

New Legal Rights for Casual Employees

Casual employment has become an entrenched feature of the modern Australian workplace. With the increase in the casualization of the workforce, the Courts and the Fair Work Commission have considered it necessary to establish guidelines and protections for these potentially vulnerable employees. There have been two major developments in 2018.

Firstly, in the 2018 Federal Court of Australia decision of *WorkPac Pty Ltd v Skene*, the Court provided legal clarification in circumstances where a person was described as a casual employee but worked a regular roster set in advance. The Court concluded that such a person was a full-time or permanent part-time employee. As a consequence, any such employee was entitled either to protection under an Award or the safety net provisions protecting non-award employees under the National Employment Standards (NES). This means that such employees are entitled to things such as pro-rata annual leave, holiday leave loading, personal leave, redundancy, etc.

The essence of the decision of the Federal Court, was that for an employee to be truly classified as a casual (as distinct from permanent part-time or full-time), the employee must have no settled work pattern and firm advance commitment as to the duration of their employment or the days or hours to be worked. The Court did leave open the question of the capacity of an employer to “set-off” liability for leave and other Award or NES benefits against the casual loading (25%), where such loading is expressed in employment arrangements as an identifiable amount.

Secondly, the Fair Work Commission has, from July 2017, been examining the necessity for the introduction of a template or “model” casual conversion clause to be inserted into most Modern Awards. The Fair Work Commission has now resolved the wording to be adopted in the model clause, and this took effect from 1 October 2018.

The casual conversion model clause allows employees who have been genuinely employed as casuals for a minimum of 12 months to seek conversion to either permanent part-time or permanent full-time.

The important features of the casual conversion clause in the Modern Awards are as follows:

- there is a requirement on an employer before 1 January 2019 to provide a copy of the new clause to casual employees who were employed as casuals as at 1 October 2018;
- any casual employees engaged after 1 October 2018 must be provided with a copy of the clause within 12 months' of their employment commencing;
- casual employees must put their request for conversion in writing;
- the employer must provide a response in writing to the request within 21 days of receiving the request;
- employers may reject the request if there are reasonable grounds for doing so. Those so-called "reasonable grounds" are set out in the clause. These ground include the situation where the employee's position may cease to exist within the next 12 months.

Failure to adhere to lawful obligations in the treatment of casuals can result in the employer:

- facing prosecution and having fines imposed; and/or
- being required to reimburse the employee for a significant quantum of back pay and entitlements.

Should you require advice regarding the status of your employees and your lawful obligations, please contact Tony O'Connor on (07) 5570 9380.

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