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Workplace View

September 2018

The Essence of Casualness: The Scent on the Tip of All Employers' Noses

Jane Silcock, Senior Associate and Madeleine Smith, Law Graduate

Does your business regularly engage casual employees? If so, please take note. In the recent decision of *WorkPac Pty Ltd v. Skene* [2018] FCAFC 131, the Full Federal Circuit Court held that the regular and predictable working arrangements of a "casual" dump-truck operator meant that he was entitled to annual leave.

WorkPac Pty Ltd (WorkPac), a labour hire operator, employed Mr. Skene as a casual dump-truck operator between April 2010 and April 2012, at coal-mining operations in central Queensland. Upon commencing employment, WorkPac gave Mr. Skene a "Notice of Offer of Casual Employment" and a document titled "Casual or Fixed Term Employee Terms & Conditions of Employment". Mr. Skene was covered under the WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007 (Agreement), which provided that "Casual Field Team Members" were not entitled to annual leave. Mr. Skene was paid a flat rate, worked on an assignment-by-assignment basis and received no annual leave.

Following the termination of his employment, Mr. Skene claimed that he was, in fact, a permanent employee under both the Agreement and sections 87 and 90 of the Fair Work Act 2009 (Cth) (FW Act) and WorkPac should have paid him annual leave.

At First Instance

The Federal Circuit Court considered the nature of Mr. Skene's working arrangements and found that, for the purposes of the FW Act, the evidence weighed in favour of him being "other than a casual employee" (i.e. a permanent employee), which resulted in an entitlement to receive a payment in lieu of annual leave. However, the court found that the documents Mr. Skene signed when he commenced employment were enough to establish that he was a "casual" employee for the purposes of the Agreement. Both parties lodged appeals to the Full Federal Circuit Court.

On Appeal – the "Essence of Casualness"

WorkPac claimed the primary judge erred in finding that Mr. Skene was not a casual employee for the purposes of the FW Act. WorkPac's main argument was that the Agreement designated him as a "casual" employee. Therefore, it followed, as a matter of statutory construction, that he was also a casual employee under the FW Act.

In considering WorkPac's appeal, the Full Federal Circuit Court considered that the words "casual employee" have developed a legal meaning, being an engagement where there has been no firm advance commitment from the employer to provide continuing and indefinite work according to an agreed pattern of work. In contrast, the court considered that the key characteristic of permanent employment (whether full or part time) is a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment, according to an agreed pattern of ordinary time work. A reciprocal commitment to provide services is given by the employee.

The significance of this case lies in the authoritative views expressed by the court as to the appropriate test to be used to determine whether a relationship of employment is truly casual, namely the "totality" test. This requires consideration of the real substance, practical reality and true nature of the employment relationship, and an objective assessment as to whether there is, in reality, a firm advance commitment to provide continuing and indefinite work.

The full court pointed to five key criteria that, taken together, are likely to indicate the absence of a firm advance commitment and comprise what has been referred to as the "**essence of casualness**", namely **irregularity, uncertainty, unpredictability, intermittency** and **discontinuity** in the employee's pattern of work.

Importantly, the court noted that whilst the payment of a casual loading indicates the employer's intention to create a relationship of casual employment, it will not alone determine whether an employee is casual (or otherwise) and whether they are entitled to annual leave under the FW Act. It will ultimately depend on the objective, true nature of the relationship.

The full court agreed with the primary judge's finding at first instance that the "essence of casualness" was missing from Mr. Skene's employment relationship with WorkPac, as his pattern of work was "regular and predictable", "continuous" and "not subject to significant fluctuation". Importantly, Mr. Skene was provided with a 12-month roster in advance, which supported the court's view.

Ultimately, the Full Court dismissed WorkPac's appeal and allowed Mr. Skene's appeal (in relation to his status as a casual employee under the Agreement), finding that the primary judge had misconstrued the Agreement and erred in finding that he was a casual employee for the purposes of the Agreement. The Full Court said the better view was that the Agreement intended to apply the usual connotation of what constitutes casual employment (that is, the totality test).

