

Casual Employees – The Cost Of Getting It Wrong

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In a recent decision handed down by the Full Federal Court in the case of *Workpac Pty Ltd vs Rossato [2020]*, it has been determined that an employee, whom is incorrectly classified as a casual employee and paid a casual loading, may also claim annual leave and personal leave from their employer.

Background information

Major labour hire company, Workpac Pty Ltd, has been involved in two recent court cases that have considered whether or not an employee is a casual employee and if they are entitled to permanent entitlements such as annual leave and personal leave (*Workpac vs Rossato [2020]* and *Workpac vs Skene [2018]*).

The facts of each case were similar and the general employment details for each employee were:

- paid a flat hourly rate that included a 25% casual loading
- there was a continuous 7-days-on, 7-days-off roster
- had regular and predictable working arrangements, indicated by the fact that shifts were set 12 months in advance and followed a stable roster
- assigned to camp-style accommodation
- did not elect the days or hours they worked
- could not choose when or where to work because they were expected to be available in accordance with the roster.

What is a casual employee?

The underlying principle that each case considered was the real substance and nature of the employment relationship and not the description that was given to the employment contract by the employer.

The definition of a casual employee from the Fair Work Australia website states:

A casual employee does not have a firm commitment in advance from an employer about how long they will be employed for, or the days (or hours) they will work. A casual employee also does not commit to all work an employer might offer.

For example, an employee who works to a roster that could change each week and can refuse or swap shifts is casual.

A casual employee:

- *has no guaranteed hours of work*
- *usually works irregular hours*
- *doesn't get paid sick or annual leave*
- *can end employment without notice, unless notice is required by a registered agreement, award or employment contract.*

In both of the Workpac cases it was found that there was a firm commitment in advance as to the duration of employment and the days/hours worked which made the employees permanent employees at law and therefore eligible for entitlements such as annual leave and personal leave.



Casual Loading – can it be used to offset leave entitlements?

Workpac argued that the casual loading it had paid to its employees should offset the annual leave and personal leave entitlements under Reg 2.03A of the Fair Work Regulations 2009. The intention of this Regulation is to prevent 'double-dipping' by allowing employees to receive both the casual loading and permanent leave entitlements.

In the case of *Workpac vs Rossato [2020]*, Workpac was unsuccessful in its attempt to offset the leave entitlements it owed Mr Rossato. Their claim failed on the basis that:

- Mr Rossato **was claiming payment for his entitlements, not in lieu of them**. Regulation 2.03A only applies when someone claims to be paid an amount in lieu of their entitlements.
- **The casual loading paid to Mr Rossato was not separately identifiable**. If the casual loading was separately identifiable and if it could be ascertained that it was paid to Mr Rossato on his acceptance that he was a true casual employee, then Workpac could have made a claim for restitution.

What does this mean for employers?

2

The key considerations for employers when employing casuals are:

- Describing someone as a casual employee and paying them casual loading does not make them a casual employee at law. It is the true nature of the employment relationship that is important.
- Employers should review their casual employees on their payroll and discuss with their Employment/HR specialist if they have any concerns. This applies for both current and former employees.
- Contracts for casual employees should be reviewed to ensure that casual loadings are clearly identified so that they may be able to be set off against entitlements if a claim is made.
- Incorrectly classifying a permanent employee as a casual could result in:
 - paying a 25% casual loading rate when you are not required to
 - becoming liable to pay annual and personal leave for current and/or former casual employees, in addition to casual loading already paid.

If you would like to discuss this matter further please do not hesitate to contact Hall Chadwick QLD.

If you have any questions or would like more information, please contact our office:

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