AUSTRALIAN INDUSTRY GROUP
Employer advice
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Casual employment – High Court overturns the Federal Court decision in the *WorkPac v Rossato* case

SUMMARY

On 4 August, the High Court unanimously overturned the decision of the Full Court of the Federal Court in the *Workpac v Rossato* case and in doing so identified that the reasoning in the Federal Court's earlier decision in the *WorkPac v Skene* case was erroneous.

These Federal Court decisions created $39 billion in cost risks for employers from potential 'double dipping' claims for permanent employment entitlements by employees engaged and paid as casuals.

These risks were comprehensively addressed through changes to the *Fair Work Act 2009* (FW Act) that came into operation in March this year, but the decision of the High Court is still very important.

The meaning of a 'casual employee' for the purposes of the FW Act

The meaning of a 'casual employee' for the purposes of the FW Act has been the subject of a great deal of controversy since the 2018 decision of the Full Court of the Federal Court in the *WorkPac v Skene* case and the Federal Court's later decision in the *WorkPac v Rossato* case. In these cases, the Court determined that Mr Skene and Mr Rossato were not casual employees, even though they were engaged as casuals and paid as casuals under WorkPac's enterprise agreement. The Court ordered Workpac to pay annual leave and some other entitlements of permanent employment to the employees.

The *WorkPac v Rossato* decision was appealed to the High Court. Before the High Court determined the appeal, the FW Act was amended to comprehensively address the risks that employers faced as a result of these decisions.

As explained in Employer Advice NAT 043/21, NAT 055/21 and NAT 085/21 amendments were made to the FW Act in March this year as a result of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*. The amendments:

- Define a 'casual employee' for the purposes of the entitlements in the National Employment Standards in the FW Act;
- Protect employers from 'double-dipping' claims by casual employees and ex-employees who claim they are entitled to annual leave and other entitlements of permanent employment;
- Require employers to give each casual employee a copy of a Casual Employment Information Statement; and
- Give eligible casual employees the right to convert to permanent employment in certain circumstances.

The High Court's decision

In its 4 August decision, the High Court unanimously overturned the decision of the Full Court of the Federal Court in the *Workpac v Rossato* case and in doing so identified that the reasoning in the Federal Court's earlier decision in the *WorkPac v Skene* case was erroneous.

The High Court has determined that at all times during his employment Mr Rossato was a casual employee for the purposes of the FW Act and the enterprise agreement under which he was employed by WorkPac.

The High Court's decision clarifies the common law meaning of a 'casual employee', which aligns closely with the definition of a 'casual employee' that was inserted in the FW Act in March.

The decision also clarifies that where an employer and an employee "*have committed the terms of the employment relationship to a written contract and thereafter adhered to those terms…..it is to those terms that one must look to determine the character of the employment relationship*". In this case, Mr Rosatto entered into a contract of employment as a casual employee and throughout his employment he was paid as a casual.

Letters of offer to casual employees

Given the new definition of a 'casual employee' in the FW Act and the High Court's decision, letters of offer to new casual employees should:

1. State that the offer is for employment as a *'casual employee'*;
2. Identify the amount of the casual loading – typically 25%;
3. State that the employer *'makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of hours'*;
4. State that *'the employer can elect to offer work to the employee and that the employee can elect to accept or reject work'*;
5. State that *'the employee will work only as required according to the needs of the employer'*; and
6. Not contain any other provisions that are inconsistent with points 1 to 5 (e.g. letters of offer should not guarantee any particular hours of work or roster).

Record-keeping and pay slip requirements for casuals

Employers should ensure that they comply with the requirements of the FW Act and *Fair Work Regulations 2009* regarding pay records and pay slips. A summary of various records that are required to be kept is set out in Employer Advice NAT 055/21.

With regard to casual employees who are paid a casual loading, the loading is required to be separately identified in pay records and on pay slips.

Casual employment transitional period ends on 27 September 2021 – Important transitional requirements

As explained in Employer Advice NAT 043/21, the recent amendments to the FW Act include some important transitional arrangements which employers of casual employees need to comply with by 27 September 2021.

A 6-month 'transition period' applies up to 27 September 2021. By this date, an employer (other than a *'small business employer'*, defined as one that employs less than 15 employees) must, in relation to all casual employees who started their employment with the employer before 27 March 2021, assess each casual employee against the conversion criteria and either:

- Offer conversion to eligible casual employees (unless the employer has reasonable grounds not to); or
- Provide a notice to each casual employee who is not offered conversion that includes the reasons why the employer has not provided the offer.

Also, an employer (other than a 'small business employer') must give each casual employee who started their employment before 27 March 2021, the Casual Employment Information Statement as soon as practicable after 27 September 2021. An employer can choose to give the Statement at an earlier time.

'Small business employers' were required to give each casual employee who started their employment before 27 March 2021, the Casual Employment Information Statement as soon as practicable after 27 March 2021.

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a special section on our website to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

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