Implications for Employers

- This decision resolves some uncertainty as to the proper characterisation of a truly casual employee and what working arrangements will properly reflect casual employment. Features such as the payment of a casual loading, termination on short notice or the parties simply describing the relationship as being one of casual employment will not be determinative.
- Employers should immediately **review their arrangements** with casual employees and consider whether the "essence of casualness" is present, that is, whether those arrangements, viewed objectively, indicate the absence of a firm advance commitment to provide continuing and definite work, according to an agreed pattern of work. If not, then the relationship is unlikely to be one of true casual employment, and liabilities may arise for entitlements such as paid annual leave.
- If any doubts arise as to whether the "essence of casualness" is present, employers should promptly seek legal advice as to their existing employment arrangements with casual employees with a view to taking appropriate steps to mitigate any risks.

Did You Know?

… About the New Family and Domestic Violence Leave for Award-covered Employees

Sharon Payn, Associate

Further to our mention of the proposed introduction of this entitlement in our April 2018 edition of Workplace View, the Fair Work Commission recently updated all industry and occupation awards to provide that award-covered employees now have access to five days of unpaid family and domestic violence leave per year, which commenced on 1 August 2018.

In addition, the Commonwealth government is proposing to introduce legislation to amend the National Employment Standards so that all award-free national system employees will have the same entitlement to unpaid domestic violence leave as award-covered employees.

The aim of the leave, as inferred by its title, is to support an employee by enabling them to take leave to deal with family and domestic violence outside of their ordinary hours of work.

Family and domestic violence is defined as violent, threatening or other abusive behaviour by an employee's family member who seeks to coerce or control the employee, and who causes them harm or fear.

Important points to note about the current entitlement include:

- All award-covered employees (new and existing) are entitled to the full five days
- The leave does not accrue each year
- There is no need for other forms of leave to be exhausted first
- Family and domestic violence leave does not break an employee's period of continuous service
- If your organisation already provides its employees with family and domestic leave, then your employees are entitled to the amount and any pay entitlements stated in the relevant policy or employment contract (provided that five days' minimum leave per year is provided for this purpose)

Migration Alert

Global Talent Scheme (GTS) Pilot Launched

Rachel Barnett, Migration Agent (MARN 1800448)

On 1 July 2018, the Department of Home Affairs launched an extension of the Temporary Skill Shortage (TSS) visa to cater for the employer and peak bodies that have complained that the restrictions on the employer sponsored visa (which replaced the 457 class visa) prevented them from attracting overseas specialist talent.

Where no suitable Australians are available, businesses now have the opportunity to sponsor highly skilled overseas workers with niche skills that are not covered by the short-term and medium-term streams of the TSS visa (subclass 482) programme.

The pilot scheme will run for 12 months, with the first GTS agreement already in place.

The GTS will have two streams:

- **Established business stream** – This allows employers who are accredited sponsors to employ highly skilled individuals with cutting-edge skills to contribute to innovation in an established business, and help make Australian businesses and their Australian employees the best at what they do.
- **Start-up stream** – This allows employers to sponsor highly skilled individuals with cutting-edge skills to contribute to Australia's start-up ecosystem and bring new ideas, new jobs, new skills and new technology to Australia. This stream is for start-ups operating in a technology-based or science, technology, engineering and mathematics (STEM) related field. The independent start-up advisory panel must endorse start-ups.

In both instances, a four-year TSS visa will be issued, with the option to apply for permanent residency after three years. For more information, please contact our immigration team.

OSH Alert

Fair Work Commission Upholds Employer's Right to Disregard Tardy and Unclear Medical Certificate

Madeleine Smith, Law Graduate

In the recent decision of *Gadzikwa v. Australian Government Department of Human Services* [2018] FWC 4878 (30 August 2018), the Fair Work Commission supported an employer's decision to disregard an employee's overdue and imprecise medical certificate and threw out the employee's unfair dismissal claim.

