INDUSTRIAL RELATIONS UPDATE

June 2020

Casuals Confusion

The status of casuals continues to be a serious issue for tens of thousands of employers following another Full Federal Court decision in the *Workpac* saga. In a nutshell, the court has again found that the employee, despite being engaged as a casual and paid a casual loading, just like awards have permitted for decades, was in fact a permanent.

The court has found the employee was never a casual, as the common law definition of a casual stands, because the work was indistinguishable from a permanent in the way it occurred i.e. regular and systematic with an expectation of ongoing relationship.

And here's the sting; the loaded casual rate will be used to calculate the annual leave entitlement to pay out the 'casual' employee. Apart from the economic damage this can do to a business, another egregious outcome of these decisions is the affect it has on permanent employees.

They receive lower pay in return for leave and other benefits and then see colleagues, who usually knew very well they were receiving a higher rate and why, double-dip. This outcome is utterly perverse and the epitome of unfairness.

And all this despite the fact the Fair Work Act actually has a definition called "long term casual" and that definition neatly fits the employees in the *Workpac* cases. Go figure.

It's a mess. Employers and employees have for a long time preferred the casual option – it has benefits both ways – even though the employee works regularly, like a permanent. The law now also protects most such employees from unfair dismissal and confers various other benefits (e.g. parental leave, long service leave). The casual loading easily compensates for the foregone 'permanent' employment conditions like paid leave and redundancy, especially where several of those benefits (e.g. sick leave, jury service, redundancy) are either partially, or never, accessed by many permanent employees.

The ease of administration for employers and the higher pay rate for employees have long been motivators for the long term casual relationship to evolve and persist. In many situations the award that applies to the work has so many restrictions on part time employment that a casual contract is really the only alternative. But even that reason is subject to the common law, as the court has already dismissed argument that the awards provide for a casual as one "engaged and paid a such".

The court decisions themselves do not solve the problem. Implicit in them is the reality that each case will turn on its own facts, which is an intolerable state of affairs leading to complete uncertainty for all concerned. The federal government has identified this problem and set-up a panel as part of its Working Groups to review IR laws as they affect casuals. It also is joining a High Court challenge to the decision. We hope these processes bear fruit.

Our best advice is to minimise the use of casuals and to ensure, for what it's worth, that the employee(s) concerned is fully acquainted with the pay rate and what it covers when it is offered on engagement. All in writing. And we also recommend you offer to casuals, who've been in your employ a while, the opportunity to convert to permanent if you can.

Reduced Redundancy Payouts Due to Pandemic

Employers in deep financial distress have recourse to the law if forced to make employees redundant but cannot afford the statutory redundancy payouts. In one recent case, the FWC has reduced by close to 70% the monies due to employees of a business due to its "significant financial strain" resulting from the close-down of so much commerce. The company provided the FWC with detailed financial data including evidence that customers were unable to settle their accounts.

HyperLife Pty Ltd T/A Acme Preston v Kelly Brennan [2020] FWC 3080 (12 June 2020)

Covid-safe Workplaces

The National Covid-19 Coordination Commission was established under the auspices of the Department of Prime Minister and Cabinet. It has published a document called a planning tool which is designed to assist employers plan how to best provide as healthy and virus-free workplace a workplace as possible as restrictions ease.

It is essentially a practical step by step guide to re-establishing business operations as more staff return to workplaces. It offers guidance on what support is available and where it can be accessed, what to do if infections do occur, what adaptations employers might make to try to prevent the spread of the virus and related matters. There is a series of check lists, which takes approximately 30 minutes to work through, on a range of topics and actions that can be taken.

It includes cross-references to WHS obligations some of which will be set at a local level, as well as those through Safe Work Australia. Various links are included in the tool which can be accessed on line here

COVIDSafe tracing app

And in another development, the federal government has made compulsory acquisition of the tracing app illegal in an employment relationship, with fines of up to $63,000 and imprisonment if breached.

Miscellaneous Matters

Staying true to the adage, *let there be no aspect of life left knowingly unregulated*, the FWC has extended the coverage of the Miscellaneous Award which may have far-reaching effect. This Award is a mongrel breed, there to catch anyone not covered by any of the other 120 odd modern awards.

It was made, along with the others, in 2010. From its original structure and the Explanatory Memorandum to the Act it was there to cover work performed essentially by workplaces which did not fall under the descriptors of the other industry, or the few occupational based, modern awards.

But it specifically excluded any employee whose workplace was regulated by a modern award (in the industry in which the employer's business is) where that particular employee's occupation was not listed under that award.

This meant, for many employers, there was only one award applying at the workplace, consistent with the legislated modern awards objective which includes this: "*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*".

An employee whose classification was not listed, would still be entitled to the federal minimum wage and all the NES. In most cases, common sense applied, and employers used the workplace award for that employee anyway, for practical and equitable reasons.

But the FWC has changed the Miscellaneous Award so that now it will apply to that type of employee. The previous exclusion will be removed. It's likely many employers don't know these employees' conditions are to be regulated differently to the main body of their workforce.

Examples could include direct hired security staff, governesses, delivery drivers, gardeners, maintenance staff, carpark attendants, in-house catering staff and so on.

Coming on top of the casuals drama, the detailed record keeping for employees on a salary and other such 'modernising' of awards, employing people in Australia in accordance with all the rules just got that little bit harder.

Employers need to check the details of the Miscellaneous Award if they employ anyone whose job is not listed in the award applying at their workplace or an occupational award, to make sure that they are compliant with the Miscellaneous Award from 1st July 2020. This can even include employers with enterprise agreements if the enterprise agreement does not cover these types of employees explicitly.

Four yearly review modern awards - Miscellaneous Award [2020] FWCFB 1589 (25 March 2020)

Sham Redundancy?

An employee has been allowed to lodge her unfair dismissal late after she discovered her old job was advertised a few weeks after she was made 'redundant'. She told the FWC that she did not file for unfair dismissal earlier, within time, because she believed her employer was genuinely making her redundant. But when she saw the job advertised so soon after her departure she became suspicious, and on making enquiries about the advertised job could not significantly distinguish it from her old job. The FWC saw the circumstances as exceptional and granted her an extension. Oh what a tangled web we weave…..?

Toni Perret v Ayers Real Estate [2020] FWC 2981 (5 June 2020)