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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

SPECIAL REPORT

Edition 80 **19 November 2018**

I am back in the saddle, ready and able to assist you in your employee issues. REMEMBER, Christmas is just around the corner and you may wish to consider my services as a fill-in whilst you go on a well-earned break.
To subscribe to my newsletters please do so through gregreiffelconsulting.com.au.

Quote

"Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies". Groucho Marx

Everything you need to know if hire casuals or temp's (including using labour-hire firms)

Executive Summary

Introduction

Given the amount of attention by the Federal Court and FWC of late to casuals, temps and labour-hire firms (and the companies that use them), I thought it useful to provide a compendium of advice (which I refer to as a "special report").

I have provided a sketch by way of "executive summary" and a more detailed (read "lengthy") summation for those of you who would benefit from this knowledge base.

Also appended are the "Casual conversion" model clause and FWC letter that must be sent to all casual employees.

Casuals

The recent *WorkPac v Skene* decision has thrown the gauntlet down to employment of casual employees, stating that (despite the payment of 25% loading), the casual in question was entitled to leave entitlements as set down by the NES.

The FWC (and its predecessors) have been tackling this issue for many years in relation to unfair dismissal claims. These decisions, whilst mostly consistent, can be quite unhelpful in defining what a true casual employee is. For example, one decision (consistent with *Workpac*), and comments that:

> *"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".*

That is, it is because a statutory definition of a casual worker is not provided in the FWA, this has led to (to my mind) very generous interpretations by the FWC (and its predecessors) of what is **not** a casual employee. In the meantime, employers have the ongoing uncertainty of employing casuals.

And then there are these considerations…

Casual conversion to permanent

The FWC has decided to provide casual employees the right to request that their employment be converted to full-time or part-time employment if, for the preceding 12 months, they have worked a pattern of hours on an ongoing basis, which without significant adjustment they could continue to work as a full-time or part-time employee. There are a number of reasons provided to reject such a request. A letter must be provided to all casual employees with a copy of the new clause within the first 12 months of their employment, or if already engaged, by 1 January 2019.

Temp and fixed term engagement

The hiring of temporary or fixed term employment must:

- Be very specific on the task the employment is for and provide a definite end date (or end of "season").
- Not contain a termination clause which would result in the temp employee being able to be dismissed prior to the end of the contract term (except in the case of breach of contract, such as serious misconduct).

And if you employ foreign workers…

Please read this excellent article by K&L Gates (sponsors of HR@Work):

http://www.klgateshub.com/details/?media=1c8e124b-d83a-41ac-a109-02edc1eab233

Read of for the full report…
Or:

Until next time…

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So, on what basis do I hire an employee?

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Casual: *Workpac* decision

As you are no doubt already aware, the Federal Court has "tested" the term casual employment in *Workpac v Skene*, determining that a casual employee was not a true casual and therefore entitled to leave entitlements. This has resulted in an outcry from employers and turning into (yet another) windfall for lawyers who are reportedly establishing class actions to claim underpayments for employees "wrongly" employed as casuals. This finding was made despite the applicant signing a "casual contract of employment" and being paid 25 percent casual loading.

Apparently, Workpac has decided not to appeal, and we have yet to hear from the law-makers on any changes to the FWA. Not helpful.

Much was made of the definition of a "casual" employee for the purposes of the NES in the context of no statutory definition. The Full Court rejected WorkPac's construction as it related to the definition within the Agreement (and more broadly, applicable industrial instruments) in favour of a legal construction involving consideration of individual factual circumstances against a number of indicia established by case law - similar to the way Courts assess independent contracting arrangements.

The factors in WorkPac that the Court found weighed against casual engagement of Mr Skene included the fact that:

- Mr Skene's employment regular and predictable - with 12 hour shifts on a designated "crew" being set 12 months in advance for a roster of 7 days on and 7 days off.
- The company facilitated, at its expense, a fly-in, fly-out arrangement with accommodation for Mr Skene.
- There was a plain expectation as to Mr Skene's availability on an ongoing basis.
- The work undertaken was not subject to significant fluctuation.
- It was not open to Mr Skene, in the circumstances, to accept or reject an offer of assignment.

The Court also noted that Mr Skene was paid a "flat rate" of pay which did not specifically provide that the rate was inclusive of a casual loading.

