Major changes for casual employees in 2021

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In March 2021, changes to the *Fair Work Act* ('FW Act') came into effect which were the result of the federal government's attempts at defining casual employment. Importantly, the new definition applies to former, current and future employees – it is retrospective.

These legislative amendments together with High Court of Australia decisions have significantly altered the definition and entitlements of casual employees under Australian law. The changes brought by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill* ('the Bill'), introduce the following into the FW Act:

- a definition for casual employee; and
- an entitlement for employers to off-set the payment of entitlements for mistakenly classified permanent employees against casual loadings paid; and
- a mechanism for the conversion of casuals into permanent employees; and
- an obligation for employers to provide a Casual Employment Information Statement produced by the Fair Work Ombudsman to relevant employees.

Further, the Full Court of the High Court recently handed down their unanimous decision in *WorkPac Pty Ltd v Rossato [2021] HCA 23* ('*WorkPac v Rossato*'), which has significantly altered the way in which the Courts will determine whether a casual employment relationship exists.

Definition of casual employee

The amendments insert, for the first time, a definition of casual employees into the *FW Act*.

A casual employee is defined as:

'a person who is offered and accepts employment on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.'

The definition applies to employment offers both before and after the commencement date but not to workers who have either been converted to permanent employees or been the subject of a Court decision that determined the status of their employment as either casual or permanent.

What does the Court consider when applying the 'casual employee' definition?

The amendments provide for the criteria that can and cannot be taken into account by a Court when applying the definition.

The following considerations are an exhaustive list of those that can be taken into account:

- Whether the employer can choose to offer or not offer work and whether the relevant worker can choose to accept or decline work;
- Whether the worker is given work according to the needs of the employer;
- Whether the relationship is described as casual employment;
- Whether the worker is or was entitled to a casual loading or a casual-specific rate of pay in the offer of employment, applicable award, enterprise agreement, or a Fair Work Commission order.

Certain considerations are also expressly excluded from being taken into consideration by the amendments:

- A regular pattern of work by itself does not satisfy the definition; and
- The subsequent conduct of either the worker or employer after the offer of employment and acceptance of that offer.

These considerations have been excluded in the wake of prior court decisions which involved casual employees successfully arguing they were in fact permanent.

What is the off-set provision?

The amendments also introduce a requirement for courts, when assessing claims by casuals claiming to be permanent employees, to reduce the amount payable for entitlements, by the casual loading that they were paid prior to the claim.

The pathway for casual employees to convert to permanent

Offer and request for conversion

Along with a definition of casual employment, the Bill also amends the National Employment Standards to create a pathway for casual employees to be converted into permanent employees.

To qualify, the relevant worker must:

- have been employed for at least 12 months; and
- have been working a regular pattern of work on an ongoing basis for at least the last 6 months; and
- be able to continue working the same pattern of work, without significant adjustment, on a full-time or part-time basis.

If the above conditions are met, an employer must offer, or an employee may request (as long as they have not refused an offer or the employer has not issued a refusal notice in the 6 months prior), a conversion from casual to permanent employee.

Employers, excluding small business employers (those with less than 15 employees), must make a written offer to the employee within 21 days of the employee meeting the above conditions and the employee must accept or reject that offer within 21 days of receiving it. Similarly, employees, including those employed by small business employers, may request conversion upon satisfying the above conditions and the employer has 21 days to provide a written response.

Employees must not make a request within the 6 months after the commencement date of these new laws; the transition period.

If the employee's request is accepted, the employer must:

- discuss with the worker, the date at which they will convert (if not, it is the first full pay period after notice is given), their hours of work after conversion and whether their conversion is to full or part-time; and
- provide a written notice to the worker, of the above matters.

Refusal notice

An employer may, however, not be required to offer or accept the request of a casual who meets the conditions of conversion where there are reasonable grounds to do so, based on known or reasonably foreseeable facts:

- where the position will not exist within 12 months; or
- where the hours or work the casual would perform will reduce significantly within 12 months; or
- where the days and/or times the casual is required to work will change significantly.

