

Workplace View

March 2016 Edition



Is It Just a “Casual” Thing? Employer Finds Breaking Up With a Casual to Be Problematic

Emily Tan, Associate

According to the Australian Bureau of Statistics, the number of casual employees in the Australian workforce is on the rise, with the highest proportion of casuals employed in the retail and building industry. However, how many of these employees are true casuals and what are the consequences of an employer not getting the relationship right?

The recent decision of the Fair Work Commission (**FWC**) in *John Perry v Nardy House Inc. (NHI)* [2016] FWC 73, concerning an unfair dismissal, has confirmed that it is the employment relationship established by the facts, and not the relationship ascribed by the employment contract, which will be determinative of whether an employee is a true casual.

The Facts

Mr Perry was employed by NHI, a charitable organisation, from 4 September 2014 until 25 August 2015 as a casual support worker. He was rostered to work 128 hours each month and his shifts were often subject to swaps or additional hours. His contract of casual employment stated that he was not guaranteed any set numbers of hours per week, would receive 25% casual loading and overtime in accordance with the applicable award.

In August 2015, NHI stopped providing casual employees with rosters in advance and instead, offered work on a “call in” basis. When Mr Perry was not offered any further shifts he lodged a claim for unfair dismissal.

The Issue

Only persons who have completed the minimum period of employment as defined in the Fair Work Act (2009) (**FW Act**) are protected from unfair dismissal. Therefore, the issue before the FWC was whether Mr Perry, as a “casual” employee of the business, had completed the minimum period of 6 months’ continuous employment. A period of service as a casual employee does not count as a period of continuous employment unless the employee both:

- was employed as a casual employee on a regular and systematic basis; and
- had a reasonable expectation of continuing employment on that basis.

FWC Decision

While there is no settled meaning of the phrase “casual employee”, the FWC in this case determined that a key characteristic of casual employment is whether an employee, from time to time, is offered

employment for a limited period on the basis that the offer of employment may be rejected or accepted and where there is no certainty about the period over which it would continue to be offered. The informality, uncertainty and irregularity of an engagement will generally support a conclusion that employment is casual.

It was clear from the evidence that Mr Perry worked “systematic” and “regular” hours in accordance with his roster throughout his engagement (i.e. 128 hours each month). Even when rostering arrangements changed, this did not result in a decrease in the number of hours worked. In addition to this, Mr Perry’s reasonable expectation of continuing employment was set from the start when NHI advised him at his interview that he would be rostered each month for 128 hours of work. Despite the terms in his contract, the FWC held that Mr Perry was rostered like a permanent part time employee and worked like a permanent part time employee. By not offering Mr Perry any further shifts, NHI frustrated the contract of employment and Mr Perry was entitled to make an unfair dismissal claim.

Tips and Traps

Determining whether an employee is a true casual and therefore not protected from unfair dismissal can be a minefield for employers. Employers should therefore review the manner in which each casual employee is engaged and consider such questions as:

- Is the employee regularly working 38 hours or more each week?
- Is there a clear regular pattern or roster for the hours and days worked?
- Is work offered and accepted regularly and sufficiently enough that the relationship cannot be regarded as irregular or informal?
- Are there reasons why the employee may have an expectation of ongoing or systematic work? (e.g. was anything promised at the interview stage? Have they worked the same days and hours for a long period?)
- Even though the employee may from time to time reject shifts or advise they are unavailable for shifts so they can have break from work, are they put back on the roster when they return?

Communication and clarity with employees regarding the relationship is very important. While just “a casual” thing may suit some employees, others may well be looking for something with more commitment. When in doubt when terminating a casual employee, employers should seek legal advice to ensure the relationship is correctly identified and how to limit any legal exposure.

Employer Reminder

Anna Elliott, Partner

A Federal Circuit Court decision earlier this month provided employers and HR managers with a salutary reminder to ensure that any deductions of wages are lawful and that employee records are accurately maintained.

In the decision of *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016], a recruitment services company, its director and HR manager were found to have unlawfully deducted an administration fee and meal allowances from casual cleaners it on-hired to work in Melbourne's Federation Square and Crown Casino without their authorisation. Further, they subsequently supplied false and misleading employee records to the Fair Work Ombudsman when they conducted an audit. The Court rejected arguments from the director and HR manager that they were unaware of the contraventions and held that they were clearly involved, meaning they each face penalties of up to AU\$10,800 per contravention and Oz Staff, as a corporation, faces penalties of AU\$54,000 per contravention. The penalty hearing is set down for August so the extent of their liability remains to be seen.

