ARE THEY REALLY "CASUAL" EMPLOYEES OR HIDDEN LIABILITIES?

Many businesses consider casual employees a flexible and low risk option.

The cost-benefit analysis most business owners run tends to go like this (in summary*):*

> *"In exchange for the higher hourly rate, I don't need to pay annual leave and sick leave, and they cannot claim unfair dismissal…*" (or something to that effect).

Last week's Full Federal Court decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 has got a lot of employers reconsidering their approach to casual staff. If it hasn't, then it should.

This is because the Court found that although the employee in that case, Mr Skene, was designated "a casual" by WorkPac, he worked regular hours and, as such, was entitled to annual leave.

Casual employment

A casual employee is one who has no expectation of ongoing work and no guaranteed or set hours of work. A casual employee may be *available* to work regular or fixed hours of work, but ultimately works irregular hours of work.

This is a *true* casual.

It is also a description of casual employment that is consistent with the Court's exploration of the term "casualness", which focused on there being no firm, advance commitment about hours of work.

Under the *Fair Work Act 2009* (Cth) (**Act**), a casual is not entitled to be paid sick or annual leave but will be eligible to various types of unpaid leave such as carer's leave.

Long term casuals

There is no definition in the Act for a "casual employee".

There is, however, a definition for the term "long term casual employee", which is a casual employee who works on a regular and systematic basis for period of time during at least a 12-month time frame or longer.

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The Act provides that a long term casual may request a flexible work arrangement and take parental leave.

The Act *does not* provide that a long term casual is entitled to paid leave (or notice of termination of employment), which is another reason why the WorkPac decision has shocked employers.

The WorkPac decision means that casuals (particularly long term casuals) may be able to claim annual leave where they work fixed or predictable hours, as Mr Skene did.

Key takeaways

This recent Court ruling means businesses with casuals:

- must pay immediate, close attention to any casual who has been employed for 12 months or longer;

- need to examine the length of time the casual employees have worked for the business, their hours of work over that period of employment and consider whether those casuals have regular or set hours of work – if so, take advice;

- cannot just use the term casual for convenience – business owners need to make sure the casual employee fits within the true definition of a casual and cannot rely on "designating" an employee a casual (whether through an agreement, a payslip or written employment contract). It also does not matter if the employee agrees to – or wants to be – a casual;

- pay the casual loading and make it clear – in the WorkPac case, it was not clear that the flat rate included the casual loading, which was problematic for the business;

- conduct regular self-audits – monitoring your workforce (especially your casuals) should become a standard business practice; and

- have employment contracts legally drafted – this will minimise the risk of casuals succeeding in asserting they are a permanent employee or otherwise double-dipping on loading and leave.

Businesses with even one casual employee should pause and do a self-audit of their workforce; it is imperative to know and understand the make-up and risk profile of your workforce when it comes to compliance with industrial laws.

At Murfett Legal we are experienced helping business owners and managers with all matters relating to Employment and Workplace Relations.

This is a guide for employers to raise awareness of the best practices and procedures relating to employment law and workplace relations. It does not constitute legal advice and

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is meant to be informational only. Specific legal advice should be obtained for each individual business to make sure it is correctly applied. ***Contact Murfett Legal for legal advice specific to your situation.***

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