A refusal notice can only be issued in response to an employee request after consultation with the casual worker. Whether in relation to the requirement to offer or refusal of a request, the employer must provide written notice to the casual detailing the reasons for not permitting the conversion.

Transition period

Employers have 6 months after the commencement date of these changes, to comply with the above amendments.

Casual employment information statement

An employer is obligated to provide employees with a copy of the Casual Employment Information Statement detailing the above requirements and entitlements.

Small business employers must provide their existing casual employees a copy of the statement as soon as practicable after the commencement date. All other employers must do so after the end of the transition period.

The impact of the WorkPac v Rossato decision

The recent High Court decision in *WorkPac v Rossato*, handed down on 4 August 2021, overturned a decision of the Full Court of the Federal Court of Australia (*Workpac Pty Ltd v Rossato [2020] FCAFC 84*) which found that Mr Robert Rossato was not a casual employee.

A unanimous full court of the High Court of Australia, in doing so, adopted a similar approach to the definition of casual employment to the Bill. This restrictive approach in effect means that many casual employees who may have had claims to permanent employment, no longer will. We explore this further below.

Facts

Mr Rossato was employed by WorkPac, a labour-hire company, to work as a production worker in mines operated by one of WorkPac's clients, Glencore.

Mr Rossato's engagement with WorkPac consisted of six 'assignments' between 2014 and 2018.

Upon his retirement in 2018, Mr Rossato, in the wake of a Federal Court decision dealing with another WorkPac employee in similar circumstances to himself (*WorkPac Pty Ltd v Skene* (2018) 264 FCR 536), made a claim for entitlements on the basis that his engagement with WorkPac was as a permanent rather than a casual employee.

The Full Court of the Federal Court of Australia found in his favour. WorkPac then appealed to the High Court of Australia.

Issue

The parties to the appeal were in agreement that a casual employee under the FW Act referred to an employee who has no “firm advance commitment from the employer as to the duration of the employee’s employment or the days (or hours) the employee will work”. The main issue in the case, however, was whether that phrase applied to the circumstances of Mr Rossato’s engagement with WorkPac.

Decision

In granting the appeal and ultimately deciding that Mr Rossato was at all times treated as a casual employee by WorkPac, the joint judgment drew an important distinction between a ‘firm advance commitment’ and a ‘mere expectation of continuing employment on a regular and systematic basis’.

This distinction led the High Court to disagree with the approach taken by the Full Federal Court which has placed emphasis on the practical realities of the relationship after the employment commenced, like rostering, hours, pay and leave arrangements. Rather, the Court emphasized the primacy of the terms of the employment contract in the identification of any ‘firm advance commitment’, explaining that the certainty and legal obligation created by contractual terms met the threshold of ‘commitment’, as opposed to a ‘mere expectation’.

In their subsequent analysis of the terms of Mr Rossato’s employment contract, the Court considered the absence of provision for work beyond each assignment, the ability for assignments to be varied or terminated with one hour’s notice, and the fact that Mr Rossato was entitled to refuse work, as factors indicating that WorkPac made no ‘firm advance commitment’ to ongoing work and that the employment was casual.

Equally, the Court downplayed the importance of the scope of the rosters according to which Mr Rossato worked; rosters which in fact scheduled work for an entire year. The Court rejected the submission that the rosters formed part of the contract and emphasized the lack of commitment to further work beyond these rosters and the assignments to which they pertained.

Significance

The High Court in essence, has significantly constrained the scope for casual employees to successfully argue that they were in fact permanent.

Together, the Bill’s amendments to the FW Act and the *WorkPac v Rossato* decision provide a certain, albeit permissive, definition of casual employees and the method for determining if that definition is met.

Departing from prior Federal Court decisions which emphasized the need to consider the employment relationship as a whole, the current state of the law now instead stresses the importance of the legally binding ‘commitments’ created by the employment contract in determining whether an employee is a casual or permanent one.

Get help from an employment lawyer

If you have concerns about the status of your employment (casual or permanent) or you have any other issues related to your employment, get in touch with one of the expert members of our employment and industrial law team.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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