Mr. Gadzikwa commenced employment with the Department of Human Services (DHS) in January 2014. In June 2016, he began an extended period of unpaid sick leave due to a mental health condition. Apart from three days, Mr. Gadzikwa did not return to work until his dismissal in March 2018. In the months preceding his termination, Mr. Gadzikwa's doctor provided medical certificates stating that the likelihood of Mr. Gadzikwa returning to work in the foreseeable future was "negligible". In late 2017, DHS advised Mr. Gadzikwa that his authorised sick leave would end in January 2018 and he would have to provide DHS with a medical certificate if he wished to return to work. When the medical certificate became overdue, DHS gave Mr. Gadzikwa notice of intention to terminate his employment. Mr. Gadzikwa then provided a two-week-late medical certificate, stating that he was able to return to work on light duties. DHS did not consider this a satisfactory medical clearance and dismissed Mr. Gadzikwa.

Mr. Gadzikwa sought reinstatement, arguing DHS had impeded him from returning to work. In dismissing the claim, Deputy President Colman found that DHS had a valid reason for dismissing Mr. Gadzikwa for non-performance of duties, **not** due to unfitness for work. In failing to provide a medical certificate when his sick leave expired, Mr. Gadzikwa's absence became unauthorised. Further, the imprecise medical certificate did not meet DHS's requirements. It was reasonable for DHS to require appropriately detailed medical evidence that Mr. Gadzikwa could safely return to work. In the context of the previous medical certificates provided, this included an explanation for why Mr. Gadzikwa was now fit for work, what his light duties could include and how long light duties would be necessary for.

Deputy President Colman considered that DHS "like every other employer or occupier of a workplace … carries important responsibilities to ensure a safe working environment". His decision supports the position that employers, in exercising their OSH duties, have a right to require timely and specific medical evidence.

Legislation Alert

Third State Adopts Labour Hire Licensing Scheme

Following our report on the commencement of labour hire licensing schemes in Queensland and South Australia in our June 2018 edition of Workplace View, the Victorian Labour Hire Licensing Act 2018 (Act) has been enacted. The Act, like its Queensland and South Australian counterparts, makes it mandatory for labour hire service providers to acquire a licence and will establish a licensing authority in Victoria with investigative and enforcement powers. The Act will commence no later than 1 November 2019, with a six-month transitional period, after which penalties will apply for failure to comply with the Act. Users and providers of labour hire services across all states and territories should also be aware that the federal Labor opposition intends to legislate for a national labour hire licensing scheme if it forms government at the next federal election.

