MADGWICKS LAWYERS

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WORKPLACE RELATIONS INSIGHTS

Casual conversion – changes from 1 October 2018

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What is casual conversion?

Casual conversion is where casual employees are given the right, subject to certain prerequisites, to request a full time or part time position after a certain period of tenure.

Not all employers will be familiar with the concept of casual conversion, as in many businesses and industries casual conversion rights and obligations have not existed for some time. **From 1 October 2018**, however, casual conversion rights and obligations will affect the majority of employers across Australia.

Casual conversion – the history

Casual conversion is one of the primary means through which unions in Australia have historically sought to limit casual work. As a result, casual conversion obligations have existed on an "on-again, off-again" basis within Australia's industrial history.

Following test cases run by the union movement from the late 1990s, casual conversion became a standard term of industrial awards. Under the Work Choices regime from 2006, casual conversion terms were unable to be included in Federal awards. When Work Choices was repealed by the Fair Work Act in 2009, casual conversion clauses were initially only included in Modern Awards for industries where casual conversion had become standard.

As a part of the four yearly Modern Award review in 2017[1], the Fair Work Commission determined that all Modern Awards should include a casual conversion term. Since then there has been much public consultation as to the form of the model term to be included in Modern Awards.

On 9 August 2018, the finalised form of the model term was determined, as was the fact that **from 1 October 2018** a model conversion term will be included in Modern Awards.

Casual conversion – the model term

From 1 October 2018, 84 Modern Awards will have the following model conversion term included:

XX Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.

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[1] *4 yearly review of modern awards - Casual employment and part-time employment* [2017] FWCFB 3541 (5 July 2017)

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(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause X. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause X.

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee whether a regular casual employee or not, with a copy of the provisions of this clause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause XX(p).

It should be noted that:

- Fourteen other Modern Awards will, from 1 October 2018, contain a modified version of paragraph (j) of the model term.
- The 28 Modern Awards which, prior to 1 October 2018, contained a casual conversion term will not at this time be affected by the introduction of the new, model term[2]. The casual conversion terms which have to date existed within those 28 Modern Awards will remain the same for now.
- Ongoing consultation is occurring on proposed casual conversion clauses for the meat processing and stevedoring industries, both of which have arrangements for employees that fall between casual and part-time work, and therefore the model term as set out above does not currently apply to those industries.

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[2] *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 (9 August 2018) at [35]

The upshot of the obligations of casual conversion

Whilst the term itself provides the full context of the obligations, here is a summary of the leading points:

- The term does not have the result of obliging employers to offer permanent employment to eligible casual employees; rather it has the result of entitling eligible employees to request conversion to permanent employment.

To request casual conversion:

- the employee must have worked for the employer for a period of 12 months or more; and
- the employee must, over the preceding 12 month period[3], have worked a pattern of hours on an ongoing basis, which they could continue to perform as a full time or part time employee, without significant adjustment.
- Employees engaged for short periods and/or who work irregular shifts or hours will not meet the criteria to convert.
- Due to the wording of the model term which includes the words "in the preceding period of 12 months worked…", the right to request conversion does not arise as a "one off" event, but is a continually exercisable right while an employee has worked the relevant pattern of hours[4].
- Eligible employees seeking to convert are required to make a request to the employer in writing.
- Employers can reject a request, provided that there *has been consultation* with the employee **and** there are *reasonable grounds* based on facts which are known or reasonably foreseeable (for instance, where the casual employee's position could cease or the hours could significantly change).
- A refusal must be put in writing with the reasons set out clearly.
- If the employee seeks to challenge the employer's refusal, then this will be resolved through the dispute resolution provision of the Award.

If a request is granted, it:

- must be discussed and recorded in writing; and
- will begin at the commencement of the next pay cycle.

How will the change affect your business?

It is important for employers to remember that, speaking generally, most casual employees want the 25% higher pay and therefore, they *want* to be employed as casuals. In those circumstances, they won't request conversion, and the actual impact is probably not going to be as significant as the Australian Council of Trade Unions and/or the media would have us believe.

