ARE CASUALS STILL CASUALS?

THE SHORT ANSWER IS YES, BUT THE WATERS ARE A BIT MURKY AFTER THE RECENT FEDERAL COURT OF AUSTRALIA ('FCA') DECISION OF *WORKPAC PTY LTD V SKENE [2018] FCAFC 131.* THIS WAS AN APPEAL TO AN EARLIER DECISION OF THE FEDERAL CIRCUIT COURT ('FCC').

Former mine site dump-truck driver Paul Skene claimed that his employment reflected permanent employment and that he should have received payment of annual leave on termination. WorkPac argued that Skene's employment was casual and he received a casual loading that compensated him for not receiving paid annual leave, and this was reflected in his employment contract and underpinned by the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* (the 'Agreement').

The FCC found that Skene was not a casual employee for the purpose of the National Employment Standards (as found in the *Fair Work Act 2009* (Cth)(the 'Act")) but was for the Agreement. Both Workpac and Skene appealed and the FCA upheld the decision of the FCC but also found Skene to be a permanent employee for the purpose of the Agreement.

The FCA and FCC considered that the Act does not define casual employment and undertook an assessment of the nature of Skene's employment, which consisted of the following important characteristics;

- The employee worked in accordance with a 7 day on / 7 day off roster, that was set 12 months in advance;
- The company facilitated and funded a fly-in fly-out arrangement that was indicative of an expectation of the employee's on-going availability;
- While the employer contended that the employee's hourly flat rate of pay included a casual loading, this was not specified in his employment agreement.

What does this mean for the hospitality industry and the future of casual employment?

The Skene decision was influenced by factors specific to the individual case, as highlighted above, and while it sets some precedent for entitlements claims in court, it does not mean that all casual employees are now permanent and entitled to leave payments and entitlements. If the casual loading was more clearly outlined in Skene's employment contract the result may have been different, at least with respect to any payment of monies ordered. Further, the commitment to a pattern of work 12 months in the future is unlikely to be a practice utilised by Hospitality Industry employers.

The Skene decision does create a level of anxiety within the business community and could affect business confidence in relation to the employment of casual employees. There may be some legislative amendment in the future that addresses this issue for employers but it's unclear what form that may take. There could be an amendment that aligns casual employment with how an employee has been engaged in accordance with an award or agreement. Conversely, there could be an amendment that defines casual employment in a manner that is not positive for the Hospitality industry. It's also unclear what retrospective protections might be put in place. Members worried about past employees should note that there is a statute of limitations on claims of 6 years from the date of a claim.

What action should employers take?

It is recommended that employers do the following:

1. Where possible, make sure that Casuals have some variation in their number of hours and particular hours of work and review the true nature of any casual employment relationship to assess whether there is a risk that the employment is not that of a true casual;
2. Consider moving those casual workers with regular and predictable working patterns into full-time or part-time employment. Part-time employment is now a viable option for Hospitality as there is now more flexibility in the *Hospitality Industry (General) Award 2010.*
3. Remember to document all discussions, your offer to convert, and the employee's response and reasons for the response (particularly if they decline the offer);
4. Ensure you have clear written employment contracts for all employees, especially casual employees. For casual employees, the contract should, at a minimum:
    - Specify the nature of the work eg that employment is on a casual basis;
    - Confirm that as a casual employee, hours of work will be according to workplace needs and demand;
    - States that a casual loading applies, what it is (eg 25%), and what it compensates for;
    - Include an effective 'set-off' clause that states that any amounts paid can be used to set off later claims for entitlements.

While it's easy to implement this for new employees, for existing employees, any amendments to a contract require that employee's agreement.

The QHA can assist you with your employment contract needs. Call us today to discuss set-off clauses and our template contracts for both award covered, as based on the *Hospitality Industry (General) Award 2010,* and (genuinely) award free positions.