Casual worker entitled to annual leave: Bench

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Employers are warning of "massive liability" and instability for all who engage casuals and unions say it could be harder to use labour hire to "drive down costs", after a full Federal Court upheld a finding that a labour hire casual was in fact an employee entitled to annual leave payments.

Both employers and unions are calling for legislative change after Justices Richard Tracey, Mordy Bromberg and Darryl Rangiah today upheld Federal Circuit Court Judge Michael Jarrett's characterisation of the mine driver as an employee of labour hire company WorkPac Pty Ltd.

Judge Jarrett in 2016 held that although Workpac's offer of casual employment gave him "the status of 'casual FTM'" with no entitlement to annual leave under its agreement, the FIFO driver's regular predictable working arrangements meant he was an employee entitled to benefits under s86 of the Fair Work Act (see Related Article).

Finding that under the NES the driver was therefore entitled to payment for accrued annual leave on termination of his employment, Judge Jarrett ordered Workpac to pay him $21,000 in compensation plus interest of $6700.

Today Justices Tracey, Bromberg and Rangiah threw out the appeal of WorkPac, a labour hire company that supplies labour to mining companies across Queensland, but upheld the drivers' appeal.

The bench found WorkPac's agreement did not designate the driver to be a casual, and nor was it clear his "all in flat rate" provided casual loading.

Regardless, the bench said it agreed with the characterisation of "casualness" in Hamzy v Tricon International Restaurants (see Related Article) that the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work" is the essence of casualness.

The bench also upheld the driver's appeal to Judge Jarrett's finding that Workpac should not be penalised for its error, and remitted the penalties and compensation matters back for redetermination by the Federal Circuit Court.

The bench said Judge Jarrett decided not to penalise WorkPac because he "mistakenly held that WorkPac had taken appropriate advice and had closely considered the legal implications of its conduct".

Noting that "although an unknowing contravention will diminish the objective seriousness of a contravention, ignorance of the law is not ordinarily excusatory", the bench said Judge Jarrett's conclusion that there was no need for deterrence "is suggestive of a manifestly inadequate penalty".

Employers question lawmakers' intent

Recruitment and labour hire peak body, Recruitment, Consulting and Staffing Association Australia, today hit out at the judgment, saying it would be talking with its member WorkPac and "looking to engage with lawmakers at the federal level to say this is clearly unacceptable".

Likening the result to "double dipping", RCSA chief executive Charles Cameron told *Workplace Express* that employers were "very concerned" that the decision provides a worker with entitlements both as a casual and as an employee, when these should be "mutually exclusive".

Cameron said it might also open the door for casual employees to argue they are entitled to other employee entitlements and lodge back payment claims stretching back seven years.

As well as creating a "massive impost" by increasing the amount labour hire companies might need to pass onto clients to account for additional entitlements, Cameron said the judgment threatens a "massive liability for every business in Australia" that employs casuals.

While it was too soon to say whether WorkPac would lodge a High Court challenge and WorkPac declined to comment, Cameron said the treatment of casual employees' entitlements "must be addressed by making the Fair Work Act clear" on the issue.

He said he did not "believe any lawmaker would have intended" to provide workers with both casual and permanent employees' entitlements.

"I challenge any lawmaker to say why it is defensible to say someone is both a casual and a permanent employee when these should be mutually exclusive," Cameron said.

Australian Industry Group chief executive Innes Willox said that regardless of what future steps would be taken in the Court proceedings, "one sensible step that should be taken without delay, is for Parliament to move to protect businesses and jobs by amending the Fair Work Act".

Willox called on federal parliament to "clarify that an employee engaged as a casual and paid as a casual is a casual for the purposes of the Act" as this was the "standard definition of casual employment, and the only workable definition"

Judgment fails pub test: AMMA

Australian Mines and Metals Association chief Steve Knott meanwhile said it "massively fails the pub test" that an employee can "seek and be awarded annual leave entitlements after knowingly accepting a higher rate of pay rate due to being casual".

He said it was widely understood and accepted by all Australians, whether "teenagers getting their first job at Coles or McDonalds" or "casual mining operators taking home some of the best hourly pay rates in the country" that casuals receive extra loading in lieu of other entitlements.

"That a 68-page decision of the Full Federal Court can turn a simple concept like this on its head, shows absurdly complex Australia's workplace relations legislative environment has become."

Victory over "misuse" of casuals: CFMMEU

Calling today's judgment a "major victory over rampant misuse of casual workers in coal mining", CFMMEU national president Tony Maher said it would "have implications for the preferred business model of labour hire companies, which is based on driving down costs through casualisation".

"The labour hire industry has thrown substantial resources at overturning this decision because it employs many thousands of workers as casuals in the coal mining industry under similar circumstances," said Maher, adding that casualisation in the sector is "out of control".

"Labour hire employees are now a significant proportion of the workforce at most coal mines, with the vast majority employed casually," he said.

"In many cases they are casual in name only, working side by side with permanent employees on the same rosters over extended periods, but with no job security."

Maher said the decision "challenges a flawed business model" and "means the end of the so-called 'permanent casual', which was always a rort".

The ACTU said the decision was evidence of a need for "proper definition of casual work".

Pointing out that the case "ran in the courts for four years before today's decision was made", ACTU president Michele O'Neil said working people "need fast efficient access to justice and the rules should be changed to make this happen".

Unions NSW secretary Mark Morey said the decision "shows employers can not use workplace agreements to circumvent the National Employment Standards".

He said employers "who think they can game labour hire to avoid their obligations need to think again".

"It should never be the mainstay of a workforce and should never define an employment relationship over the longer term."

WorkPac Pty Ltd v Skene [2018] FCAFC 131 (16 August 2018)

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