Without any definitive statutory definition of a casual employee, *WorkPac* makes it clear that specific circumstances will be relevant in determining whether an engagement is reflective of casual employment, balancing considerations relating to contractual documents and work arrangements.

Implicit in the reasoning in *WorkPac* is that the overriding consideration will be the nature of the engagement as it relates to work performed - ie hours, rostering arrangements etc - over considerations relating to pay rates inclusive of loading and contractual documents specifying that the basis of employment was casual. This may have a significant impact on a number of employees across a number of industries.

This may also impact employers with enterprise agreements that cover casual employees and the future negotiation of agreements.

The Full Court also detailed the other entitlements in the NES that casual employees are not entitled to, which could also form the basis of claims that may arise in the future.

Employers should still carefully consider the engagement of casual employees in the workplace, including by having regard to the following:

- *Classification as a casual employee in an employment contract or an industrial instrument is not determinative.*

- *Regular / predictable roster patterns and hours of work are likely to weigh against the argument that an employee is engaged on a casual basis.*

- *Rates paid to casual employees should clearly specify that the rate makes provision for a casual loading and the entitlements that loading is paid in lieu of.*

Casual: Entitled to Redundancy

In Unilever Australia Trading Limited v AMWU. (C2018/1367) [2018] FWCFB 4463, the Full Bench of the FWC upheld appeal that resulted in casual employment being counted for redundancy pay purposes.

[This was an appeal against decision ([2018] FWC 1150) of Deputy President Gooley in matter number C2017/1089].

Casual: Unfair dismissals

The FWC has defined casual employment over many years. Casuals are exempt from claiming an unfair dismissal unless they work on a "regular and systematic basis". And I suspect that previous decisions of the FWC relating to unfair dismissal decisions will be used to formerly define a casual employment clause in the NES of the FWA (to defuse *Workpac*). The following decision summarises the FWC's view to casual employment and "regular and systematic" employment.

Janell Hansson v Bronze Hospitality T/A The Harbour Terrace. (U2018/6613) [2018] FWC 5665. Wilson, C. 18 September 2018 – which quoted a number of citations.

- 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.

- 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.

- The general contractual characteristics of casual employment is that a person who works over an extended period of time as a casual employee will be engaged under a series of separate contracts of employment on each occasion a person undertakes work, however they will not be engaged under a single continuous contract of employment.

- Service rendered under a series of separate casual employment contracts may be regarded as continuous in respect of statutory entitlements such as long service leave, certain entitlements prescribed under the National Employment Standards and accident compensation legislation, and for the purposes of assessing whether a particular employee had been engaged for the minimum employment period for the purposes of making an unfair dismissal remedy application under the Act. But such recognition of casual service does not alter the fundamental contractual character of regular casual employment as a series of engagements, each under a separate contract of employment.

- Continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee **make it clear** to the other party, by words or actions that there will be no further engagements. The gaps between individual engagements in a

sequence of engagements should not be seen as interrupting the employee's period of continuous employment. In particular, a period of continuous service is not to be seen as broken by a period of "leave" or an absence due to illness or injury.

- It is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement.

- The term "regular" should be construed liberally. It may be accepted that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant".

- The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged.

- It is clear from the examples that a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all.

- Engagement under contracts on a 'systematic basis' implies something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan.

- Hours varying from week to week does not lead to an inevitable conclusion that that the casual employment was not regular or systematic.

- 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.

Casual: Conversion to permanent employment

The Fair Work Commission FWC), as part of its four-yearly review of modern award, has decided that a standard clause be inserted in awards that provides for casual employees (subject to some rules) to request being made permanent.

This new clause will apply from 1 October 2018.

The new clause will give casual employees the right to request that their employment be converted to full-time or part-time employment if, for the preceding 12 months, they have worked a pattern of hours on an ongoing basis, which without significant adjustment they could continue to work as a full-time or part-time employee.

Conversion to permanent employment is not automatic however, and an employer may refuse the request to convert, but only on reasonable grounds after consultation with the employee.

Reasonable grounds for refusing the request may include that:

- It would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of the relevant award – that is, the casual employee is not truly a regular casual employee.

- It is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months.

- It is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months.

- It is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

This list of reasonable grounds is not exhaustive and other matters may arise which makes it reasonable to refuse an employee's request to convert.

Under the new clause, an employer must not engage, re-engage an employee, or reduce a casual employee's hours of work in order to prevent the employee from being able to make the conversion request.

