



The seven things you need to do right now if you employ casual employees

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Employers around Australia are grappling with the effect of a recent decision of the Full Federal Court¹, which found that employers must pay annual leave to wider categories of employees than previously thought.

This wider category includes those employed as casual employees. That is, employees who have agreed to be engaged as a casual and receive a casual loading, typically 25%. In addition, those employees may now be entitled to four weeks' paid annual leave per year.

The only employees excluded are those who have “*the essence of casualness*”.

What is the “essence of casualness”?

The “*essence of casualness*” is expressed by the Court in negative terms. That is, the essence of casualness is said to exist where there is an absence of “*a firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work.*”

The decision involved a casual mine worker who had been employed regularly over a 20 month period, pursuant to a roster. Some years later, he made a claim to be paid for annual leave on termination, despite the fact he had agreed to an offer of casual employment and received a casual loading.

The Court concluded that, despite the agreement and the payment of the casual loading, where the objective

¹ *WorkPac v Skene* [2018] FCAFC 131 (**Skene**)

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circumstances show an expectation of continuing employment, an employee will be entitled to accrue annual leave. Here, there was found to be an expectation from both parties that the employee “*would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster*”.

The Court observed that the key indicators of casualness are irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee.

Where those key indicators are absent, the employee will be entitled to paid annual leave, even if they have been paid a casual loading in compensation for supposedly not being entitled to annual leave.

Confusing?

The decision is at odds with various modern awards, which provide for casual conversion clauses whereby long-term, regular casuals may apply for conversion from casual to permanent employment (at the employee's election).

Following employers calling for legislative change to address the issue, the Federal Government announced, on Tuesday, 11 December 2018, a two pronged response:

1. Regulations will be added to the *Fair Work Act 2009* preventing a casual employee who has been paid casual loading, from “double dipping”. That is, where an employer can show an employee has received a

25% casual loading, the employer may use the loading to offset any paid annual leave entitlement determined by a Court to be owing to the employee under the National Employment Standards. The change is to be made by Regulation – meaning it does not require prior approval by the Senate. However, there may be a move to disallow the Regulation when the Senate returns in 2019.

2. The NES will be amended to reflect modern award requirements that employers provide ongoing regular casual employees the right to convert to part-time employment if those employees wish to convert.

So, here are seven things you need to do now if you employ casual employees.

1. **Review your business practices.** Although the written employment contract is important (which we discuss below), a Court will look beyond it to establish the true nature of the employment. Consider your business needs. Why are the employees engaged as casuals? Do you need intermittent labour? Is there another way? Consider also how many hours casual employees are working when compared to permanent employees – and whether that might give rise to an expectation of ongoing employment.
2. **Review your employment contracts.** Employers should be careful to ensure contracts are in writing and clearly state that the employment is on a casual basis. The contract should be clear there is no guarantee of regular hours and the employment should be terminable on short notice.
3. **Consider any applicable industrial instrument.** Enterprise agreements and modern awards will usually define or describe casual employment. Meeting the definition is not enough, but it will be a start.

Importantly, all modern awards now require employers to provide ongoing regular casual employees the right to convert to part-time employment, and to notify employees of that right by 1 January 2019. The NES will provide a similar obligation in 2019. An employer can only refuse to convert an employee on “reasonable business grounds”.

4. **Review rostering arrangements.** Providing a regular roster in advance is a factor which

apparently shows an advance commitment to hours and days to be worked. Employers should consider a mechanism, if practicable, to permit casual employees to swap rostered shifts, or for the employee to give the employer notice in advance of the employee’s availability over the short term. However, employers also need to consider any requirement to provide rosters, or not to change rosters, under an applicable modern award or enterprise agreement.

5. **Have employment records showing where, how and why a casual loading is paid.** This includes in the written employment contract and on payslips. This will become relevant if an employee is successful in a claim and you want to set-off any entitlement to annual leave against the payment of the casual loading. Also clearly state what the casual loading is comprised of (for example, what percentage is attributed to annual leave).
6. **Consider moving casuals to part-time or full-time employment, or employment for a specified period.** The Court observed that “*what is agreed to at the commencement of an employment is relevant to the characterisation process, but an employment which commences as casual employment may become full-time or part-time because its characteristics have come to reflect those of an on-going part-time or full-time employment.*”

If you are concerned the employment has become permanent and ongoing, consider stopping payment of the casual loading and move the employee to permanent employment or a short term contract now. Come early 2019, there will be a legislative obligation to consider this in any event. However, employers should be very careful about this approach, as there are restrictions on the hours of work that may be worked by part-time employees at ordinary time rates, consequences for overtime, and potential back-payment of annual leave.

7. **Consider limiting or changing hours of work.** Determine whether it is possible to limit the hours of work for casual employees, and to vary the hours and days they work from week to week. This would result in intermittency and unpredictability of working patterns, consistent with the “*essence of casualness.*”

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