It will, however, be important for businesses to ensure compliance with the obligations where required as the recent cases indicate that the upshot of non-compliance can be significant. To that end, in November 2017 the Federal Court of Australia, although determining the casual conversion obligations of an employer arising under an enterprise agreement rather than a Modern Award, delivered a clear message to employers that it will enforce casual conversion clauses and that employers who fail to comply with their obligations may be liable for significant penalties[5]. Some other recent case law indicates that employers could have exposure to casual employee claims for permanent entitlements such as annual and personal leave, notice of termination payments etc.[6]

How do the casual conversion clauses affect labour hire?

The casual conversion clause in Modern Awards is intended to apply to employers in the labour hire sector in the same way as it applies to any other employer.[7]

What employers should do

Employers who have casual employees should:

- on 1 October 2018 check the applicable Modern Award or enterprise agreement to determine their obligations, familiarise themselves with them and ensure compliance.
- give all casual employees a copy of the conversion clause within the first 12 months of their first engagement. For casual employees already employed as at 1 October 2018, employers must provide them with a copy of the conversion clause by 1 January 2019.

If you have any questions or concerns in relation to your obligations as to casual conversion, our experienced Workplace Relations team can assist.

[3] *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 (9 August 2018) at [22]

[4] ibid

[5] *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208

[6] See e.g. WorkPac Oty Ltd v Skene [2018] FCAFC 131 (16 August 2018) (at the time of writing, susceptible to appeal); Apostolides v Mantine Earth-movers & Constructions [2018] FCCA 279

[7] *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 (9 August 2018) at [30](2)

WORKPLACE RELATIONS INSIGHTS

Casual employee held to be entitled to annual leave

By Tim Greenall
Special Counsel

WORKPLACE RELATIONS

In Brief

The Full Federal Court has held that an employee employed as a casual and ostensibly paid casual loading, was nonetheless entitled to payment of accrued annual leave upon termination of his employment. The facts of the case involved labour hire arrangements and were somewhat unusual, but the reasoning of the Full Federal Court rings alarm bells for any employer using casual labour on a regular or systematic basis.

What you need to know

- Under the National Employment Standards of the Fair Work Act, annual leave applies to employees, **other than casual employees.**
- The meaning of **casual employees** is not defined under the Fair Work Act.

Background

The salient facts of WorkPac Pty Ltd v Skene [2018] FCCA 3035 were:

- The employer WorkPac was a labour hire company operating in the resources boom.
- The employee, Mr Skene, was a fly-in fly-out driver who worked for two years in a Central Queensland coalmine.
- Mr Skene was paid a composite rate of $50 per hour for seven consecutive days on a 12.5 hour shift with seven days off on a continuous roster sequence fixed 12 months in advance.
- Mr Skene accepted an offer of casual employment with a flat pay rate of $50 per hour for an assignment of three months duration.
- Mr Skene worked for approximately two years prior to termination in April 2012 and was not paid out annual leave.
- CFMEU brought a claim on behalf of Mr Skene for payment of accrued annual leave.

The Decision

1. The Full Federal Court held that Mr Skene was entitled to payment of annual leave because whilst he had been employed ostensibly on the basis of casual employment, his employment was regular and predictable over a two year period.
2. The National Employment Standards for annual leave incorporates the common law definition of a "casual" which can be summarised as being "... the absence of a firm advance commitment as to the duration of the employment or the days or hours the employee will work ..."
3. On the facts, there was plainly an expectation that Mr Skene would be available, on an ongoing basis to perform the duties required of him in accordance with his roster, which had been determined 12 months in advance.
4. WorkPac had a collective agreement which entitled it to inform prospective employees of the status and terms of their engagement, and it had engaged Mr Skene as a casual. However, the Full Federal Court held that Mr Skene was not properly classified as a casual under WorkPac's collective agreement and could not be deemed a casual employee by the employer acting unilaterally.

The Implications

Employers can be exposed to claims for annual leave and other accrued entitlements (such as redundancy pay and personal leave) for casual employees engaged on a regular and systematic basis, even if:

- the casual employees are engaged as such under the terms of an enterprise agreement or modern award; and
- the employee is paid a flat rate per hour inclusive of casual leave loading.

Employers will be exposed where the relationship is not regarded as "casual" employment at common law, irrespective of how the employment relationship is described by the parties.

At common law, the hallmark of casual employment is "... the absence of a firm advance commitment as to the duration of the employment or the days or hours the employee will work ..."

