upon client demand. No formal letter or advice regarding the regularity or duration of future work was provided to Mr Ponce. Nevertheless, his working hours and dates followed

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a strong pattern. Although there was no fixed roster, his supervisor would always inform him when his next shift would be, and Mr. Ponce nearly always accepted the shift that was offered to him. On average, he would work over 30 hours per week.

These factors were all considered to be relevant in coming to a finding that Mr. Ponce's employment was "regular and systematic" and that he had a reasonable expectation of continuing employment on that basis.

Implications for Employers

Employers should be aware:

- Courts/Tribunals will look beyond the words used in an employment contract;
- Casual employees have greater protections under the Act than was the case with the *Workplace Relations Act*;
- Courts/Tribunals are likely to interpret "regular and systematic" broadly;
- If a casual employee works regular hours and in accordance with a roster, and if employment on this basis is expected to continue, the relationship could well be one of permanent employment, entitling the employee to rights such as annual leave, personal leave, notice of termination, redundancy pay and protection from unfair dismissal;
- Long term casuals who have a reasonable expectation of continuing employment are entitled to unpaid parental leave under the Act;
- There are significant implications of getting it wrong, including penalties of up to \$33,000 per breach.

For advice and assistance with casual employment or any other workplace relations issue, contact the Workplace Relations Team at Moores Legal on 9898 0000.

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The Moores Legal Workplace Relations team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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