The Model clause is attached as **Appendix "A"**. Noting that each award may contain subtle changes.

A template letter which has been approved by the FWC is attached at **Appendix "B"**.

Action required:

- Casual employees must be given a copy of the new clause within the first 12 months of their employment, or if already engaged, by 1 January 2019.

- Employers should also be planning whether casual employment (given Workpac) is the most appropriate method of engagement.

- A system should be implemented that alerts the employer of a casual employee reaching 12 months of service. It can then be assessed on a case-by-case basis.

Beware of employing labour hire casuals

Ricky Taulapapa v Toll Personnel Pty Limited. (U2018/6243) [2018] FWC 6242. Cambridge, C. 16 October 2018.

- This matter relates to an unfair dismissal case involving a labour-hire employee that was subsequently employed by the labour-hire company's client. Specifically whether the time worked with labour-hire employer, counted towards service when employed by the new employer. If the Commission found that the service did count, the applicant would have satisfied the minimum of six months service threshold (ie minimum employment period) to enable the unfair dismissal application to proceed.

- The Commissioner relied on the unfair dismissal and Transfer of Instruments division of the Transfer of Business provisions of the FWA; finding in favour of the applicant (ie the service of the labour-hire company counted towards service with the new employee) to enable the unfair dismissal application to go ahead, relying on the "regular and systematic…with an expectation of ongoing employment" casual employment definitions, plus interpreting the Transfer of Business definitions contained in the FWA.

- Whilst raised by the applicant's representative, the Commissioner did not seem to consider that the simple solution that would have stopped this application in its tracks:

- "…the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised".

Lesson: when taking on personnel previously engaged by your business (or associated entity) from a labour-hire business, ensure that the letter of offer stipulates that any previous employment will not be recognised for any and all purposes.

Casual Service NOT counted for redundancy pay

Unilever Australia Trading Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) [2018] FWCFB 4463, (C2018/1367). Full Bench: Catanariti, VP; Colman, DP, Wilson, C. 30 July 2018.

This is a precedent setting full bench decision of the Fair Work Commission, which has categorically found that casual and seasonal employment does not count towards redundancy pay. This decision does not count where an employer, at it its own volition, has a written policy providing that such service shall be included when calculating redundancy pay.

The main statements to consider in the decisions are:

> *"Casual and seasonal employees render service. In relation to casuals, the common law position is that each engagement stands alone. Each engagement constitutes a period of service, but there is no continuity of service from one engagement to the next. Such is the case also with seasonal workers, who render service for each season they are engaged, but ordinarily do not have continuity of service from one season to the next. The common law position can of course be altered by statute, contract, or an industrial instrument.*

And:

> *"…casual and seasonal employees would not ordinarily be entitled to payment of redundancy benefits anyway. The employer could simply not reengage casual employees; there is no need to make them redundant. The position is similar in relation to seasonal employees; 'redundancy' occurring at the end of the season would simply mean that the employer would not reengage the person for the following season…"*

Casual Engagement (summary)

It is becoming evident that the courts (and FWC) are taking a historical approach to casual employment. Casual engagements should be carefully managed:

- Better used for ad-hoc employment (ie employed to fill short-term needs).
- The 25% loading should clearly be stated that it is paid in lieu of annual leave, personal leave and public holidays not worked.
- Casual employment may be used in calculating redundancy payments.
- Employees of a labour-hire companies that your business had used as supplementary labour, if subsequently employed may claim service all time worked with your business despite being employed by a third party.
- AND there is a huge question-mark over the ability for client companies of labour-hire firms to use the labour-hire firm to avoid the legal consequences that come with employment.
- AND what do you do if the FWC orders reinstatement and you are not the true employer?

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Temporary Engagement

Magdalini Nesci v The Playford Hotel T/A The Playford Hotel Pty Ltd. (U2018/5809) [2018] FWC 5777. Platt, C. 14 September 2018. Platt, C. 14 September 2018.

Application for an unfair dismissal remedy – jurisdictional objection – employment ceased as a result of expiration of fixed term contract – contract contained term permitting termination before expiry – not a fixed term contract within meaning of s.386(2)(a) – jurisdictional objection dismissed.

The employment contract, under the paragraph heading "Contract of Employment" makes it clear that the employment was for a fixed period ending on 2 July 2018. The issue is whether the reference in the preceding paragraph which provides "Throughout this period of time, either party may **terminate this contract of employment with one week's notice**" has the effect of preventing the characterisation of the contract as a fixed term.

