

Last year, there were major changes to the casual employment regime. Effective March 2021, the Fair Work Act 2009 (Cth) (FW Act) was amended to introduce casual conversion obligations, along with a definition of “casual employee” and the requirement to provide all casual employees with the Casual Employment Information Statement.

In the recent unfair dismissal case of *Sapandeeep Toor v Cleanaway Operations Pty Ltd* [2022] FWC 1900, the Fair Work Commission (FWC) found that the employer’s dismissal of a casual employee was unreasonable due to a “tainted process” connected to his casual conversion request four months earlier.

What Was the Case About?

Mr. Sapandeeep Toor (Mr. Toor) worked for Cleanaway Operations Pty Ltd (Cleanaway) as a casual driver between 8 November 2019 and 30 November 2021. In late June 2021, Mr. Toor was told by Cleanaway that he had the right to elect to convert from casual to permanent part-time employment. Mr. Toor thought about it and decided that he would like to convert to permanent employment.

Mr. Toor’s supervisor was not supportive of the casual conversion and shortly thereafter the employer commenced an investigation into Mr. Toor’s behaviour at work. Mr. Toor was the only employee subject to investigation. Cleanaway found Mr. Toor had falsified his run sheets and failed to take required fatigue breaks in line with heavy vehicle (fatigue management) national regulation requirements and company fatigue management policy.

Mr. Toor’s employment was subsequently terminated for serious misconduct with immediate effect.

In May this year, Mr. Toor challenged the fairness of his dismissal, claiming that the real reason for his dismissal was that he had made a casual conversion request and Cleanaway did not want to convert his employment from casual to permanent.

What Was the Outcome?

The FWC found that Mr. Toor was unfairly dismissed and that compensation was the appropriate remedy.

The ultimate question fell on whether the dismissal was “harsh, unjust or unreasonable”. The FWC found that Cleanaway had a valid reason for Mr. Toor’s dismissal but the process it adopted in relation to the dismissal was tainted.

The FWC found the timing of the audit by Cleanaway was too coincidental and the evidence regarding the origins of the audit was incomplete. The fact that Mr. Toor had been singled out for disciplinary action in its most severe form also gave credence to his submission that the audit arose in connection with the conversion request. No consideration had been given by Cleanaway to alternative disciplinary action such as a warning, retraining or close monitoring. The company policies were neither followed nor consistently applied in practice and no other person, including his supervisors, who had been involved in the breaches attributed to Mr. Toor had been investigated or sanctioned for their conduct.

Additionally, Cleanaway had not supported Mr. Toor’s choice to convert. His attempts to obtain and sign the form were rebuffed and even actively discouraged. Barriers were placed in the way of him requesting a meeting with his union to progress the matter and once he had finally signed the form, Cleanaway responded that he had missed the deadline and gave vague reasons for not being able to comply with his request. It is likely the matter would have remained in dispute had Mr. Toor not been dismissed.

Mr. Toor was awarded 13 weeks’ pay but the FWC reduced his compensation to factor in other earnings, his failure to mitigate his loss in the first month (10%) and the fact that his misconduct in failing to accurately record his break times was serious (10%).

What Does This Mean for Employers?

In light of this decision, employers should be aware of their casual conversion obligations under the FW Act and be wary when dismissing employees who have recently made casual conversion requests.

Employers should ensure that investigations and dismissal procedures are properly complied with and that reasons, processes and evidence supporting the dismissal are not linked to an employee's casual conversion request.

For more information on casual conversion obligations, please see the previous [Casual Employee Overhaul Guide for Employers in Australia](#) and [Preparing Your Organisation for the Casual Employment Changes in Australia](#) articles published by our team.

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