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CASUAL EMPLOYMENT AND LABOUR STANDARDS IN AUSTRALIA

The rise of the phenomenon of « zero hours » contracts, and other forms of irregular casualised engagement in the gig economy, has highlighted the pressing need for greater regulatory protection of precariously engaged workers around the world. Regulatory solutions must be found, to ensure that workers are treated fairly, with dignity, and not treated as disposable commodities, ready to be taken off the virtual « shelf » at the convenience of business.

Australia has a history of protective labour regulation of « casual employees ». However, two recent decisions of the Full Federal Court of Australia have highlighted systemic problems with the Australian approach. The regulation of casuals in Australia, and the complexities of the regime, are the subject of this update.

One of the peculiarities of the Australian regulation of casual employment is how a worker in casual employment is identified. A person may be a casual employee for one form of regulation but not another, depending on the definition of casual applied. There is marked variation between the common law, Statute and industrial instruments such as awards and enterprise agreements.

Under the common law, whether an individual is an employee, and the nature of their employment, are questions of law determined by reference to the contract under which the individual is engaged. In common with many overseas systems, the existence of an employment contract is determined by reference to a range of factors including the degree of control held by the employer, the integration of the worker into the business of the employer and the extent to which the worker is in business for themselves¹. Where an employment contract exists, the nature of that contract as fixed-term, ongoing or casual will depend on the terms. A casual contract is one which manifests the indicia of « irregular work patterns, uncertainty, intermittency of work and unpredictability »².

Once engaged under a contract of employment, the bulk of an employees' rights will be sourced from Statute and industrial instruments. Most workers in Australia are covered by the *Fair Work Act 2009* (Cth) (FW Act) which contains minimum standards of employment in respect of, amongst other things, leave entitlements, working hours and unfair dismissal. The FW Act also provides for the creation of modern awards, which set more detailed labour

- 1 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; see further A. Stewart and S. McCrystal, « Labour Regulation and the Great Divide: Do New Business Models Require a New Category of Worker? » (2019) 32 *Australian Journal of Labour Law* 4.
- 2 *Workpac Pty Ltd v Skene* [2018] FCAFC 131 at [172].

standards applicable on an industry or occupation basis, and enterprise agreements which are negotiated between an employer and their employees, and apply at enterprise level.

In respect of awards and agreements, most include definitions of different types of employment which apply for the purpose of that instrument only. A common definition is that a casual employee is an employee that is « engaged and paid as a casual employee ». Or, in other words, irrespective of the nature of the engagement, if the contract states that a worker is a casual, and they are paid as a casual, the worker is a casual employee and not in ongoing employment in respect of the rights contained in that instrument. This allows workers to be casually engaged, where their hours are not guaranteed and rights like leave are not provided, but then paid at higher hourly pay rates as some compensation for ongoing precarity and irregularity. This rate is generally set at 25% of the base hourly pay rate of a continuing employee. The ability to do this has led to a phenomenon in Australia known as « permanent casual employment » - where a worker is engaged and paid as a casual, but their working hours and rostering arrangements are effectively full-time or part-time and continuing.

This disjunct between the common law and the definition of casual employment under awards and agreements has been long recognised. In the context where most terms and conditions of the engagement of a worker are found not in their contract of employment, but in an award or enterprise agreement, it has not created significant difficulties.

However, as noted, some employment entitlements exist in the FW Act. The FW Act does not contain a definition of a « casual » employee. Instead, casual employees (without definition) are excluded from some rights, and permanent casuales are provided with others.

For example, under unfair dismissal law, a « casual » employee can challenge the fairness of their dismissal if they have been engaged by the same employer for 12 months or longer on a regular and systematic basis, and they have an expectation of ongoing employment³. A worker who is classified as casual under an award or agreement, and paid as a casual, will be protected against dismissal if they are effectively a continuing worker⁴. This creates a disconnect between the pay and conditions of the worker, and their FW Act protection against dismissal, a disconnect which in practice acts as protection for « long term casuales », creating the potential for them to transition to ongoing employment.

The problem that has arisen, however, relates to the definition of casual employee for the purposes of access to annual leave and personal (sick and carers) leave. The FW Act entitlement to annual leave is contained in s 87, which provides an entitlement to 4 weeks (or 20 days) of annual leave to full-time employees covered by the Act, pro-rata for part time employees, and 5 weeks of leave for shift workers. However the rights in s 87 apply to « employees, *other than casual employees* »⁵. The same applies in respect of the right to 10 days per year of personal leave under the Act⁶. The term casual is left undefined, and any other approach to long term casuales in the Act does not apply.

For the purposes of the right to annual and personal leave under the FW Act, which definition prevails - the one contained in any relevant award or agreement, or the common law?

