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Article Information

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Service: Employment & Labour

"Protected" casual employees – when a casual is not a casual (continued….)

Periods of casual employment may be more likely to count as service for the purposes of eligibility to bring an unfair dismissal claim following the recent decision in Amy Greene v Floreat Hotel Pty Ltd [2020] FWCFB 6019. Michelle Cox, Senior Associate, reviews the decision, and reflects upon other recent and forthcoming developments in relation to casual employment.

The nature of "casual" work and the gig economy has been a hot topic of debate in 2020. Commonwealth Treasurer Josh Frydenberg has promised that Attorney General Christian Porter's proposed IR reforms will be "first cab off the rank" in the government's economic response to the covid-19 global pandemic, and casual employment is therefore a topic that will no doubt continue to be on everyone's minds throughout 2021.

Porter's proposed reforms include introducing a new definition of "casual" employee into the *Fair Work Act 2009* (**FW Act**). The meaning of a "casual" employee for the purposes of the FW Act has previously been considered in the recent Full Federal Court decisions of *Workpac v Skene* and *Workpac v Rossato*, in relation to which Workpac has now been granted leave to appeal to the High Court. Those decisions challenge the previously well-accepted notion that engaging an employee as a casual and paying a casual loading would disentitle the employee to paid annual leave and sick leave.

Piper Alderman has previously written about the Full Federal Court decisions in *Skene* and *Rossato*, in articles available here and here, and Professor Andrew Stewart also discusses the implications of the decision in *Rossato* in episode 12 of our podcast, Employment Law for the Time Poor, available here.

Bench casts wide net on "regular and systematic" casuals protected from unfair dismissal

Many employers also mistakenly believe that a casual employee is not entitled to run an unfair dismissal case. However, an exception to that general rule applies under section 384(2)(a) of the FW Act, in that a period of casual employment will count as service for the purposes of an unfair dismissal claim if that employment is on "a regular and systematic basis", and the employee has a reasonable expectation of ongoing employment. Furthermore, a recent decision of the full bench of the Fair Work Commission suggests that that exception may be broader than was previously understood.

In *Amy Greene v Floreat Hotel Pty Ltd* [2020] FWCFB 6019, a full bench of the Fair Work Commission (headed by Vice President Hatcher) overturned a decision of Deputy President Binet, and held that an employee who converted from casual to permanent employment approximately three months before the termination of her employment had performed the minimum period of continuous employment of 6 months which is necessary to make an unfair dismissal application. The facts of the case were as follows:

- The employee was originally engaged on a "zero hours" contract, that is, she was employed with no guaranteed minimum period of engagement, as a food and beverage attendant and was characterized as a casual employee.
- After a period of a few weeks, from approximately 4 March 2019, Ms Greene was allocated the duties of an assistant manager, which included managing staff, training and banking, and thereafter worked an average of approximately 36 hours per week, other than during periods of pre-arranged leave. The Applicant also gave evidence that she was "*always given first choice of hours and days*".
- From March 2019 the majority of the Applicant's working hours were rostered in advance in consultation with her, with the balance of hours being allocated to her on an ad-hoc basis as needed.
- In August 2019, the company offered to convert the Applicant to full-time employment, but the Applicant declined.

The Applicant subsequently agreed to convert to permanent employment in January 2020, and her employment was terminated in 15 April 2019.

The full bench determined that the Applicant's period of casual employment was to be counted as service for the purposes of the minimum period of employment, because she was employed on a "regular and systematic" basis from March 2019 and she had a reasonable expectation of ongoing employment, for the following reasons:

- The Applicant's employment "regular" in that she worked an average of 36 hours per week
- The Applicant's employment was "systematic" because she worked in accordance with a roster which was established in advance in consultation with her; and
- The Applicant had a "reasonable expectation of ongoing employment" because she felt secure enough in her employment to decline to convert to permanent employment, and because she had the capacity to choose her own shifts.

Implications of the decision

The Applicant in *Floreat Hotel* did not work the same pattern of shifts every week, and her hours of work as well as the particular shifts she performed each week were determined on a weekly basis in consultation with the Applicant. She was free to refuse any shift which did not suit her in a particular week. In these respects, it is our observation that the terms and conditions of Ms Greene's employment were somewhat commonplace. The decision of the full bench therefore potentially expands the unfair dismissal jurisdiction of the FW Act to large numbers of casual employees who are rostered to work for a particular employer every week for an extended period of time, particularly in industries with high levels of casual employment (such as hospitality, retail, and fast food).

The decision also has implications for the JobKeeper scheme, which has now been extended to 28 March 2021, and which also covers casual employees only to the extent they are long term "regular and systematic" casual employees. Many of the industries which have been hardest hit by the pandemic in Australia (and particularly in Melbourne) are those same industries with historically high levels of casual employment.

Our company has regular and systematic casual employees. What should I do?

The decision in *Floreat Hotel* is a reminder to employers about the risks associated with long term casual employees, which may not have been fully appreciated historically. However, it also highlights the need to seek advice before seeking to convert employees from casual to permanent employment, and before terminating the employment of casual employees who have performed work for the employer regularly for at least 6 months.

If you would like to discuss the implications of the decision in *Floreat Hotel* for your workplace, or if you have any other questions about changes to casual employment arrangements as discussed above, please contact a member of our employment relations team.

Key takeaways

- The recent full bench decision of *Greene v Floreat Hotel* [2020] FWCFB 6019 may expand the unfair dismissal jurisdiction of the *Fair Work Act 2009* for casual employees
- Employers seeking to terminate or convert long term casual employees should seek legal advice
- Further changes to the terms and conditions of employment for casual employees are anticipated from both the High Court and the Commonwealth Government