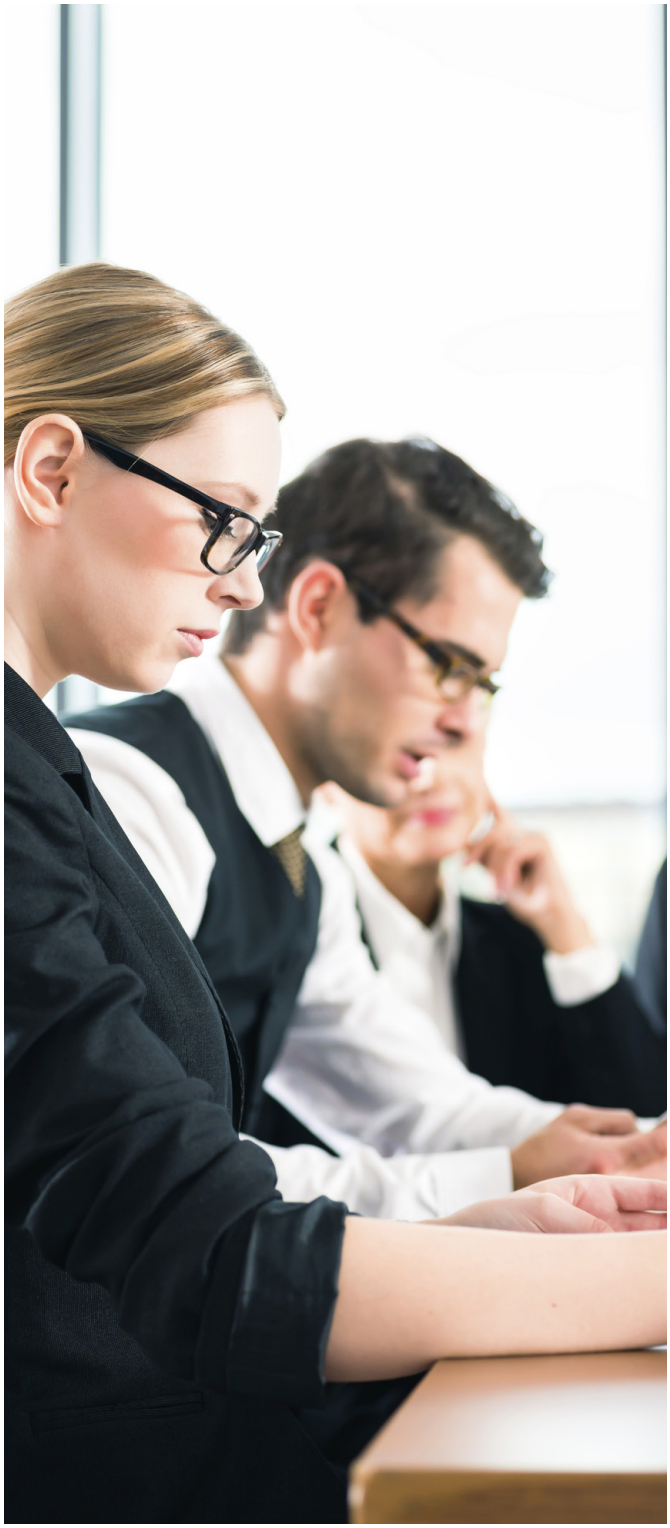
Curious Cases

Fair Work Commission Refuses to Extend Time for "Extremely Depressed" Worker Caught Out by "Truly Awesome" Holiday Evidence

Madeleine Smith, Law Graduate

The Fair Work Commission has sent a strong message to tardy unfair dismissal applicants in *Wragg v. Queensland Scaffolding Pty Ltd* [2018] FWC 4986, by relying on evidence of an employee's Facebook posts, text messages and selfies to throw out their application for an extension of time to lodge their claim.

The employee claimed he had been "extremely depressed" after his partner's miscarriage, preventing him from lodging an unfair dismissal claim after his employment was terminated. While the commission accepted that the employee, a "very good wordsmith", believed he was depressed, it found that his lengthy reports to former colleagues and Facebook friends of his post-termination holiday, "unwinding, relaxing and enjoying tropical Queensland", demonstrated he should not be excused from failing to lodge his claim within the 21-day time limit. The commission reasoned that if the employee was able to send 2,500-word text messages, page-length emails and post an "extraordinary glowing review of a vanilla bean" he had used on Facebook, he "had capacity to make a phone call to complete an unfair dismissal application, or visit the Commission website to do so".



Events Update

Labour & Employment Seminar Series

Our Labour & Employment Practice Group is holding its last seminar in its Labour & Employment Seminar Series, on the topic "One of my employees is stress/depressed, often absent and my business is suffering. What can I do without being subjected to a claim?"

This seminar will look at the potential adverse consequences that can arise from the incorrect handling of mental health issues in the workplace and will provide practical tips on how employers can manage stressed and/or mentally unwell employees to mitigate claims and ensure employee wellbeing.

- **Perth – 7:30 a.m. registration/breakfast** (for an **8 a.m. start** and a **9:15 a.m. finish**) **on Wednesday 10 October 2018** at Squire Patton Boggs Perth office, Level 21, 300 Murray Street, Perth.
- **Sydney – 12:15 p.m. registration/breakfast** (for a **12:30 p.m. start** and a **1:45 p.m. finish**) **on Wednesday 17 October 2018** at Squire Patton Boggs Sydney office, Level 17, 88 Phillip Street, Sydney.

If you have not received our invite and wish to register for any of the above events, or if you have any queries, please do not hesitate to contact Kristy Anthony on +61 8 9429 7425 or kristy.anthony@squirepb.com.

Meet the Team

John Oakes, Partner, Sydney

This month, we would like to introduce **John Oakes**, our new partner in the Labour & Employment team based in Sydney.

If I was not a lawyer, I would be a … fisherman

A random fact about me is … I know a lot of random facts

My favourite quote is … some mistakes are too much fun to only make once

The rule/s I try to live by is/are … the only rule is that there are no rules

My last supper would be … King George Whiting and a glass of rosé

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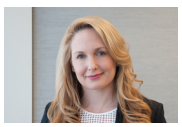

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