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Employee Relations News

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In this Edition 18, I discuss:

- The implications of casual employment;
- Bullying is further defined and I find (and share) the meaning of "longueur".

Further, I am chuffed to announce that my newsletter is being published by third parties for information to their client base.

Casual employment in focus

Casual employment has been used for years as an easy way dismisses a worker should they become less than satisfactory. In some cases employers use casual employment as a formal probationary period. In all instances, employee believe (incorrectly) that it is a quasi get-out-of-jail free card in relation to the "unfair dismissal" laws.

Regular and Systematic[1]

The FWA recognises that a casual employee employed on a regular and systematic basis and had a reasonable expectation of continuing employment is entitled to claim for an unfair dismissal, subject to the employee has served a minimum employment period of one year for a small business (15 or less employees) or 6 months for an employer which is not a small business.
In this matter the DP related to a number of citations and simple dictionary definitions of the words "regular" and "systematic". That is, each word separately.

Mr James McKinnon (the applicant) was employed as a casual employee in the bottle shop of The Crest Hotel Sylvania from 22 August 2012 to the date of his dismissal 17 February 2014.

During this period he received varying levels of payments based on the hours worked, and worked each and every week.

According to the DP,

> *"The finding as to whether employment is regular and systematic is a discretionary one having regard to the totality of the evidence. Setting out factors which dictate a finding one way or another is to be avoided, particularly so given the Act is silent as to the matters to be considered."*

The applicant worked consistently for a period of 76 weeks. His weekly roster was never the same, based only on [the employer's] need and his availability, with non-regular and non-systematic hours of employment.

Despite this, the DP found that *"…a different roster week to week is not fatal to a conclusion that a casual employee is employed on a regular and systematic basis."*

In Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic (the Ponce decision) Roe C said:

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[1] James McKinnon v Reserve Hotels Pty Ltd T/A The Crest Hotel Sylvania[2014] FWC 5053 (U2014/5153) DEPUTY PRESIDENT BOOTH

> *"It is the employment which must be on a regular and systematic basis. This does not mean that the hours or days of work must be regular and systematic. It is clear that to establish "regular and systematic" there must be sufficient evidence to establish that a continuing relationship between the employer and the employee has been established. This is clearly a reason why there is a legislative requirement for a reasonable expectation of continuing employment."*

The DP decided:

> *"I have no doubt that the applicant's employment was on a regular and systematic basis. An analysis of his pay slips reveals that he worked at least one, and generally more than one, shift in each of his 76 weeks of employment. The number of hours worked per week varied but the engagement was regular. But for his dismissal the applicant could have expected to continue to be engaged for shifts in the bottle shop. I believe that the applicant had a reasonable expectation of continuing employment on a regular and systematic basis. All of his 76 weeks of employment therefore count towards the minimum employment period, in this case 6 months or 26 weeks, which he well and truly exceeds."*

The nature of casual employment[2]

In this matter, the applicant (a casual employee) objected to a reduction in her hours.

The SDP found that:

> *"Ms Pikunova was employed as a casual employee and paid as such. Her employment came to an end at the conclusion of each engagement, only to be reinstated upon a further engagement, when an offer of work was accepted.*
>
> *The Full Bench in Shortland v Smiths Snackfood Co Ltd [2010] FWAFB 5709 considered the matter this way in a common law context:*
>
> > *"As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. In this sense no casual employee has a continuous period of employment beyond any single engagement. Moreover, it is common for a casual employee to transition between a period in which their engagements with a particular employer are intermittent and a period in which their engagements are regular and systematic and vice versa."*

Commentary

In my humble opinion, casual employment should only be used to "fill gaps". Fixed term/temporary employment is to be avoided due to the courts determining any temporary contract that has a termination clause (expect misconduct) is not a true fixed contract (ie think of the sacked football coach analogy, where contracts must be paid out).

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[2] Tetyana Pikunova v Mcdonald's T/A Jatam Pty Ltd [2015] FWC 1059 (U2014/9560), SENIOR DEPUTY PRESIDENT RICHARDS

Further the "minimum employment period" should give adequate relief from unfair dismissals for most employers. **However**, a casual employee can still lodge a WorkCover or discrimination claim at any time.

If injured, the casual employee must continue to be paid until they are fit for work (up to 12 months). In one matter I was involved in recently the casual employee sustained a broken bone and worked casual at two employers, with my client being the secondary employer, but still having to reimburse for loss suffered by the employee from both jobs.

Anti-bullying decision teaches us what "longueur" means and further defines bullying behaviour[3]

This matter relates to the applicant claiming that she was bullied by a number of persons at the BOQ as a consequence of negative "performance reviews", which identified shortcomings:

- Time management;
- Work output;
- Spending appropriate amounts of time on matters;
- General advising;
- Workload;
- Assisting others when they were busy;
- Regularly and correctly completing St Andrew's timesheets;
- Decision making in progressing matters;
- Service levels not being met on contract reviews; and
- Allocation of general advice work from other Senior Corporate Solicitors.

At the time of the claim, the applicant was on leave due to mental health issues (related to the alleged bullying), citing:

> *"I recall when I first received the PIP document that I had a physical reaction to it. I was shaking and my face became very flushed. I felt ill. I was completely surprised by the document. I did not understand it. I thought why do I have to do this. I had not heard of the PIP process before. I felt nervous and anxious. I did not know why I was being subjected to this process. I noted on the last page of the document that it says the process could lead to the termination of my employment. I was worried what I would do if I did not have a job. I felt powerless as if there was nothing I could do about it. I felt like crying but could not because I work in an open plan environment."*

The VP considered "*…that her belief that she has been bullied at work was reasonable in the sense that it has something tangible to support it and is not entirely irrational, absurd or ridiculous*".

However, the DP found:

> *"My overall conclusion is that the decision to place Ms Mac on a PIP, and the manner in which the PIP process was implemented, was not unreasonable. Prior to the decision to place Mr Mac on a PIP being made, shortcomings in her performance had been identified by Ms Mac's managers over a considerable period of time.*

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[3] Amie Mac v Bank of Queensland Limited; Michelle Locke; Matthew Thompson; Stacey Hester; Christine Van Den Heuvel; Jane Newman. [2015] FWC 774 (AB2014/1324). VICE PRESIDENT HATCHER

> *"During a longueur* in the hearing, I attempted to draw up a list of the features at least some of which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying at work. My list included the following: intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination".*

*Longueur, noun. A tedious passage in a book, piece of music, etc. A tedious period of time. (PS: 10 points to anybody who knew this already).

Commentary

Despite the FWC finding that the applicant had a genuine belief that she was being bullied (as evidenced, no doubt, by the medical reports), the VP in a moment of "longuer" found that the performance improvement plans that were properly implemented did no constitute bullying, and the application for an anti-bullying order was dismissed.

Until next time…

Greg Reiffel
(including Greg Reiffel HR & IR Consulting)

	**Remember, I am currently searching for contract (under my own ABN) or permanent opportunities. I would be grateful for any leads you may have** ☺ I also would greatly appreciate if you could pass this newsletter on to your business contacts	Greg Reiffel HR & IR Consulting