The case law on this issue is well established. In the decision of *Andersen*, von Doussa J held:

> *"A contract of employment for a specified period of time would be one where the **time of commencement and the time of completion are unambiguously identified** by a term of the contract, either by the contract stating definite dates, or by stating the time or criterion by which one or other end of the period of time is fixed, and by stating the duration of the contract of employment. As the period of time is defined in this way, it is apt to refer to a contract of employment for a specified period of time as a contract of employment for a fixed term, although this is not the description used in the regulation. A contract of employment to run throughout a nominated number of days, weeks, or years would be a contract of employment for a specified period of time. If the terms of the contract of employment, instead of identifying in this manner the period of time during which it is to run, provides that it is to run until some future event, the timing of the happening of which is uncertain when the contract is made, the contract will be for an indeterminate period of time".*
>
> *"In the present case the Employment Agreement clearly state both a commencement date for the employment and a cessation date, but in light of the right of either party to the contract to bring the employment to an end on two weeks' notice, and the right of the employer to bring the employment to end without notice on payment of two weeks salary, the cessation date **merely records the outer limit** of a period beyond which the contract of employment will not run. The period of the contract of employment is indeterminate. At any point during the two year period identified by the commencement and cessation dates neither side could know with any certainty when the period of the contract of employment might come to an end."*

Similarly in *Cooper v Darwin Rugby League Inc*, Northrop J held:

> *"The clause headed "Notice of Termination" appears to give either party the right to terminate the employment on notice at any time during the **three year period**. This conclusion follows from the fact that the clause excludes termination in the case of misconduct where the employer terminates the employment "in accordance with the clause relating to the Employment Period in" the contract, but provides for termination of either party by notice. In the context, this must relate to notice given within the three year period. There is no reason to suggest that this clause is limited by implication to apply to any extension of the employment period after 10 December 1995. In my opinion, the contract of employment is for a specified time but can be terminated before the expiration of that period by either party on notice or by the respondent, as employer, for the misconduct of the applicant, as employee. On*

> *this construction of the contract of employment, the applicant is not a worker engaged under a contract of employment for a specified period of time..."*

A Full Bench also considered this issue in the case of *Dale v Hatch Pty Ltd*, where it was held:

> *"There is one other aspect of the Contract which requires comment. Clause 27 of the Contract provided, among other things, that Ms Dale's employment could be terminated by Hatch without cause on one week's notice during the probation or minimum employment period and on four weeks' notice thereafter. In relation to employment contracts for a specified time, it was held in Andersen v Umbakumba Community Council…that an employment contract will not be one for a specified period of time if it gives either party an unqualified right to terminate the contract on notice or with payment in lieu of notice within any specified term. The basis for this proposition is that a specified period of time is a period of employment that has* ***certainty as to its commencement and time of completion****, and where a contract provides a broad or unconditional right of termination during its term, the period of the contract is indeterminate and thus not for a specific period of time."*

Fixed term contracts, by their very nature, are intended to give both parties certainty in relation to the date of commencement, duration of the employment relationship and the completion date. **The inclusion** of a termination provision within a fixed term employment contract destabilises this certainty which explains why the Courts and the Commission have found that the inclusion of such provisions prevents the contract being properly described as a fixed term contract.

That the period of time in which the contract allows for the employment to be terminated by one week's notice is unclear. The period of time could be a reference to the probationary period of three months, or the minimum employment period or indeed the entirety of the contract. Regardless of which of these propositions is correct the effect of the provision is that the employment contract is **not for a fixed term but for an "outer limit"** with the potential for it to be terminated earlier with one week's notice. That the contract permitted either party to terminate the contract with one week's notice results in the contract not being correctly characterised as a fixed term contract.

Specified task

Michael Newton v Lend Lease Engineering Pty Ltd. (U2018/7514) [2018] FWC 6385. Saunders, C. 16 October 2018.

This decision provides excellent guidance to what constitutes being employed for a "specific task" for the purposes of an unfair dismissal application.

