



Jan29, 2019 by Peter Maguire

Getting the balance right with casual employment

There has been a lot of activity around casual employment over the past year or so – in the courts, in the Fair Work Commission and in regulation by the Federal Government.

What we aim to do in this article is to dispel some of the myths that create confusion and concern and to offer advice on practical tips for “getting the balance right with casual employment”. In doing that, we do have regard to the recent developments in:

- The Workpac v Skene case wherein the Court awarded annual leave payments to a nominally casual employee
- Casual conversion provisions introduced to modern awards
- Regulation by the federal government to limit the ability for a nominally casual employee to be awarded annual leave payments

Is this really a casual employee?

The classic casual is someone who is required to work on an irregular or limited tenure basis.

It might be as a shop assistant in the lead up to Christmas or in hospitality or security at events like the Australian Open or the Melbourne Grand Prix ie the job only exists for a limited time.

It might be someone who is on a relief roster and is called in as needed or someone whose work hours vary in line with their availability while they are still at school or university.

Or it could be someone who is called upon as projects come online and they come in and perform certain tasks on the project and then stop being employed when they finish the tasks.

All of those are true casuals.

If the role is really a continuing one with reasonably consistent and predictable hours of work and it continues that way month after month, that creates an expectation for the employee that they will have continuing employment. So it isn't really casual, is it?

That is essentially what the judgement in Workpac v Skene said. The employee concerned was on back to back contracts and fly in fly out rosters with pre booked accommodation for two and a half years and had no indication that that pattern would not continue indefinitely.

The pros and cons of hiring continuing workers as casuals

The first point here is that, in a competitive labour market, limiting engagement options to casual distinctly limits your ability to find the best staff for your business. People are generally unlikely to leave secure employment to take on a casual job.



There are those who believe that engaging workers as casuals is safer and cheaper when, in reality:

- the 25% casual loading applying under modern awards is a lot more expensive than the paid leave entitlements a full-time or part-time employee gets
- you still have to pay the superannuation guarantee
- casuals accrue long service leave and, where they work in an industry with a portable long service leave fund, are entitled to employer contributions into that fund just as full-time and part-time employees are
- casuals have the same access to the unfair dismissal, adverse action, industrial dispute, bullying and discrimination and WorkSafe and WorkCover jurisdictions as continuing employees do

Where it is really (or potentially) a continuing employment arrangement, one advantage of engaging someone as casual is that you don't technically have to provide notice of termination because that is notionally compensated for by the casual loading.

Another might be that, if there is some fluctuation in hours of work, that can be more easily managed if the employee is engaged as a casual.

The question is, when you look at all of the elements set out above, what's the best option having regard to your overall business needs?

How you hire a casual

One of the main reasons that the judgement in the *Workpac v Skene* case was to award annual leave entitlements was because the employment contract did not specify the amount of the casual loading ie it didn't specify how the entitlement to annual leave that a continuing employee would have was set off by the casual loading.

In response, the Federal Government's regulatory change provides some relief from so called "double dipping" of casual loading and annual leave payments but stipulates that there must be an employment contract that includes that specification.

There is an obligation to provide a Fair Work Information Statement on first engagement as a casual...and there is the obligation to provide a casual with a copy of the Casual Conversion clause in any award that was varied last year to provide that right.

So ensure that you do all of this in writing before the employee starts and get professional advice if you aren't sure on what to include or writing isn't your strength.

Dealing with casual conversion

Last year, a casual conversion clause was included in most modern awards which did not already have one.



This provides the right for an employee who is engaged regularly and systematically as a casual for 12 months to request conversion to full-time or part-time employment.

The employer has to provide casuals with a copy of the casual conversion clause and, if a request is made, has to respond within 21 days in writing.

If the employer refuses the request which can only be done in quite limited circumstances, the employee has the option of taking the matter to the Fair Work Commission for conciliation and arbitration.

Our advice is to be proactive in satisfying the obligation to offer casual conversion by:

- Providing any new casual employee with a copy of the casual conversion clause from the relevant award on engagement or in the onboarding process.
- When it becomes clear that the employee is going to continue in employment on a regular and systematic basis for a period of at least 12 months, remind them in writing of the opportunity to convert to full-time or part-time, spelling out the options and what they each mean for the employee (eg if I stay casual, this is what I get, and, if I convert to full-time, this is what I get).
- Require the employee to nominate in writing which of the options they want to take up.
- Confirm in writing the agreed arrangement going forward and implement it in practice.

One other option you could consider is to tell casuals when you engage them that, if they get through their probation period or at some point up to reaching twelve months' employment, they will be offered full-time or part-time employment as applicable. You would do this if you wanted to secure employees who had proven themselves to be productive and a good fit during their initial period of engagement.

Note: there are a number of awards which already had casual conversion clauses requiring the employer to offer conversion after six months regular and systematic employment. These include building and construction, manufacturing, quarrying and trades industries among others. Check the clauses in the modern awards applying in your business to be sure.