3 FW Act s 384.

4 See eg *Ponce v DJT Staff Management Services* [2010] FWA 2078.

5 FW Act s 86.

6 FW Act ss 95, 96.

This answer to this question is of critical importance given the prevalence in Australia of so called « permanent casuals » engaged and paid as casuals under awards and enterprise agreements, but treated in effect as ongoing regular employees. Many of these workers accept this status because of the 25% casual loading which is designed to compensate for precarity, unstable work and, in theory, the loss of those rights enshrined in the FW Act including rights to annual and personal leave. The casual loading has the effect of increasing the weekly take home pay of a casual employee at the expense of other employment entitlements. For workers in precarious or low paid work, particularly those living week to week, this is a trade-off that makes sense when it leads to an increased weekly wage, but becomes a problem when those workers want to take time off work for rest, recreation, or illness, when they must take the leave unpaid.

The problem has been the subject of two recent cases in the Full Court of the Federal Court of Australia, which involved substantially the same fact scenario, *Workpac v Skene* (« Skene »)⁷ and *Workpac v Rossato* (« Rossato »)⁸. The cases involved workers in the mining industry, where the use of « permanent casual' employment is common. Both cases involved workers engaged over a period of years, working 12 hour shifts on a 7 or 14 day rosters (7/14 days on and 7/14 days off), in circumstances where their rosters were set annually. In each case the employees were hired under a contract of employment which expressly stated that the engagement was as a « casual employee » and there was an enterprise agreement in place stating that for the purposes of the agreement, a casual employee was an employee engaged and paid as such. Each employee was paid a flat hourly rate for hours worked, but was not paid annual or personal leave.

While the legal questions in the cases were slightly different, essentially the Court had to determine how to define the term « casual » for the purposes of the exclusion from leave entitlements. This came down to whether or not the term casual in the FW Act in the context of the leave provisions should be interpreted by reference to the common law, or the definition contained in the relevant modern award applying to the mining industry or the enterprise agreement negotiated and applicable at the site.

The employees argued that the FW Act should be interpreted by reference to the common law, which suggested that they had held ongoing contracts. The employer argued that the industrial instruments should prevail given the relationship between the FW Act and modern awards/agreements, and the payment of the casual loading which was designed to compensate employees for the loss of entitlements like annual leave.

To understand the employers' position, it is necessary to appreciate that prior to 2006, rights to annual and other leave were contained within industrial instruments, and the development of the casual loading occurred within this context, where casuals who were « engaged and paid as such » were denied rights of leave within the same instrument. When the rights were shifted to Statute, and « casuals » were excluded, it appears to have been simply assumed that the pre-existing state of affairs would continue. However, the difficulty with this approach is that it operates backwards - whereby legislative instruments created under a Statute are used to give content to the meaning of the Statute. This is especially problematic where there is no one definition of casual in those statutory instruments.

Ultimately, it was held that the definition of casual in the FW Act is not subservient to the definition of casual in the relevant industrial instrument, and that the status of the workers

7 [2018] FCAFC 131.

8 [2020] FCAFC 84.

concerned had to be determined by reference to whether the contract of employment was, at common law, casual or ongoing. For the employees, it was found that the engagement was not irregular or unpredictable and they were not casual employees for the purposes of the right to annual leave under the FW Act. It was also found that the unpaid accrued annual leave entitlement could not be set off against the 25% casual loading that had, in theory, been paid to the workers. The *Rossato* decision is currently under appeal to the High Court of Australia.

The problem created by these decisions is that employers who have engaged staff as « permanent casuals » because the modern award or agreement permits them to do so, may face substantial claims for unpaid annual or personal leave from their casual employees - who they paid a higher hourly rate, on the understanding that this was compensation for the loss of that leave. The extent of the unpaid leave bill for some employers could be crippling.

However, the decision also challenges a long standing feature of Australian labour law - that employees who are not truly casual can be treated as casual and denied annual and personal leave, upon receipt of a higher hourly wage. The difficulty with this is starkly illustrated by the COVID crisis where workers turning up to work sick from not having paid leave has been implicated in the spread of the virus⁹. Paid leave for illness, for caring responsibilities and for rest and recreation are fundamentally important for the mental and physical wellbeing of any community, and these cases offer the opportunity for Australian regulators to rethink the regulatory regime for both « permanent » and truly irregular casual workers in Australia. A government roundtable is currently looking at the issue, and it is hoped that a solution that provides all workers with proper leave entitlements will be preferred to one that preserves the pre-existing status quo.

⁹ <https://www.sbs.com.au/news/the-feed/what-does-the-spread-of-covid-19-mean-for-casual-workers>