Whilst the Commissioner found in favour of the Applicant, the total award was a mere $728.62 less tax (Legal costs were not incurred as the applicant was represented by his union and the respondent was self-represented), the decision was very thorough in its findings, including the emphasis that the FWC has no jurisdiction for claims for non/underpayments:

> *"I do not consider that the unfair dismissal provisions of the Act should be used as a substitute mechanism for the recovery of monetary entitlements under the Act or an industrial instrument. If Mr Newton believes he has an entitlement to redundancy pay, then he can make an appropriate application to a relevant court for the recovery of such an entitlement".*

In terms of being employed for a "Specific task", the decision gave the example of:

> *"Although contracts for a specified task, such as erecting the framework on a house, will likely be for an uncertain duration (due to weather etc.), an **employee working on such a task can monitor progress of the task and readily understand the scope of the work they have remaining on the project**".* [My emphasis].

In this matter, the application for unfair dismissal remedy by a civil construction roller driver/labourer working on a specific road project. The Applicant was employed on a contract of employment that stated:

> *"If, at the end of your engagement, you are not offered, or you do not accept, a new engagement, your employment will be terminated in accordance with the Agreement.*
>
> *"Your employment may be terminated prior to the end of the engagement by either party in accordance with the Agreement.*
>
> ***"Duties and Reporting***
>
> *"You will be located at the Richmond 2 Ballina project and report to Paul Bull, General Superintendent.*
>
> *"For the duration of your employment, you will:*
>
> > *"Perform any duties or tasks that the Company directs you to carry out to the best of your skills, competence and training and with reasonable care and diligence. This may include, but is not limited to the duties, task, or roles contained in any job description that is in place for your position…*
> >
> > *"The Company may also vary your duties provided the variation is reasonable, in accordance with any applicable provisions of the Agreement and the duties are within your skills, competence and training. Depending on management needs and any applicable provisions of the Agreement, you may be required to rotate to different sections and roles throughout your project…"*

The Commissioner commentary on the contract of employment was far from complimentary:

> *"It is clear from the 'Engagement' term of the Contract that Mr Newton was not assured employment throughout the whole of the time that Lendlease was engaged on the R2B project. Instead, the Contract states that Mr Newton's engagement would "**end either when the project concludes, or the work for which you are employed on this project concludes**".* [My emphasis].

Concluding:

> *"…the Contract is vague as to how long Mr Newton may be employed on the R2B project. In particular, the **Contract permits Lendlease to unilaterally decide**, at any time convenient to it and without prior notice to Mr Newton, that the work for which he was employed on the project has concluded".* [My emphasis].

The decision contained numerous citations, which I will summarise:

- "Task" is a piece of work to be performed or undertaken.
- It must be the task of the employee, not the employer.

- "The words "for a specified task" qualify the words "contract of employment". The contract of employment must be for a specified task; it must be a contract under which the employee is to carry out a specified task. The words "for a specified task" have nothing to do with the employer's task, or project.

- The task must be "specified" - that is, identified in definite terms. In a written contract of employment, it could usually be expected that the task would be identified in express words, although it is not impossible to conceive of a case whereby the task might be specified as a matter of necessary implication. Further, the relevant contract of employment must be "for" the specified task, meaning that it has been entered into for the purpose of the performance and completion of that task.

- The task be sufficiently definite in its nature and delineation such that identification of when the task is completed is not a matter of doubt or speculation or contingency but is clear and predictable.

- A contract for a specified period terminating at the end of that period, or for the duration of a specified season terminating at the end of the season - likewise involve the termination of employment occurring at an identifiable time or upon an identifiable event.

- For the purpose of the phrase 'specified task' the term 'task' has not the same meaning as a role, job or project which the employee is engaged to perform. A "role", as a matter of the ordinary meaning of the term, usually involves a collection of work duties and functions required to be performed on an ongoing basis for an indefinite period of time. It does not usually involve the completion of a discrete piece of work.

- A further example of a "specified task": an employee engaged to personally develop a piece of software for cash registers for an employer with no software expertise was held to have been employed under a contract of employment for a specified task [as it]:

    - A piece of work imposed on or undertaken by a person.

    - A definite piece of work assigned or falling to a person.

    - Any piece of work.

- Returning to contractual wording:

    "[An] employee has been engaged under a contract to perform a project or job which is distinct or identifiable in its own right. The task to which the original employment contract relates should be self-contained and not leave open the possibility of the employee performing any work outside the realm of the specific task for which the employee is being employed".

