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17 September 2020

SIMPLIFICATION OF THE MODERN AWARD & AUSTRALIAN EMPLOYMENT SYSTEMS BY REMOVING THE CONCEPT OF CASUAL EMPLOYMENT

The issue of "casual employment" has been in the press a great deal lately. As a general proposition, employers, employees, unions and the various industrial and common law tribunals and courts have serious difficulties with it, albeit from different perspectives.

From an employer's perspective, the main problems with casual employment are:

1 The risk of having the erstwhile "casual" employment being reclassified by the Fair Work Commission ("**FWC**") or a common law court to one of part or full time employment. This occurred recently in the High Court decision in *Workpak.*

In this scenario, employers who have paid their "casual employees" the relevant Award-based casual loading are now exposed to further payments of annual and personal leave, to the date of commencement of employment where each erstwhile "casual employee" has been engaged on a "regular and systematic" basis.

That category of "casual employee" is now deemed to be engaged in part time employment. Even providing a "casual employee" with a roster or giving them the same shifts each week can make the employment "regular and systematic". If this is the case, then the further payments of annual and personal leave to the erstwhile "casual employee" are based not only on the original Award rate of pay but also include the casual loading, which is now re-classified as an over-Award payment.

In other words, the now "caught-out" employer who was previously required to only pay the casual loading to "casual employees" is now stung a second time with having to back pay annual and personal leave at the above Award rate, possibly to the commencement of the employment. That cost will often be in respect of work that has been quoted and billed to the client and now comes off the bottom line as the exposure cannot be passed to these clients.

2 If the back-pay issues were not enough, the breach of the casual Award provisions that caused the problem (improper use of "casual" employment, failure to implement casual conversion clauses etc) can attract prosecution by the Fair Work Ombudsman ("**FWO**") with resultant fines and other reputational exposures.

3 The (often expensive) obligation on employers to keep track of casual employees' length of service in order to comply with casual conversion clauses in Awards and to manage the risk of establishing "regular and systematic" employment.

4 The risk of providing additional hours of work to casual employees. Many employers don't wish to become too dependent on any particular casual employee, which results in the need to hire and supervise a large pool of "casual" employees, thereby increasing the risk of exposure to the above issues as the length of their employment or "time on the employer's books" increases.

5 The confusing mixture of approaches in Awards as to whether deemed "casual" employees are entitled to overtime if more than their agreed hours are worked, they work over 38 hours per week or they work more than 10 hours in a day.

From a casual employee's perspective, the main problems with casual employment are:

1 Uncertainty of continuing employment.

2 Exposure to termination of employment before casual conversion obligations in Awards are triggered.

3 Inability to obtain additional hours of work as employers don't wish to become too dependent on any particular casual employee or are fearful of providing them with regular and systematic work.

4 Reduced ability to seek credit or access to a mortgage because of their current "casual" status.

Putting it bluntly, this means that the current system of "casual" employment is broken.

There are many industrial commentators (including me) who regard it as an anachronism and an impediment to the freeing up of our workforce and therefore the economy. It does not work in the COVID-19 world.

REPLACE CASUAL EMPLOYMENT WITH A MORE FLEXIBLE FORM OF PART TIME EMPLOYMENT

I believe that some of the issues set out above (and others) can be negated or better managed.

I put the following propositions as an alternative to the current status quo:

1 Remove forever the concept of "casual" employment from all Federal and State and Territory Awards and from Australian employment law and all related entitlements and obligations. This will simplify Awards and the common law considerably.

2 All employment contracts to be in writing setting out the minimum conditions of employment (eg Award coverage, classification, location, ordinary rate of pay) as well as the minimum number of guaranteed hours of work per week or fortnight ("**minimum guaranteed hours**"). This will provide clarity as to the conditions of employment but will also reduce the cash economy and payments to employees "under the table". One might assume that more tax and superannuation will be collected.

3 Replace the concepts of "casual" employment with that of part time employment in which all proposed part time employees are given the minimum guaranteed hours pursuant to their written employment contracts. For example: "*We guarantee that you will be offered 12 hours of part time work per week, to be worked Mondays, Tuesdays and Wednesdays each week or such other patterns as are agreed between the parties*".

4 The proposed part time employment can be open ended or for a fixed term. (The usual rules with respect to fixed term employment and the renewal of that employment to apply.)

5 In the light of the above, the concept of casual loadings now becomes redundant. In its place, in respect of the minimum guaranteed hours, employers to accrue both annual and personal leave for all part time employees based on their ordinary rate of pay and hours worked. This removes employers' exposure to the fall out from *Workpak* and makes redundant all casual conversion clauses in all Awards. It also means that the potential damage to employers' bottom line expenses in future years will be minimised.

6 Mandate in all Awards that if an employer wants to offer any part time employee additional hours and the employee is prepared to work them, any such additional hours worked will be paid at the ordinary rate of pay until the employee works either 10 hours in any one day or 38 / 76 hours in any week / fortnight. Thereafter overtime in accordance with the Award is payable.

This action will remove inconsistences between Awards in which some employees are entitled to overtime once their minimum hours of work are exceeded (even if they don't work over 38 hours per week). Employers to pay annual and personal leave on all additional hours. While this is an impost, the obligation to pay a casual loading has been removed.

7 If the minimum guaranteed hours offered by an employer are excessive post the commencement of the employment, the employer and employee can either negotiate lesser hours per week or fortnight or, if no agreement is able to be reached, the employee to be made redundant and paid redundancy entitlements based on the hours of work performed in the preceding 12 months for the employer. The usual rules about no redundancy entitlements in the first 12 months of employment to apply.

8 In all other respects the usual employment laws and Awards to apply. This means for example that the usual laws of termination of employment apply as would the black-out periods before FWC Unfair Dismissal proceedings could be commenced.

If the above regime was implemented, the concept of casual employment would disappear and former and proposed casual employees would be treated the same way as part time employees.

There would be more certainty with respect to employment terms and hours of work.

Difficulties with the management of casual conversion clauses, the calculation of casual loadings and how overtime would apply are otiose.

Employers would be more confident to hire staff based on their actual needs in terms of hours per week / fortnight / month. It would, in my view, be a "win-win" for employers and employers and create more jobs at time when that has never been more important.

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