A DISTINCTION WITHOUT A DIFFERENCE

Are your 'casual' workers really 'casual'?

The recent Full Federal Court decision of WorkPac Pty Ltd v Skene [2018] FCAFC 131 has determined that a FIFO worker who was classified as a 'casual' was in fact a full-time employee of WorkPac for the purposes of the Fair Work Act 2009 ('FW Act').

With the potential to 'stir up the hornets' nest,' employers who engage 'casual' workers on continuous rosters with regular and predictable hours of work will need to reconsider and evaluate the nature of their casual engagements - just because you call something by a different name, doesn't make it so.

The FIFO worker was engaged in his written employment contract and letter of engagement as 'casual'.

Considering this, the Court looked to substance over form and determined that the worker's employment was full-time because:

- his pattern of work was 'regular and predictable' - he worked regular and systematic hours of seven days on, seven days off continuously, except for a short seven day break in employment;
- the employment was 'continuous' – there was an expectation that the worker would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster (set 12 months in advance);
- the fact that the worker was defined or described as a casual employee was a relevant factor, but not determinative with regard to the totality of the relationship – in which there was no absence of an advance commitment as to the duration of the employee's employment or the days (or hours) the employee would work.

With regard to these factors, the Court ruled the employee was full-time for the purposes of the FW Act, which is determined by an assessment of all of the relevant factors above and the actual 'reality' of the employment relationship.

Simply put, just because an employer has 'called it straight' and defines their employee as 'casual' does not necessarily mean that they are a casual.

Worth the paper it is written on? Defining a 'casual.'

Following this decision, it is relevant to consider 'who' then would be a casual employee (if they're defined as such on paper).

The main consideration on whether an employee is casual is the 'absence of an advance commitment and indefinite work', which is considered by looking at the surrounding circumstances around the employment contract, regulatory regimes (including the FW Act, awards and enterprise agreements).

The key circumstances are:

- Irregular work patterns;
- Uncertainty, discontinuity, intermittency of work;
- Unpredictability.

What does this mean for employers?

Following this decision, because the employee was found to be 'full-time', he was entitled to past annual leave accrued over the entirety of his employment.

In addition, the Court ordered that WorkPac must pay pecuniary penalties for contravention of the FW Act and the 'National Employment Standards.'

The law now regards any casual employee who should be a full-time employee under law to be a serious contravention.

The fact that an employer was 'unknowing' or 'mistaken' as to the actual effect of the employment arrangement did not excuse the failure to comply with their obligations.

Need assistance?

Employer Assist can assist you in reviewing the any casual employment agreements and can undertake a job analysis of all relevant and surrounding factors to assist you in meeting your employer obligations.

If you require assistance, we encourage you to contact Employer Assist on 1300 735 306 or aaaa@employerassist.com.au