- Using an example of a **labour hire company** ("Recruitco"):

    "That case involved a casual employee of a labour hire company who was assigned to work for a particular client (a retail grocery distributor) and did so, on a regular and systematic basis, for a period of over six years. The employee claimed his employment with the labour hire company terminated when the client informed the labour hire company his assignment was terminated. This occurred after some absences from work by the employee, alleged to be unauthorised, due to the birth of his child. The following conclusion was stated in that decision.

    "We cannot, with respect, accept that an employment contract to perform work of an ongoing and generic nature for a third party client until that client no longer requires the person to perform the work constitutes an employment contract for a specified task. There was no identifiable or distinct piece of work that was required to be performed or any specific result required to be achieved. The

facts did not suggest that the employee had completed any particular piece of work or even that the work performed by the employee was no longer required to be performed when the assignment was terminated, but only that

- A "position" is not the same thing as a "task", particularly in circumstances where the Contract permitted Lendlease to direct Mr Newton to perform "any duties or tasks". Further, the Contract permitted Lendlease to unilaterally determine, at any time, when the work for which Mr Newton was employed on the R2B project had completed. Lendlease did this by deciding in June 2018 that it no longer needed Mr Newton to work on the R2B project as a Labourer and/or Roller Operator, notwithstanding that such work was continuing to be done on the R2B project by other Lendlease employees. In this way, identification of when the "task" for which Mr Newton was employed would be, or had been, completed was **not clear or predictable, but was a matter of doubt and speculation on Mr Newton's part. For these reasons, Mr Newton was not employed under a contract of employment for a specified task**.
- A task is one which is completed when the employee finishes the work involved in it.
- Mr Newton's employment with Lendlease did not end because he had completed any particular task.

"Rather, Lendlease decided to bring Mr Newton's employment to an end because it had completed about 85% of its bulk earthworks…and it did not require as many Labourers or Roller Operators working on the project to complete it. Lendlease did not employ anyone else to replace Mr Newton's role…Lendlease made a no doubt commercially sensible decision that it no longer required as many employees working…so it abolished the roles of a number of employees on the project…"

Labour Hire firms not immune from unfair dismissal claims

Two recent decisions, firstly a full bench appeal of the FWC which upheld a $15,000 award, and secondly an injunction allowed by the Federal Court of Australia involving Workpac (yes, the same company that was party to Federal court case awarding annual leave to a casual employee) ordering a labour hire employee to be reinstated to a client's site.

The take home message, being put by the FWC and courts is that it is incumbent on labour-hire firms to ensure that due process is followed when concluding an assignment. This may include an alteration to contractual terms between the labour-hire company and its employees, and the labour-hire company and its clients. Read on…

In the first matter, *Spinifex Australia Pty Ltd t/a Spinifex Recruiting v Patrice Tait (C2018/3537)*, the Full Bench upheld the original decision and was very informative in its findings.

In short, Spinifex's client was unhappy with the attendance and performance of the placement and requested that the placement be removed and replaced. Ms Tait had been on temporary placement through Spinifex and had on foot a contract that stated (in part):

"1. My employment with Spinifex Recruiting is as a temporary on an assignment by assignment basis, with each assignment constituting a discrete period of employment. I may accept or reject any offer of an assignment from Spinifex Recruiting. On completion of an assignment, whether satisfactory, or otherwise, Spinifex Recruiting is under no obligation to offer me further assignments.

2. I understand that Spinifex Recruiting's customer (not Spinifex Recruiting) controls the length of any assignment and I accept that whilst Spinifex Recruiting may indicate to me in good faith the potential length of an assignment with a customer, the customer may vary the length of an assignment period or

terminate my attendance at an assignment at their absolute discretion. I agree to notify Spinifex Recruiting without delay if I am informed by the customer of the completion date of an assignment.

3. I accept that I am under care, control and supervision of Spinifex Recruiting's customer during the period of any assignment. In regard to defined working arrangements and the manner in which and the degree of proficiency at which my work is to be performed, I acknowledge the rights of Spinifex Recruiting's customer to direct my work activities."

