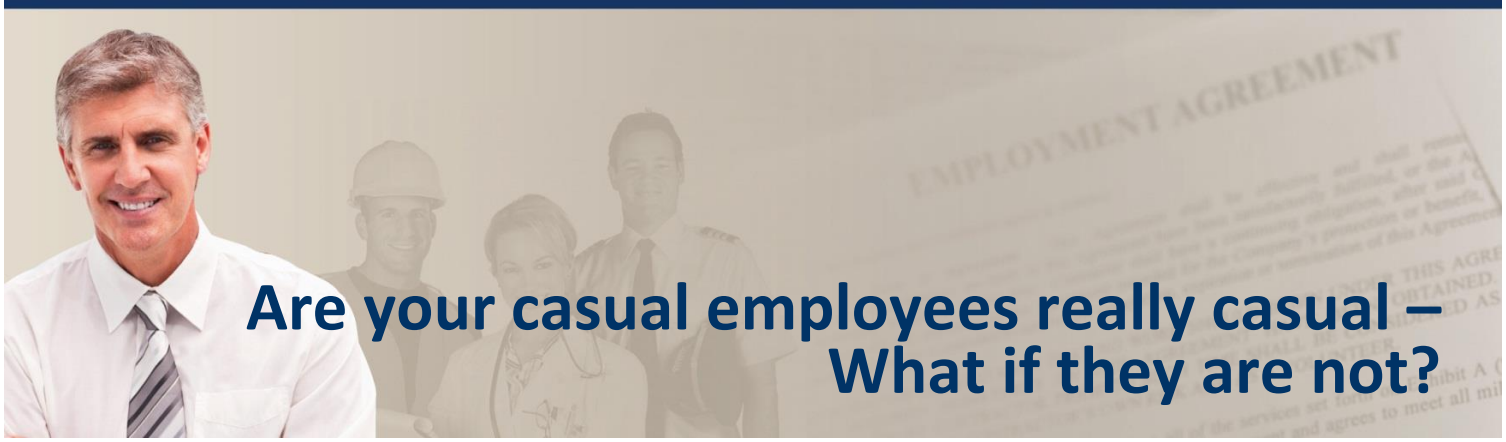
Bateman Battersby
LAWYERS



Are your casual employees really casual – What if they are not?

It has long been understood and accepted that casual employees receive a loading (extra pay) to compensate them for the absence of entitlements that permanent employees enjoy under the National Employment Standards (NES) and Modern Awards created under the Fair Work Act such as annual leave and personal leave.

The Federal Court in its decision in Workpac Pty Ltd v Skene in August 2018 found that Mr Skene, who was employed by Workpac Pty Ltd, a labour hire company, to work as a casual employee as a 'fly in fly out' dump truck operator at a Rio Tinto Coal Mine, was entitled to receive annual leave or be paid an amount of this entitlement on the termination of his employment.

What is a casual employee?

The Fair Work Act does not contain a specific definition of 'casual employee'. As such the common law (law that comes from decisions by Courts rather than legislation) tells us what casual employment is. The question of whether a person is a casual employee is determined by a number of indicia, including:

- The regularity of work pattern;
- Certainity of work;
- Continuity of service
- Intermittency of work and its predictability

Mr Skene's letter of offer from Workpac Pty Ltd stated it was an 'Offer of Casual Employment' for an assignment of 3 months duration and expressed his rate of pay was a flat rate per hour which was not expressed to be inclusive of casual loading, and was not offset against any minimum entitlements under the NES. Mr Skene worked a 7 day on / 7 days off continuous roster, which was regular and predictable, and set for 12 months in advance. His work was continuous, did not fluctuate and his hours were regular and certain, and his assignment continued for about 22 months. The Court found that, whilst Mr Skene's employment contract clearly stated his engagement was 'Casual Employment', he was not a casual employee at law for the purposes of annual leave entitlements in the NES and was entitled to receive payment for annual leave. The fact that Mr Skene considered he was a casual, that he was paid by the hour, and that his employment could be terminated on one hours' notice, were supportive of the argument he was a casual employee, but were not determinative.

What has changed since this decision?

The first change is that the Fair Work Regulations have been amended on 18 December 2018 to protect employers from employees 'double dipping' by receiving a casual loading and permanent benefits such as paid annual leave. For this protection to apply ALL the following criteria must be met:

- The employee is employed on a casual basis;
- The employee is paid a casual loading that is clearly identifiable as being an amount paid to compensate the employee for entitlements that the casual employee is not entitled under the NES eg. annual leave, personal leave;
- Despite being classified by the employer as casual, the employee is in fact a full time or part time employee for some or all of their employment for the purposes of the NES;
- The employee has made a claim to be paid one or more NES entitlements (that casual employees do not have) that they did not receive for all or some of the time they were incorrectly classified as a casual employee.

The second change is that as from 1 October 2018, a Model Casual Conversion term has been inserted in approximately 85 Modern Awards. Other Awards already had such a clause. Under the Model term 'Regular Casual Employees' who have worked a regular pattern of hours for at least 12 months, without significant adjustment, have the right to request their employment be converted to permanent full time or part time employment.

The Model Term requires the employee's request be made in writing. The employer must respond within 21 days, the employer can only refuse the request if:

- They have consulted with the employee; and
- There are reasonable grounds to do so; and
- The refusal is put in writing within 21 days of the request being made.

'Reasonable grounds' for refusal include that:

- The conversion would require a significant adjustment to the employee's hours of work in order for the employee to be engaged as a full time or part time employee;
- It is known, or reasonably foreseen, that:
  - The employee's position will cease to exist within the next 12 months; or
  - The hours of work which the employee is required to perform will be significantly reduced within the next 12 months; or
  - There will be a significant change in the days and/or times at which the employee's hours of work are required to performed in the next 12 months which cannot be accommodated within the days and /or hours during which the employee is available to work.

Importantly, employers have an obligation to provide new casual employees with a copy of the Model Terms within 12 months of their employment commencing. For existing casual employees, employers were to provide them with a copy of the Model Term by 1 January 2019. If you had existing casual employees as at 31 December 2018 and have not done so, you should immediately provide them with a copy of the Model Term.

What should employers do now?

If you have casual employees, you should:

- Review if your casual employees are truly casual, or whether they are permanent full time or part time employees;
- Review your employment contracts to ensure you clearly identify casual loadings in monetary terms;

- Review the Awards that apply to your work place and familiarize yourself with the new Model Term
- Implement a system to ensure compliance with the obligation to provide casuals with a copy of the Model Term, and to respond to any conversion request.

If you are unsure whether your business employs regular casual employees or if you require assistance with your employment contracts, contact Ken Gray on 02 4731 5899 or email us on commercial@batemanbattersby.com.au.