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

Just a Fling – Australian Employer Finds Breaking Up With Casual is Hard to Do

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According to the *Australian Bureau of Statistics*, the number of casual employees in the Australian workforce is on the rise, with the highest proportion employed in the retail and building industries. However, how many of these are true casuals and what are the consequences of an employer not getting the relationship right?

The recent decision of the *Fair Work Commission* in ***John Perry v. Nardy House Inc.*** has confirmed that it is the relationship established by the facts and not the one described in the contract which will be determinative of whether an employee is a true casual.

The facts

Mr Perry was employed by NHI from September 2014 to August 2015 as a "casual support worker". He was rostered to work 128 hours each month and his shifts were often subject to swaps or additional hours. His contract stated that he was not guaranteed any set numbers of hours per week but would receive 25% casual loading and overtime in accordance with the applicable award.

In August 2015, NHI stopped providing casual employees with rosters in advance and instead offered work on a 'call in' basis. When Mr Perry was not offered any further shifts he lodged a claim for unfair dismissal.

The issue

Only those who have completed the minimum 6 month period of employment as defined in the *Fair Work Act* (2009) (**FW Act**) are protected from unfair dismissal. A period of service as a casual does not count as a period of continuous employment for this purpose unless the employee both:

- was employed on a "regular and systematic" basis; and
- had a reasonable expectation of ongoing employment.

FWC decision

While there is no settled meaning of the phrase ‘casual employee’, the FWC in this case determined that a key characteristic of casual employment is whether the individual is from time to time offered employment for a limited period on the basis that the offer of employment may be rejected or accepted and where there is no certainty about the period over which it would continue to be offered. The informality, uncertainty and irregularity of an engagement will generally support a conclusion that employment is casual.

It was clear from the evidence that Mr Perry worked “systematic and regular” hours in accordance with his roster throughout his engagement (i.e. 128 hours each month). Even when rostering arrangements changed, this did not result in a decrease in the number of hours worked. In addition to this, Mr Perry’s “reasonable expectation” of continuing employment was set from the start when NHI advised him at his interview that he would be rostered each month for 128 hours of work. Despite the terms in his contract, the FWC therefore held that Mr Perry was rostered like a permanent part time employee and worked like a permanent part time employee. By not offering Mr Perry any further shifts, NHI had frustrated the contract of employment and Mr Perry was entitled to make an unfair dismissal claim.

Tips and traps for employers

Determining whether an employee is a true casual and therefore not protected from unfair dismissal can be a minefield for employers. While a ‘casual’ employee generally has limited protections and entitlements, if he is a ‘Long Term Casual’ within the meaning of the FW Act (i.e. has been employed on a regular and systematic basis for a period of at least 12 months) and has a reasonable expectation of continuing on this basis, then he may not only be protected from unfair dismissal but also entitled to request flexible working arrangements and parental leave.

If the individual is ‘in fact’ a part-time employee or full-time employee, he will be entitled to the full range of employee entitlements and protections. A failure to pay relevant entitlements as a result of misconstruing the basis of employment can result in underpayment claims and civil penalties for companies and officers or senior employees involved in the contraventions.

Employers should therefore review the manner in which each casual employee is engaged and consider questions such as:

- Is the employee regularly working 38 hours or more each week?
- Is there a clear regular pattern or roster for the hours and days worked?
- Is work offered and accepted regularly and sufficiently enough that the relationship cannot be regarded as irregular or informal?
- Are there reasons why the employee may have an expectation of ongoing or systematic work? (e.g. was anything promised at the interview stage? Has he worked the same days and hours for a long period?)
- Even though the employees may from time to time reject shifts or advise they are unavailable for shifts so they can have a break from work, are they put back on the roster when they return?

Communication and clarity with employees regarding the relationship is also very important – while just ‘a casual’ thing may suit some people, others may well be looking for something with more commitment. When in doubt when terminating a casual employee, employers should seek legal advice to ensure the relationship is correctly identified and any legal exposure properly mitigated.

National Law Review, Volume VI, Number 103