Published on *The National Law Review* https://natlawreview.com

Keeping it Casual: When to Define the Relationship

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Litigation at KL Gates

There is no denying that 2018 has brought the engagement of casual employees to the fore as an increasingly contentious issue facing employers. This has been most recently highlighted by the decision of a Full Court of the Federal Court of Australia in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (***WorkPac***).

Mr Skene was employed by labour hire company, WorkPac Pty Ltd, as a casual employee and worked on two different Rio Tinto sites during his employment.

The applicable industrial instrument under which he was employed was the *WorkPac Pty Ltd (Coal) Industry Workplace Agreement 2007* (**Agreement**) which provided that employees could be engaged on a casual basis, which was also confirmed in the written terms and conditions of employment provided by Mr Skene.

At first instance, Judge Jarrett found that Mr Skene was not a casual for the purposes of the entitlement to annual leave in the National Employment Standards (**NES**) to the *Fair Work Act 2009 (Cth)*, but that he was a casual for the purposes of the Agreement.

On appeal in *WorkPac*, the Full Court upheld the finding of Judge Jarrett that Mr Skene was entitled to annual leave under the NES but found error in His Honour's findings about the Agreement, finding instead that Mr Skene was also a casual for the purposes of that instrument.

When is a Casual … not a Casual?

Much was made of the definition of a "casual" employee for the purposes of the NES in the context of no statutory definition. The Full Court rejected WorkPac's construction as it related to the definition within the Agreement (and more broadly, applicable industrial instruments) in favour of a legal construction involving consideration of individual factual circumstances against a number of indicia established by case law - similar to the way Courts assess independent contracting arrangements.

The factors in *WorkPac* that the Court found weighed against casual engagement of Mr Skene included the fact that:

- Mr Skene's employment regular and predictable - with 12 hour shifts on a designated "crew"

being set 12 months in advance for a roster of 7 days on and 7 days off
- the company facilitated, at its expense, a fly-in, fly-out arrangement with accommodation for Mr Skene
- there was a plain expectation as to Mr Skene's availability on an ongoing basis
- the work undertaken was not subject to significant fluctuation
- it was not open to Mr Skene, in the circumstances, to accept or reject an offer of assignment.

The Court also noted that Mr Skene was paid a "flat rate" of pay which did not specifically provide that the rate was inclusive of a casual loading.

Beyond *WorkPac*

Without any definitive statutory definition of a casual employee, *WorkPac* makes it clear that specific circumstances will be relevant in determining whether an engagement is reflective of casual employment, balancing considerations relating to contractual documents and work arrangements.

Implicit in the reasoning in *WorkPac* is that the overriding consideration will be the nature of the engagement as it relates to work performed - ie hours, rostering arrangements etc - over considerations relating to pay rates inclusive of loading and contractual documents specifying that the basis of employment was casual. This may have a significant impact on a number of employees across a number of industries.

This may also impact employers with enterprise agreements that cover casual employees and the future negotiation of agreements.

The Full Court also detailed the other entitlements in the NES that casual employees are not entitled to, which could also form the basis of claims that may arise in the future.

While the claim in *WorkPac* specifically related to NES entitlements that casual employees are not entitled to, it is important for employers to remember that claims under the NES are not confined to issues related to the engagement of casual employees.

For example, there are proceedings currently before the Federal Court about the interpretation of the entitlement to personal/carer's leave which, while expressed in the FW Act in "days", may be accrued, taken and paid with reference to an employee's hours of work.

While it remains to be seen whether the *WorkPac* decision will be appealed, employers should still carefully consider the engagement of casual employees in the workplace, including by having regard to the following.

- Classification as a casual employee in an employment contract or an industrial instrument is not determinative.
- Regular / predictable roster patterns and hours of work are likely to weigh against the argument that an employee is engaged on a casual basis.
- Rates paid to casual employees should clearly specify that the rate makes provision for a casual loading and the entitlements that loading is paid in lieu of.

As the NES applies to all national system employees / employers regardless of industry, occupation or classification, hours of work / rostering arrangements and pay, employers should exercise caution in adopting an overly simplistic approach to the entitlements within and seek advice where

appropriate.

Chloe Mitchell contributed to this article.

National Law Review, Volume VIII, Number 256