INDUSTRIAL RELATIONS UPDATE

September 2016

Redundancy payouts must count regular casual employment

Redundancy pay has, up until now, been calculated by reference to employees' permanent service only. But in a game changing FWC decision on what counts as "service," a Full Bench has found that periods of regular and systematic casual employment, before becoming a permanent employee, are to be taken into account when calculating service.

When a shipbuilding company made a number of its employees redundant at one of its yards after the completion of a major contract, a union disputed the company' redundancy pay calculation for permanent employees who had previously been employed as regular casuals with the company.

In the original decision, the FWC found that, in accordance with the company's EA, prior continuous service was only recognised for the purposes of calculating long service leave, not notice or severance payments. The FWC said that the 25% loading casual employees receive compensate them for service-related benefits such as redundancy pay, which are only accessible to permanent employees. However, this decision was overturned by a Full Bench majority on appeal.

In the majority decision, Drake SDP and Lawrence DP adopted a broad interpretation of "continuous service" under s.22 of the Fair Work 2009 (the Act). Although the Bench acknowledged the principle of a casual loading and 'industrial justice,' it found that the definition of continuous service under the Act includes periods of regular and systematic casual employment for the purpose of severance payments.

The dissenting member, Commissioner Cambridge, said the majority had adopted an erroneous approach to the interpretation of s.22, which is reliant upon the absence of express terms relating to casual employment within that section. In his view, the majority did not properly characterise the concept of service in the overall statutory scheme – which has been the orthodoxy to date.

Commissioner Cambridge warned that the majority's characterisation of service as "encompassing a period of casual employment prior to permanent employment being established" has significant implications for a number of NES items. In particular, the payment of annual and personal/ carer's leave, which accrue based on each year of service.

He said that the practical effect of this construction is that service related benefits that are "unambiguously not available" to a casual employee become bestowed on a permanent employee for a prior period of service which would not have provided any entitlement for that benefit.

What remains unclear is whether this decision will feed into other service-related benefits contained in the Act. Only time will tell.

What we do know for certain is that this decision has real and potentially costly effects for employers who convert casual employees to permanent employees. A redundancy bill may check out a lot higher than originally anticipated.

To avoid any doubt about an employee's entitlements, employers should check their payroll records for any mixed period/s of casual and permanent employment. And be very careful dealing with casual conversion issues.

AMWU v Donau Pty Ltd [2016] FWCFB 3075 (15 August 2016)

CONTACT US

Please contact us if you have any questions or queries about these matters or any other industrial relations matters.

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Changes about annual leave

The FWC has inserted provisions into almost all modern awards allowing employees, by agreement, to cash out some of their annual leave, as long as they have at least four weeks remaining after doing so. Under these changes, employees will only be able to cash out two weeks of annual each year.

Employers will also be able to direct their employees to take annual leave where they have accrued more than eight weeks annual leave. Employees too will have new rights to demand to take leave at times that suit them in certain situations.

This Time it's Personal

Adamant to ensure someone is held responsible for breaches of workplace law, the Fair Work Ombudsman (FWO) has begun to step up its compliance activities by targeting those beyond employers and company directors.

In a speech to the Australian Human Resources Institute, FWO warned that it is "adventurously testing the limits of accessorial lability provisions" so that it extends to HR advisors, line managers, recruiters, admin staff, contractors, and individuals involved through a supply chain or franchise network.

This means that practically any person who is involved in facilitating a breach of workplace law/s may be at risk of being found to be personally liable for any back-payment, penalties or other costs associated with the breach.

The test for accessorial liability is whether a person was "knowingly concerned in or party to" a contravention. The FWO said that the usual excuses for non-compliance – ignorance, inadvertence, 'wilful blindness' or simply following orders - will not be enough to prove otherwise.

The FWO has had a number of legal victories in this domain.

In one case, it initiated proceeding against an accountancy firm which processed staff wages for a client, despite having explicit knowledge that the rates were below the award. In another case, a director, HR manager and line manager of a restaurant were ordered to personally pay penalties for the company's award breaches.

Employers and decision-makers who want to avoid accessorial liability need to know more about the labour hire companies, contractors and other employers in the supply chain. With so much relevant information to assist compliance publicly available and easy to access, there are few excuses left to avoid penalties if breaches are discovered.

Innovative response to a picket line?

A number of workers that were "just trying to do their jobs" have filed anti-bullying claims against a union, who is currently in dispute with a major labour hire company.

The dispute between the union and labour hire company arose when the client terminated the employment of 55 long-term maintenance workers because a contract came to an end. The union alleged that the workers were told upon termination to re-apply for their job at a new labour hire contractor for 65% less pay.

The union then set up a daily picket line outside one of the client's facilities and a weekly protest outside their corporate headquarters. This industrial action has lasted almost two months.

Usually in these situations, it is the employer who responds to industrial action, perhaps by way of applying to the FWC to suspend the action or capitulating to union demands.

In a surprising turn of the events though, the workers of the new labour hire contractor are taking action against the union by filling a number of anti-bullying claims. This is instead of the labour hire company, and its client, who are the direct targets of the picket line.

Could this tactic possibly be an innovative way for employers to respond to, and ultimately defeat, union sponsored picket lines?

At this stage, the cases have yet to be finalised by the FWC so watch this space for more information!