The decision was also critical of the contractual arrangements that may apply between a labour-hire company and its clients stating:

"[48] Where managers of a ***host employer inform a labour hire employee that he or she is to be removed from site on the basis of conduct, capacity or work performance****, the actions of the host employer may be* ***tantamount to dismissal****. This is particularly so where managers or supervisors of the host employer have also been involved in disciplining the labour hire employee. A labour hire employee seeking to contest such action by making an application for an unfair dismissal remedy, faces considerable difficulty, principally because the host employer is not the employer of the labour hire employee. It is also the case that a labour hire company may face considerable difficulty preventing a host employer from taking disciplinary action against an employee of the labour hire company.*

*"[49] However****, the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair*** *dismissal.* ***Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly****. If actions and their consequences for an employee would be found to be unfair if carried out by the labour hire company directly, they do not automatically cease to be unfair because they are carried out by a third party to the employment relationship. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal.* ***To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal****."* [Emphasis added].

In turning to the contractual arrangement between the labour-hire company and the client, the FB determined:

"If, for example, ***the labour hire contract permitted*** *the host employer to* ***request the removal of a worker only in the case of proven misconduct or non-performance of duties****, entirely different considerations would arise. In that case the* ***labour hire employer would have the contractual right to resist the removal of a worker by the host employer where substantiation of any allegation of misconduct or non-performance was not forthcoming****. If, notwithstanding this, the labour hire employer* ***simply acquiesced in the removal of the worker and proceeded to dismiss him or her****, it is* ***difficult to imagine that such a dismissal could be justified*** *on the basis of the worker's incapacity, since the inability of the worker to continue working for the host employer would be the result of the labour hire employer's failure to insist upon compliance with its contract with the host employer rather than any incapacity on the part of the worker.* [Emphasis added].

And in quoting another case:

"…the labour hire employer simply acquiesced in the host employer's contention that the worker had engaged in misconduct without forming any ***independent view*** *about whether this allegation was substantiated…"* [Emphasis added].

The FB became particularly scathing, stating:

> *"…We agree with the Senior Deputy President when he said the appellant hid **behind the terms of the [agreement]** when deciding to dismiss the respondent.*
>
> *"We consider it would be a **perverse outcome**, were it to be the case that an otherwise **unfair dismissal cannot be so described because of technical manoeuvrings** over the true nature of the employment relationship and the circumstances giving rise to a dismissal…"* [Emphasis added].

Commentary

It is abundantly clear that FWC's view of labour-hire arrangements can be questionable. As employers, labour-hire companies must ensure that when removing an employee from a client that there is a valid reason and procedural fairness is applied.

In the second (Federal Court) matter (Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd [2018] FCA 1590) found:

> *"…until the hearing and determination of this matter or further order, the respondent, by itself, its servants or agents, be restrained from excluding or otherwise preventing Kim Star from attending the Goonyella Riverside Mine to perform work there on behalf of WorkPac Pty Ltd pursuant to the labour hire contract between the respondent and WorkPac Pty Ltd."*

By way of background:

- Ms Star was employed by WorkPac as a casual machinery operator.
- The mine was owned and operated by BMA.
- Ms Star was engaged in accordance with a regular roster, and she worked a rotating roster across fourteen days out of a 28 day cycle.
- During the time Ms Star worked at the mine, no issues were raised in respect of her performance by either BMA or WorkPac.
- Ms Star alleges that she was required to drive a truck on a lamp without lights and then to dump loads of rocks, and because this was hazardous she requested that lights be provided. There was interaction between BHP supervisors and Ms Star in respect of the lights issue, and she assumed it had been resolved. Ms Star was required then to undertake a random mid-shift drug test which had previously been arranged, finished her crib break, and then completed her shift without incident.
- Ms Star spoke with WorkPac who told Ms Star that her services were no longer required by BMA and that Ms Star was being "demobilised". WorkPac professed lack of knowledge of why this was the case.
- Ms Star was subsequently contacted by Thiess to work at another BMA coal mine. She commenced working in her new role on 27 November 2017. In her new role, however, she rarely sees her partner because of different shifts.
- Ms Star filed an unfair dismissal claim against BMA under the FW Act, seeking orders for reinstatement to her job with WorkPac.

- The Fair Work Commissioner issued a reinstatement order. As a result Ms Star resigned her employment with Thiess. WorkPac did not reinstate Ms Star, advising her that BMA would not allow her back into the mine.

- Ms Star has taken up a role with Mackellar Mining, and, although the earning are approximately the same, she will not be able to live in the same house as her partner while she is rostered to work because of the location of her new employment.

