UPDATE – NEW REGULATION ALLOWS EMPLOYERS TO OFFSET CASUAL LOADING

Last year Employer Assist released an article updating members on a recent case, WorkPac Pty Ltd v Skene [2018] FCAFC 131. The Full Federal Court held that an employee who was classified as a 'casual' was in fact a permanent employee due to their regular and predictable hours and expectation of continuing work. As a result the employee was entitled to paid annual leave in addition to their casual rate of pay.

This decision was controversial as it raised the possibility of incorrectly classified casuals being able to 'double dip' by claiming permanent entitlements (e.g. Annual Leave) in addition to the casual loading that they have already received.

For obvious reasons, this would have a significant financial consequences for employers who have mistakenly incorrectly classified their employees for a number of years.

New Regulations

Thankfully, in response to concerns raised about the above controversial decision, the government varied the *Fair Work Regulations 2009* (**FW Regulations**) with the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* to clarify that in certain circumstances employers may claim that an employee's casual loading payments should be offset against certain entitlements owing to the employee.

The below regulation will be added to the FW Regulations.

2.03A Claims to offset certain amounts

(1) This regulation applies if:

(a) a person is employed by an employer on the basis that the person is a casual employee; and

(b) the employer pays the person an amount (the loading amount) that is clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during a period (the employment period); and

(c) during all or some of the employment period, the person was in fact an employee other than a casual employee for the purposes of the National Employment Standards; and

(d) the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements.

Note 1: This regulation is intended to apply if the person has been mistakenly classified as a casual employee during all or some of the employment period.

Note 2: For the purposes of paragraph (b), examples of where it may be clearly identifiable that an amount is paid to compensate the person for not having one or more relevant NES entitlements include in correspondence, pay slips, contracts and relevant industrial instruments.

(2) To avoid doubt, the employer may make a claim to have the loading amount taken into account in determining any amount payable by the employer to the person in lieu of one or more relevant NES entitlements.

(3) This regulation does not affect the matters to which a court may otherwise have regard, at law or in equity, in determining an employer's claim to have the loading amount taken into account.

(4) A reference in this regulation to a relevant NES entitlement is a reference to an entitlement under the National Employment Standards that casual employees do not have.

The new regulations are effective from 18 December 2018 and apply retrospectively.

Mistakenly classified employees

Although the above new regulation provides clarification on an employer's ability to offset the casual loading, employers should be aware that the casual loading may not be sufficient to totally offset the amount of a claim brought by their employee. Also, employers who mistakenly and/or incorrectly classify an employee may also be ordered to pay pecuniary penalties for contravening the *Fair Work Act 2009* (**FW Act**) and National Employment Standards (**NES**).

Employers should take the WorkPac decision as a warning of the potential consequences of incorrectly classifying permanent employees as casuals which is considered to be a serious contravention. The fact that an employer was 'unknowing' or 'mistaken' as to the actual effect of the employment arrangement will not excuse the failure to comply with their obligations.

What is a 'Casual'

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; and
- Unpredictability.

Recommendations

It is prudent for employers to review the current employment status of their employees to ensure that they have not mistakenly classified any of their employees as casual. Further, employers should implement appropriate systems to ensure that the status of their employees is reviewed systematically (e.g. bi-annually).

As part of the review, employers should consider and evaluate the nature of their casual engagements. If a casual employee has been working regular and predictable hours on a continuous basis, the employer may be required to convert the casual employee to a permanent position.

Further, contracts and payslips should clearly identify that a casual loading is paid to casual employees in lieu of NES entitlements. In the event of a dispute or claim, this will be used as evidence when attempting

to claim the offset. To be eligible to claim the offset, employers will need to comply with all of the requirements set out in the regulation above.

Employers should contact Employer Assist for advice on classifying or converting employees.

Member Benefits

Employer Assist can assist employers with reviewing their employment contracts, provide advice on classifying their employees and assist with converting employees to permanent positions if required. Employer Assist can also provide representation in the event of a claim. If you require assistance, we encourage you to contact Employer Assist on **1300 694 842** or **hvia@employerassist.com.au.**

Emma Dalley and the **Employer Assist** team.

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