Interestingly, recent cases such as *FWO v GrandCity Travel & Tour Pty Ltd & Anor* [2015] FCCA 1759 (29 June 2015), have indicated that penalties can be substantially reduced where employers and individuals are co-operative and/or admit culpability and where the court applies the "totality principle" (which may involve a reduction where the aggregate penalties are not just and appropriate).

These cases provide a useful reminder that:

- having a general deductions clause in an employment contract is not sufficient to circumvent statutory obligations. It is important to comply with the Fair Work Act 2009 (Cth) and its regulations when deducting any amounts from wages as this is only permitted in limited circumstances, such as where the employee consents and the deduction is principally for their benefit, or the deduction is authorised by law (e.g. tax) or an industrial instrument; and
- in the event of an investigation or audit by the Fair Work Ombudsman, cooperation, honesty and plea bargaining can pay dividends.



Did You Know...?

Jessica Geelan, Associate

The Fair Work Commission (**FWC**) may deny legal representation to an employer defending an unfair dismissal claim if it can be effectively handled by a HR Manager or officer in Human Resources despite that person having no experience with Australian employment laws. This issue has recently been considered by the FWC in three decisions:

- In *Barkho v Dairy Country* [2015] FWC 8549, Commissioner John Ryan said there was nothing to suggest that Dairy Country's HR manager could not effectively represent it at a hearing but added there was no barrier to the company having its legal team attend proceedings or provide advice at the bar table.
- In *Fleming v Sonic Innovations Pty Ltd* [2015] FWC 8476, Senior Deputy President Matthew O'Callaghan rejected arguments by Sonic Innovations that its HR specialists were inexperienced and lacked the capacity to defend the claim.
- In *Araya v Doutagalla* [2015] FWC 8676 a nursing home's application was also refused with Commissioner John Ryan finding that a lawyer would be unnecessary as the case law was well established and the matter was not sufficiently complex enough to justify legal assistance.

OSH Update

Emma Dawson, Associate

As the 2016 AFL pre-season kicks off, employers should spare a thought for the Essendon Football Club's past mistakes as a reminder of the very real risk of failing to provide a healthy and safe working environment, even in the world of competitive sport.

Earlier this year, the Essendon Football Club were convicted and fined AU\$200,000 for failing to provide players with a safe working environment as a result of its 2011-12 supplements program. Perhaps of greater significance is the fact that the players involved were banned from playing for a year and are therefore not available to play for the club until next season.

Following the decision, WorkSafe Victoria warned that "all employees, whether they are working on a factory production line or competing as a professional sports person, have every right to expect that their employer will provide a healthy and safe workplace".



Meet the Team

During 2016 we will introduce you to our Labour & Employment Team. Kicking off this week we would like you to meet Elizabeth McLean, who was recently promoted to Senior Associate in our Perth office.

My first ever job was...

Hungry Jacks – I started out sweeping fries off the floor before being promoted to the front counter.

What I like about my current job is...

The interesting and challenging people problems we deal with. As an employment lawyer, you never know what you'll be working on next...

The best advice I've been given is...

Worry is a waste of energy and don't sweat the small stuff.

A random fact about me is...

In August I'll be getting married on a remote stretch of Kimberley coast (Northern WA).

My last supper would be...

Seafood pasta washed down with Margaret River Chardonnay

Squire Patton Boggs Labour & Employment Seminar Series

The first Labour & Employment seminar of the year "Redundancy – Getting the Process Right" will be held in:

- **Perth** at 8 a.m. on Wednesday 13 April 2016 at Squire Patton Boggs' offices at Level 21, 300 Murray Street, Perth
Presenters Kylie Groves (Partner) and Tammy Tansley (Tammy Tansley Consulting)
- **Sydney** at 12:30 p.m. on Tuesday 19 April 2016 at Squire Patton Boggs' offices at Level 10, Gateway, 1 Macquarie Street, Sydney
Presenters Anna Elliott (Partner) and Jennifer Howe (Trevor-Roberts)

Redundancies can be stressful for both employers and employees. In this seminar we will look at the redundancy process from both a legal and human resources perspective and provide practical tips on getting the process right.

Should you have any queries or wish to register for either event, please do not hesitate to contact [Isla Rollason](#) on +61 8 9429 7624 (Perth).

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