A breach of the National Employment Standards is a breach of the civil penalty provisions under the Fair Work Act and in these circumstances, ignorance of the law without closely considering the legal implications of its conduct, was held not to be an excuse.

Conclusion

The current situation (which may yet be affected by appeal to the High Court) would best be resolved by the introduction of a statutory definition of "casual" for the purposes of the National Employment Standards under the Fair Work Act. This is the stated policy of the Federal Opposition Labour Party.

In the meantime, employers using casuals on a regular and systematic basis are exposed to claims for accrued annual leave (and redundancy pay and personal leave) and civil penalties, even having paid a casual loading.

If you have questions about how to best manage this risk, please contact our Workplace Relations team.

External advisers penalised for a client's exploitation of vulnerable workers

By Emily Dempster
Senior Associate

WORKPLACE RELATIONS

In Brief

We have said it before, and we will say it again, the accessorial liability provisions in the *Fair Work Act 2009* (Cth) (**Act**) have broad reaching implications on a range of persons including company directors, human resources personnel, payroll officers and external advisers (such as accountants and payroll providers).

What you need to know

- An external accountancy firm was recently found to have been 'involved in' its client's contraventions of the Act and was consequently ordered to pay a pecuniary penalty of $51,330.
- For a refresher on the accessorial liability provisions of the Act, see our July 2017 article entitled 'Could you be found accessorily liable under the Fair Work Act 2009 (Cth)?'

The Decision

In the article we referenced a decision of the Federal Circuit Court in *Fair Work Ombudsman* (***FWO***) *v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 in which an external accountancy firm was found accessorily liable in relation to underpayments made by the employer.

The employer in that decision, Blue Impression Pty Ltd (**Employer**), operated a Japanese fast food chain. The external accountancy firm, Ezy Accounting 123 Pty Ltd (**Ezy**), provided payroll services to the Employer.

The Employer was found to have underpaid two of its 417 visa workers a total of $9,549 and was ordered to pay a penalty of $115,706.

Ezy was found to have been 'involved in' the Employer's contraventions for the purposes of section 550 of the FW Act as:

- it was aware of the relevant minimum award rates as it had assisted the Employer in calculating and rectifying underpayments that had been identified by the FWO during a 2014 audit;
- despite being aware that the Employer's pay rates were incorrect, it failed to alter the hourly rates in the Employer's MYOB system over which it had control; and
- despite recommending that the Employer comply with an audit finding letter sent by the FWO, it did not ensure that the pay rates that had been provided to it for use in the MYOB system had been updated.

The primary Judge likened Ezy's conduct to 'wilful blindness' and Ezy was ordered to pay a pecuniary penalty of $53,880.

The Appeal

EZY appealed the primary Judge's decision to the Full Federal Court.

The Full Federal Court recently handed down its decision in which it:

- dismissed Ezy's appeal;
- agreed with the primary Judge's findings that Ezy was 'involved in' the Employer's contraventions; and
- reduced the penalty to $51,330 on the basis that the Court had not provided reasons for a couple of the alleged contraventions.

The Implications

The above decisions demonstrate that external advisers can be prosecuted for contraventions made by clients that they are advising.

As such, external advisers should mitigate the risk of being found to be an accessory. It is important to note that, on its own, not participating in any contravention will not be enough. External advisors should also take proactive steps to prevent (or at least recommend against) contraventions of the Act. This may include:

- being equipped with the knowledge of the Act and other relevant laws in order to ensure compliance;
- taking steps to advise and/or recommend (in writing) against a particular action or practice if it will contravene the Act;
- if the employer continues to engage in the particular action or practice that contravenes the Act:
  - obtaining external legal advice as to available options and potential liability in the circumstances; and/or
  - severing the contractual relationship with the employer altogether.

Conclusion

The accessorial liability provisions of the Act have broad reaching implications on a range of persons and companies including external advisers. If you require assistance in understanding your obligations, it is important to seek advice in order to place yourself in a good defensible position in relation to any potential liability.

Madgwicks would be happy to assist you in understanding your obligations and managing your risks, in this regard.

MADGWICKS LAWYERS

WORKPLACE RELATIONS INSIGHTS

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