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CLIENT ALERT

LANDMARK DECISION ALLOWS REDUNDANCY FOR PERIODS WORKED AS A CASUAL

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To All of My Valued Clients,

This Client Alert is to advise that the Fair Work Commission (FWC) has released a controversial decision allowing the hours worked by an employee as a casual are to be counted for the purposes of the calculation of redundancy payments.

This decision has important consequences and cost implications for employers and is very much an “about face” determination on what has been previously decided.

If you need further information in relation to this issue please do not hesitate to contact me.

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Fair Work Commission decides that periods of Casual employment counts towards Redundancy payments

Important cost implications for employers

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CONTROVERSIAL FWC DECISION DECIDES THAT CASUAL SERVICE COUNTS TOWARD REDUNDANCY PAYMENTS

A Full Bench of the Fair Work Commission, in a controversial decision has decided by majority that casual hours should now count towards redundancy pay entitlements. This decision significantly differs from previously accepted authorities.

The previously accepted interpretation of the relevant legislation was that casual hours did not count in the calculation of service accrued for redundancy pay entitlements.

The result, it appears, is that employees who have regular ongoing employment, either as a casual or permanent employee will have all service counted for the purposes of calculating redundancy payments.

It is important to note however that this decision does not apply where an employee is a casual employee at the time of termination. However if an employee was previously a casual employee before becoming a permanent employee, then the period of employment as a casual employee with regular on-going employment shall be included in the calculation of the period of service for redundancy purposes.

In *AMWU v Donau Pty Ltd* [2016] FWCFB 3075 (15 August 2016) – the majority of the Full Bench members upheld an appeal by the Australian Manufacturing Workers' Union which will now require ship building company previously known as *Forgacs Engineering Pty Ltd,* to count an employee's the period of regular casual employment as well as permanent employment when calculating redundancy pay.

In July 2015, Forgacs made a large portion of its workforce redundant. Some of these workers commenced with the Company as casual employees but become permanent staff through a conversion clause, and the dispute centres on the length of service that would impact upon their final redundancy payouts.

Although the initial Union application was first rejected by the FWC, a later appeal by the AMWU was overturned the Commissions original decision.

Senior Deputy President Drake and Deputy President Lawrence considered the relevant provisions of the *Fair Work Act 2009* (Cth) and concluded "*A period of continuous service as defined by s.22 of the Act includes a period of regular and systematic casual employment.* [because] *There are no words in the Agreement or the Act excluding any period of regular and systematic casual employment from the calculation of service for the purposes of a redundancy payment.*"

However, the other member of the Full Bench, Commissioner Cambridge decided otherwise in dissention. The Commissioner stated *"In my view, the words "a period during which the employee is employed by the employer" as contained in subsection 22 (1) of the Act, must logically be confined to*

what is described as permanent employment, as opposed to any casual employment, be that regular, systematic casual employment, or casual employment of any other arrangement. Any arrangement of casual employment, by its intrinsic nature, does not count as service, nor does it attract service related benefits unless terms of a specific instrument prescribe otherwise."

The Commissioner went on to draw comparisons to other service related provisions including annual leave. He said: *"The prospect that a casual employee who became a permanent would have her or his annual leave entitlement calculated from the date of commencement as a casual exposes the folly of the interpretation of the meaning of service in s22, to include any period of casual employment."*

This is a matter of significance for employers, particularly those who have casual staff who have converted over to permanent during their years of service. Whilst no announcement has been made yet, an appeal would seem likely as this decision has considerable cost implications for employers.

Further, the outcome again provides a disincentive for employers to consider the transferring of casual employees to permanent employment.

Clients will be kept up-dated on further outcomes from this matter.

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