HOW ABOUT THE 'SERVICE'? DOES CASUAL EMPLOYMENT COUNT?

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Labour, Employment and Workplace Safety Alert

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A recent decision of the Full Bench in *AMWU v Donau Pty Ltd* [2016] FWCFB 3075 (Donau) has held that a permanent employee's initial regular and systematic casual employment will now be included in their service period for redundancy calculations.

The decision overturned the earlier ruling of Commissioner Riordan in *AMWU v Forgacs Engineering Pty Ltd* [2016] FWC 638 and is centred on an unprecedented interpretation of the definition of "service" and "continuous service" contained in section 22 of the *Fair Work Act 2009 (Cth)* (FW Act).

Senior Deputy President Drake and Deputy President Lawrence constituted the majority and said that there are no words in the FW Act or the applicable enterprise agreement which exclude a period of regular and systematic casual employment from the definition of service or continuous service for the purpose of calculating severance payments.

Commissioner Cambridge dissented, holding that service is intrinsically not derived from casual employment unless specified otherwise. He said the majority's construction was inconsistent with the industrial purpose of casual employment.

WHAT'S THE EFFECT?

Don't press the panic button yet. The decision does not give employees who are casuals at the time of termination a right to redundancy pay. This is precluded by s 123 of the FW Act and remains unaffected. It is confined to the situation where a permanent employee who was initially employed as a casual is made redundant.

The decision will apply when calculating redundancy entitlements for an employee who:

1. is being made genuinely redundant
2. is a permanent employee at the time of the redundancy
3. was initially employed as a causal employee on a regular and systematic basis
4. did not take a break between their casual and permanent roles
5. is not subject to an enterprise agreement, contract or other industrial instrument that expressly excludes casual employment from the definition of service.

WHAT DOES THIS MEAN FOR YOU?

Employers will now need to:

- reconsider the effect of including casual conversion clauses in contracts of employment and enterprise agreements
- communicate the change to all staff in human resources and payroll so that they know to include immediately preceding periods of regular casual service in redundancy payout calculations for permanent employees
- review business restructuring plans to assess possible cost consequences
- update policies if required.

WHAT COULD IT MEAN FOR OTHER ENTITLEMENTS?

The majority judgment did not address how its interpretation will apply to the accrual of other service related entitlements afforded to permanent employees under the FW Act and National Employment Standards (NES).

Does the majority's interpretation of "service" then effectively mean that casual employees who become permanent now also accrue annual, personal or carer's leave from the date they commence as a casual?

Surely not. Practically, this is at odds with the construction of the statutory scheme, which already provides a 25% casual loading to casual employees instead of the service related entitlements permanent employees receive. If service related entitlements also accrued, casual employees who transition to permanent roles will effectively be "double dipping" for their casual employment period.

The nature of casual employment is also in the spotlight as part of the Modern Award Review. Currently, the Fair Work Commission is considering whether to insert a clause affording casual employees an "absolute right" to become a permanent employee after six months of regular casual employment. The effect of the Full Bench decision in *Donau* may have even wider consequences for employers if this is accepted.

Access the Full Bench decision in *Donau* by clicking here.

Can we help?

If you have any questions about the effect of the decision on your obligations as an employer, please do not hesitate to contact our Labor, Employment and Workplace Safety team.

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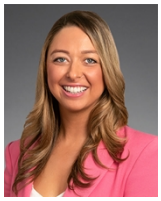

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