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WHEN IS CASUAL PERMANENT? FINDING A WORKABLE DEFINITION

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Legal Briefings – By **Drew Pearson and Wendy Fauvel**

INTRODUCTION

The question "*would you like to be permanent*" may become a very common one in workplaces across Australia.

A topic of debate for decades has been defining a casual employment relationship – although it has seen greater scrutiny over the past five years. This increased focus has followed the decisions of *Skene v WorkPac Pty Ltd* [2016] FCCA 3035 (**Skene No 1**), the Full Court of the Federal Court decision in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536; [2018] FCAFC 131 (**Skene**), and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (**Rossato**).

The ideological positioning of the debate is clear, either:

- casual employment should only be used for short term, ad hoc work; or
- an employer and an employee should be able to voluntarily agree upon the casual nature of their relationship for the purpose of any period and nature of work.

Following Skene No 1, we have seen an increased number of class actions and other proceedings commenced claiming that casual employees are in fact full-time employees and are entitled to back payments for leave. We have also seen an increased number of casual employees challenging their status to gain access to the unfair dismissal regime in the Fair Work Commission.

With this increased focus in the Courts and the Fair Work Commission, it is critical to many Australian employers that the issue of casual employment be a priority in the Coalition's upcoming reform package. But to be effective, it is essential that any reforms consider the following:

1. **Future definition** – a more robust definition will need to be included to set the boundaries for who is a casual employee;

2. **Past liability** – a balance will need to be struck between providing entitlements to employees who truly are not casual whilst respecting any loading or additional payments they have received during their employment; and

3. **Conversion options** – casual conversion requests where a casual employee can request to convert to permanent employment have become a feature of modern awards, and is expected to broaden to other instruments and the National Employment Standards (**NES**).

FUTURE DEFINITION

Skene recognised that the term "casual employee" had no precise meaning.

However, the Full Court of the Federal Court in Skene found that the "legal" or "ordinary" meaning of a "casual employee" was an employee who had "no firm advance commitment from his or her employer to continuing and indefinite work according to an agreed pattern of work" and the employee also did not provide a reciprocal commitment to the employer. The Court found that this was the "essence of casualness". In making its decision, the Full Court followed a long line of case authority that looked at the "totality of the employment" to determine whether there was a "firm advance commitment", having regard to the conduct of the parties (including the real substance, practical reality and true nature of the relationship). Factors that can suggest the absence of a firm advance commitment include irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability.

In Rossato, White and Bromberg JJ in separate judgements reiterated that there was no single test for determining whether an employee is a casual employee as much may depend on the particular statutory, award or enterprise agreement context and the factual circumstances of the case. The Court found that Skene set out matters of general principle or approach relating to time-based performance of employment, rather than purporting to lay down some hard and fast rule for the identification of casual employment.

In light of this, there are some difficulties with reaching a one-size-fits-all approach to the definition of casual employment that applies in Australian workplaces. We suspect that the reform will align to the approach taken in Skene and set out general principles for how to determine who is a casual employee. We are hopeful that some primacy is given to the agreement that is reached between the employer and the casual employee at commencement of their employment – but it is not certain whether this will be the case.

Even if this is enshrined in legislation, we expect that this will not resolve the difficulty of determining whether a casual employee is a full-time employee or not. The difficulty we have seen for many employers following the Skene principles is that the principles require a balancing of the different aspects of a casual employee's engagement and circumstances of their employment. It is up to the Court or the Fair Work Commission to determine which factors take precedence over the others, and the application of the principles to different circumstances can lead to very different results for different employers. There is some uncertainty that remains in how these principles are applied in practice.

Even if a casual employee is found to not to be a full-time employee, there are additional entitlements in the NES and access to the unfair dismissal regime if an employee is a "*long-term casual employee"* who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months. While previously, case law has indicated that primacy should be given to the pattern of work to assess whether an employee is regular and systematic, increasingly, cases in the Fair Work Commission have followed an ACT workers compensation decision in *Yaraka Holdings* that found that the focus should be on the engagement rather than the pattern of work in the engagement.[1] This means that there have been cases where employees who have irregular working patterns who have been employed for a longer period of time have found to be regular and systematic. We doubt that this was intended by the legislation when these provisions were made.