- There are a number of objective facts which support the inference that BMA acted for a prohibited reason, including that no reasons were given by BMA in respect of its decision to exclude Ms Star from the mine, there had been no performance issues in relation to her work during her four years there, the decision to exclude Ms Star came only a few hours after she exercised a workplace right, and, after being informed of the decision of the Fair Work Commission that Ms Star had been unfairly dismissed and reinstated to the mine, BMA continued its exclusion of Ms Star without providing any reason for its position.

As the Judge put it:

> *"…the only inference I am able to draw from the material before me is that, for unknown reasons, [BMA] does not want Ms Star to return to work at the mine. This apparent, unexplained preference of [BMA] can be contrasted with the personal detriment deposed to by Ms Star. In this respect, the applicant substantiates its case for interlocutory relief."*

In the "unfair dismissal decision, *Ms Kim Star v WorkPac Pty Ltd T/A WorkPac Group (U2017/12786)*, leading to the Federal Court injunction, the Commission foreshadowed the difficulties in forcing Workpac, as a labour-hire company, imposing its employees on a client:

> *"While expressing a provisional view that I would order reinstatement if it was pressed by Ms Star, I indicated (in summary) that I had reservations about whether* ***reinstatement is appropriate in circumstances where WorkPac has no right to insist that BMA give Ms Star access to its site*** *and that subject to BMA making reasonable attempts to persuade BMA to the contrary, Ms Star could be placed in a position where her incapacity to work at that site was a valid reason for dismissal at a future time."* [Emphasis added].

Justifying the decision by:

> *"…reinstatement will place Ms Star in the position that she held immediately prior to her dismissal – Mine Worker Level 3 at the Goonyella Riverside Mine. WorkPac will then be in a position where it can take the steps it should have taken prior to dismissing Ms Star including making reasonable attempts to ascertain the reason for the directive from BMA to remove her from the Mine site and establishing whether provisions of the contract between WorkPac and BMA in relation to unsatisfactory performance by WorkPac personnel applies in Ms Star's case."*

Commentary

The FWC fundamentally washed it hands of the problems, subsequently placing Workpac in an impossible position – a position the FWC knew would occur if reinstatement was ordered.

In fact, the decision has caused further litigation, with the refusal of the client to agree with the order, which in turn has led to the applicant resigning another position.

The applicant (in the Federal Court) claims that an "adverse action" has taken place. This is confusing because (in my mind) this would be "double-dipping" as this involves a separate claim under the Fair Work Act – the original claim being for unfair dismissal.

Note: On 2 October 2018 Workpac filed an application in the Fair Work Commission seeking to vary the reinstatement order, and on 4 October 2018 Workpac appealed the Fair Work Commission decisions. Watch this space!

Until next time…

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Appendix "A"

The Model Clause

Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to fulltime or part-time employment.

(b) A regular casual employee is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause X. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause X.

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause XX(p).

Until next time…

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Appendix "B"

Template Letter

<Print on your business letterhead>

<Insert date>

Private and confidential

<Insert employee's full name>
<Insert employee's residential address>

Dear <insert name>

Letter of casual conversion

This letter is to inform you that as of <insert date> you have been employed on a casual basis by <insert company/partnership/sole trader name and the trading name of business> (the employer) on a regular and systematic basis for 6 months.

> *To help your employee understand their right to elect to convert their employment to full-time or part-time, attach the relevant award clause to this letter.*
>
> *Each award has a unique clause dealing with casual conversion, so make sure you read it carefully.*

In accordance with clause <insert relevant clause number> of <insert modern award title> you have the right to elect to convert your employment status to <insert full-time or part-time>. Please find copy of the relevant clause attached to this letter.

> *Some award clauses have specific conditions about whether a casual employee can elect to convert to full-time or part-time employment based on the employee's pattern of work while they were casual. Read the clause carefully before amending the information between the red <> symbols.*

When you've received this letter please reply in writing with your decision whether to convert your employment to <insert either full-time or part-time> in accordance with the process in <insert relevant clause number> of <insert modern award title>. If you elect to convert your employment status it will be approved unless it is unreasonable for the business to do so.

If you don't respond within 4 weeks of receiving this letter, you'll be deemed to have elected not to convert your employment status. We will still require you to provide a written notice of your decision not to convert your employment status.

If you decide to convert your status of employment, please provide a dated letter with your decision by <insert date>.

To find out more about your entitlements at work, visit www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94.

Should you have any questions, please contact me on <insert phone number>.

Yours sincerely,

<Insert name>

<Insert position>