INDUSTRIAL RELATIONS UPDATE

April 2021

Casuals defined in legislation

The employment category of Casual, engaged and paid as such, who is free to accept or reject work and is paid a loading in lieu of typical permanent employment benefits like paid leave, is now enshrined in federal legislation. Of critical importance, the definition focuses on the *intention* of the employer and the employee at the start of the relationship in identifying the true nature of the employment contract.

The impetus for this development was the controversial *Workpac* cases where employees, engaged and paid as casuals, were found not to be casually employed by the Federal Court. As permanents the court found they were entitled to annual leave, but did not deduct the casual loading when awarding backpay. This double-dipping caused a big headache for the employers of millions of casuals.

The legislation says that if "*an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person and the person accepts the offer on that basis*", then, prima facie, that person is a casual.

This wording is essential to supporting any contention about the nature of the relationship and should be used in employment offers/contracts. If this is done, then the court can note it if an employee later argues they were in fact permanent.

There is a flip-side though to these changes. This legislation requires an employer to make an offer to a casual to convert to permanent under certain circumstances. This offer must be made if the casual has been employed for 12 months (counting from the first day the casual was employed) and, during at least the last six months of that period, the casual employee had a regular pattern of hours which could readily be structured as a full or part time arrangement.

Until now, conversion provisions were in awards and agreements. Raising it to the Act itself means it covers all situations and generally overrides award or agreement provisions to the extent of any inconsistency.

The new legislation limits circumstances where an employer can refuse a conversion request. There are also mechanisms, through dispute settling procedures both in the legislation and awards/agreements where the FWC could become involved. In such cases, it is potentially available to argue that adverse action has occurred if for example the FWC recommends conversion but the employer still refuses.

Employers will be obliged to provide all casual employees a Casual Employment Information Statement which the Ombudsman will promulgate shortly. So there is definitely a new landscape, with safeguards to avoid double-dipping as happened to *Workpac*, but with increased emphasis on reducing casual employment where the employee wants permanency.

Whether this will be the end of the problem however is not absolutely certain. Already there's talk of a constitutional challenge to this legislation. And the High Court has yet to hear the full arguments in the *Workpac* cases which may impact on the new laws. Meanwhile, employers are entitled to act on the law as it is. The main issue is to ensure that offers of employment for casuals, and their contracts, are very clear and use the same language as the legislation.

Fair Work Amendment - Casual employees - March 2021

Covid-19 Award Flexibilities Extended to December

The FWC has decided to extend the operation of the award flexibilities in a range of modern awards arising from the pandemic. These awards were varied to include a special Appendix which provided for unpaid pandemic leave and the flexibility to take twice as much annual leave at half pay. Originally slated to expire in March this year coinciding with the end of JobKeeper, the FWC has decided to extend the operation of these provisions until 31st December 2021.

COVID-19 Award Flexibility Schedules [2021] FWCFB 1621 (26 March 2021)

To jab or not to jab

Right now many employers worry about the legalities of requiring, or not requiring, employees to vaccinate against Covid-19. Advice on this vexed question is available from Safe Work Australia (SWA), but in a nutshell, the vast majority of employers will be neither obliged nor entitled to insist on vaccinations.

This means if for example an employee refused to attend a workplace because vaccination there is voluntary, according to SWA "*in most circumstances, a worker will not be able to rely on the WHS laws to cease work simply because another worker at the workplace isn't vaccinated*".

Customers too need to be considered. Front line staff should be alert to any on-site requirements that might apply to customers and visitors as do to employees.

Employers should always check if there are any unusual circumstances that might justify exemptions or special measures. It is relatively new ground industrially, and some relevant matters before the tribunals and courts are yet to be heard and determined. So caution is advised.

Safe Work Australia - workers, customers and vaccinations

Zombies escape sledgehammer - for now

One of the less discussed provisions in the Fair Work Act proposed amendments that sank without trace in parliament in March was the sunsetting of so-called zombie agreements. The target groups in the failed legislation were agreements made under WorkChoices from 2005 onward and those made from the commencement of the Fair Work Act in July 2009 for a six month period, through to 31st December 2009.

It was proposed that all those agreements would be cancelled as and from mid-2022. This meant any workplace still on a zombie agreement would come under the relevant award(s) again because the agreement will no longer be in force. It would cease to exist from that date.

Since the Bill parliament passed was restricted to fixing the casuals problems, this proposal is in limbo, as are the proposed increased penalties for underpaying employees. It beggars belief that Labor, Greens, Independents and unions opposed these initiatives, but that's what happened. A revised package, with some of these items in it might elicit a different stance from the naysayers.

There is considerable evidence that many employers continue to operate under these agreements, albeit with some provisions in them updated informally. Crucially though, many of these agreements have tailor-made structures for work patterns and payment methods which, if they were presented now, would struggle to get FWC approval. This is because the better off overall test has been applied much more rigidly against the awards that now, despite all the rhetoric to the contrary, are more complex and detailed in many cases than they were before 2010.

It's possible that some of these 'lost' proposals will re-surface later this year. Especially when JobKeeper stops and the real economic situation emerges. Employers operating under agreements this old ought to be thinking now about what they will do if that happens. (It could have already occurred had this recent legislative effort succeeded.)

They need to be checking the relevant award(s) and not just focusing on hourly wage rates. That's the least of the concerns. It is the structure of hours, overtime, how time off in lieu works, restrictions on casuals, myriad allowances, penalty rates for certain ordinary hours – the list of items is long in many awards that these old agreements did away with in favour of simplicity. Braining their zombie could be a real big headache for some employers.

Fair Work Amendment Bill 2020

Working from home? Or anywhere

If you have a white collar job and you can work from home, maybe your work can be done from anywhere. Like The Philippines, or India or some other low wage country? If videoconferencing works from Parramatta it can work from Peshawar too. Off-shoring is not new, but it may be that the experiences over the last twelve months (a reasonable trial period for any new working method) have demonstrated that the export of jobs can be more than just some back office admin and call centres.

HR departments in organisations which would prefer to have employees on site, more or less full time, might be wise to point this out to cohorts of employees who are in love with WFH. They need to consider a possible longer term risk. Underutilised workspaces and equipment, along with the WHS headache of making sure that someone's home (or wherever) is safe, may well lead to some employers radically changing how they operate. Sometimes such decisions are made offshore too. Careful what you wish for….