PAST LIABILITY

Even if principles for determining who is a casual employee is enshrined in legislation, another key aspect will be dealing with past liability.

The *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (Cth) was made by the Coalition to attempt to allow employers to have the casual loading taken into account in paying any claimed underpayment of full-time entitlements, where the employee clearly received the casual loading in lieu of those full-time entitlements.

However, the utility of this Regulation has been called into question following Rossato. In that case, as Mr Rossato was claiming annual leave entitlements rather than payment in lieu of annual leave entitlements, the Court found that this fine distinction meant that the Regulation did not apply.

Any reform to deal with casual employment needs to redress this issue to ensure that employers can use the casual loading and any over-award or over-agreement payments to pay any underpayments in the event that the employee is found to be a full-time employee. It will also be interesting to see how the timing of any reform aligns with the High Court's decision in Rossato as a special leave application is currently on foot.

CASUAL CONVERSION

If the casual employment arrangement no longer suits the employee, there are mechanisms in place in various modern awards that give the employee the option of requesting to convert to permanent employment. This has had a flow on impact to many enterprise agreements, which include a similar casual conversion term (although many included a casual conversion term before these terms were introduced to modern awards from 1 October 2018).

We expect that casual conversion will become a feature of enterprise agreements and enshrined in the NES. The question will be what period of casual employment is specified in the provisions before the employees have an entitlement to request to become permanent (e.g. 6, 9, 12 months?), and what processes employers will have to implement to deal with these requests. We expect the structure of the provisions will align to the modern award provisions – that employers will have certain notification requirements when casual employees reach a certain period of employment to prompt them to make a request, and that there be detailed steps and timing requirements that apply once that request is made relation to the acceptance or rejection of the request.

Pre-COVID-19, we have seen a number of employers running casual conversion campaigns with their workforce, only to find that there is minimal take up by employees because the arrangements suit individual circumstances due to the flexibility and often higher pay. However, with job security concerns in many industries across Australia because of the impacts of the COVID-19 pandemic, we may see casual conversion campaigns take centre stage in workplaces.

For employers with large casual populations, the question will be how to run these casual conversion campaigns – is an IT solution needed? Can the campaign run on an exceptions basis – that if an employee does not respond that it is assumed that they don't want to request to become permanent? The practical implementation of these requirements may pose some difficulties for these employers.

WHAT TO DO IN THE MEANTIME?

The Coalition's proposed reforms are expected to be tabled in Parliament at the very end of this year, and WorkPac is seeking special leave from the High Court in relation to the Rossato decision. But business must continue. In the interim, the focus must be on risk management.

We are currently working with clients on the following risk management activities:

- **Reviewing the use of casuals:** Many employers are reviewing their labour model to consider whether casuals can only be used where the employment is truly intermittent, irregular, informal and unlikely to continue for any length of time. Employers are considering avoiding casuals working patterns of stable, regular and predictable employment;

- **Rosters:** Employers are now moving to offer employment to casuals on a daily or shift basis only, and ensuring that there are appropriate mechanisms for the employee to elect whether or not to work on each day or shift;

- **Contracts:** Employers are reviewing contracts of employment to reflect the true and current nature of arrangements with their casual employees;

- **Casual loading:** Employers are ensuring that a casual employee's rate of pay reflects a separately identifiable casual loading both in their contract of employment, and pay slips;

- **Casual conversion:** Employers are considering casual conversion campaigns on a regular basis and keeping records of employees' responses;

- **Set off clauses:** Employers are including appropriately worded set off clauses that may expressly permit the recovery of the casual loading if the relationship is subsequently found to have been mischaracterised;

- **Managing the termination of long term casual employees carefully:** Given the increasing litigation in this space, employers are managing any termination of a long term casual employee carefully.

ENDNOTES

1. The Court in Rossato declined to deal with this issue although it stated that there was "some force" in the proposition that the construction adopted by Yaraka Holdings has application to the definition of "long-term casual employee".

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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