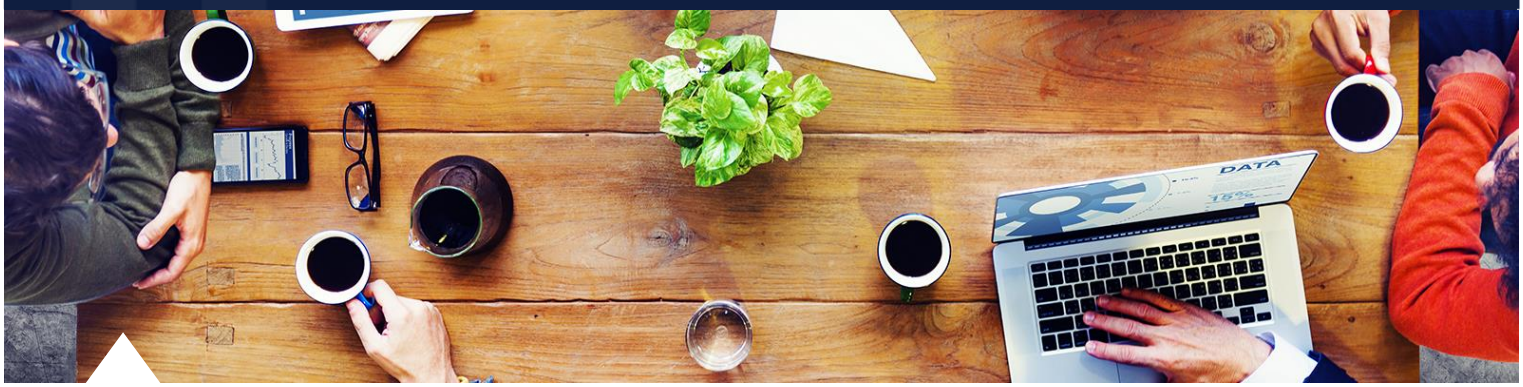

DOES IT PAY TO BE A CASUAL?

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The Federal Circuit Court has found that truck driver, (Mr. Skene) engaged on a casual basis under an enterprise agreement and who worked regular rosters, was entitled to annual leave under Part 2-2 of the *Fair Work Act* 2009 (**FW Act**).

The finding of an entitlement to annual leave under the FW Act arose even though the Court found Mr Skene was a casual employee and not entitled to annual leave under his enterprise agreement. The relevant enterprise agreement provided that casual employees would be paid a casual loading in lieu of leave entitlements.

In March 2017, the Court ordered Mr Skene's former employer to pay him compensation for annual leave that he apparently accrued during his employment (which ended almost two years before Mr Skene commenced the claim), plus interest that had accrued in the two years since he ceased employment.

A copy of the decision can be found here. The decision means:

- An employee can be a "casual employee" under an enterprise agreement or a modern award (both of which are created and regulated by the FW Act), but be something "other than a casual employee" for the purposes of the FW Act, and accrue leave;

- A Court can look behind the label the parties place on the relationship to determine the "true" nature of the relationship, by examining things such as the regularity of the arrangement, a commitment by the employer and the way in which the employee was paid. Courts do this to determine if someone is an independent contractor or employee – but here, there was no dispute that Mr Skene was an employee; and

- Employees may be compensated for annual leave twice if a casual loading has been paid to the employee during the employment. The requirement for employers to pay a casual loading is found in enterprise agreements, modern awards and in the FW Act.

The decision is the subject of an appeal to the Full Federal Court. The appeal was heard over three days in May, October and November 2017. The employer argued that if an employee is engaged as a casual employee pursuant to an industrial instrument, and paid a casual loading, they are a "casual employee" under the FW Act.

The reliance on the "label" placed on the relationship by the parties appears to be the preference of industrial tribunals over the past 70 years. This is reflected in the fact most modern awards contain a definition of casual employees as "one engaged and paid as such". To look behind the label placed on the relationship would be inconsistent with the way in which enterprise agreements and modern awards have evolved. This was highlighted by a five member Full Bench of the Fair Work

Commission in *4 Yearly Review of Modern Awards – Casual and Part Time Employment* [2017] FWCFB 3541.

Currently, there is no definition of "casual employee" in the FW Act. When it delivers its decision, the Full Federal Court will be the first appellate Court to rule on the meaning of "casual employee" in the FW Act. The last Full Federal Court to determine a similar issue was over 16 years ago, when the meaning "employee engaged for a short period" was considered.

Irrespective of the decision, employers should:

- Consider reviewing engagement documents in respect of casual employees to ensure casual employees are defined;
- Ensure actual work practices reflect what is agreed between the parties so no dispute about a change in status can arise ;
- Don't engage in practices which may suggest you are giving a casual employee a firm advance commitment as to the duration of their employment (for example, if rosters are provided, be clear about whether it is a commitment to ongoing work or simply a roster of offered shifts); and
- Ensure pay slips and other documents (such as an appointment letter) specify any casual loading paid to a casual employee, and what that is paid in lieu of. This will become important if an employee or former employee who was paid a casual loading in lieu of annual leave sues you for that leave (as you could possibly make a cross claim for the repayment of those funds in the event they were successful).

This will be an important decision which will impact all employers across Australia. Watch this space!

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