Landmark Decision Impacts Casual Engagement Model

The recent decision of the Full Court of the Federal Court in the matter of *WorkPac v Skene*[1] creates an enormous challenge for Australian businesses, and has led to fears of significant liabilities for the back payment of wages arising from the engagement of casual employees.

In this matter the Full Court of the Federal Court held that a labour hire casual who worked regular and predictable hours was a permanent employee at law and was therefore entitled to paid annual leave, and other permanent employment rights, despite WorkPac paying him as a casual.

The Full Court determined that when considering the proper nature of a casual employee's engagement an objective assessment needs to be undertaken. While a valid Casual Contract of Employment would go to identifying the intentions of the employee and employer at the commencement of the employment relationship, the Full Court importantly held that the provision of an agreed and continuous pattern of work can demonstrate a contrary intention to that contained within the employment contract, and in certain circumstances give rise to a permanent employment relationship.

The Full Bench ruled that Mr Skene was entitled to $21,000 in compensation plus interest of $6700 for accrued annual leave under the National Employment Standards (**NES**). Significantly, the Federal Court has also set the matter down for consideration of the pecuniary penalties which would be imposed in this matter for the failure of WorkPac to pay Mr Skene permanent employment entitlements.

This decision has resulted in understandable concern from employers engaging casual employees who fear it may result in a significant volume of claims from employees challenging the status of their engagement and seeking the back payment of permanent employment entitlements such as annual leave, redundancy and notice of termination. With employees having 6 years in which to raise a claim, the decision provides both current and former employees with an opportunity to pursue a claim of this type.

It is important to note that the decision does not require employers to begin back paying current casual employees nor does it mean that all casuals are now entitled to annual or personal leave. For casual employees who work a consistent number of hours each week, with little or no variation in the days worked or start and finish times, the risk is significant. At the other end of the scale, casuals who work irregular hours, with changes in the number of hours and times when those hours are worked, there is very little risk of deemed permanent employment. A large proportion of casual employees are, however, somewhere in between the two extremes.

With a recent announcement that casual employees in the mining industry commencing a class action against a mining company, and one of Australia's leading labour hire companies, concerning the misclassification of workers engaged as casuals, this issue is likely to escalate.

Given the serious ramifications arising from this decision many leading business and employer groups have called upon the Government to legislate to remove any ambiguity which may exist with the engagement of casual employees and avoid employees effectively "double dipping".

It is widely predicted that this matter will be the subject of a High Court appeal, however as yet an appeal process has not been initiated. Unless (or until) a High Court appeal is lodged and

[1] WorkPac Pty Ltd v Skene [2018] FCAFC 131

determined, the decision stands as law, and businesses need to review their own casual engagement model and take steps to quantify the potential risk and implement measured to minimise risk.

The VANA Employment Relations Team will continue to review and update members accordingly in relation to this matter, however, until that time members are strongly encouraged to contact the Telephone Advisory Service on (02) 9083 0091 for guidance upon this decision and what steps can be taken to minimise the risk to your business.

Introduction of Family and Domestic Violence Leave

Following on from a decision by the Full Bench of the Fair Work Commission in March 2018 unpaid Family and Domestic Violence Leave is **now** available to all employees who are covered by an industry or occupation modern award.

As of 1 August 2018 employees covered by a modern award are entitled to take Family and Domestic Violence Leave if they are experiencing family or domestic violence. Whilst the introduction of Family and Domestic Violence Leave is unlikely to have an immediate effect, it is important all employers are ensure they are aware of the new entitlement and the obligations that arise with the changes.

What is unpaid Family and Domestic Violence Leave?
This new entitlement provides all employees (including casuals) with 5 days of unpaid leave to deal with family and domestic violence.

Family and domestic violence is defined as violent, threatening or other abusive behavior by an employee's family member that seeks to coerce or control the employee or causes them fear or harm.

The term family member is defined to include:

- a spouse, de facto partner (including a former spouse or de facto partner), child, parent, grandparent, grandchild or sibling of the employee; or
- a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

The 5 days of unpaid leave is available in full from the start of each 12 month period of employment and provides the employee the ability to take their entitlement immediately. The leave however, does not accumulate from year to year.

The leave does not need to be taken all at once and can be taken as separate days. The time an employee takes on unpaid Family and Domestic Violence leave does not count as service, however will not break the employees continuity of service.

Who gets Family and Domestic Violence Leave?
All employees covered by a modern award, such as the General Retail Industry Award are entitled to Family and Domestic Violence Leave (including casuals).

It is important to remember the leave is available in full to all employees, this means part time and casual employees can take the full 5 days of unpaid leave (it will not be pro-rata).

Given the entitlement is award based it will not apply to employees covered by an Enterprise Agreement or employees who are award free.

Employees taking Family and Domestic Violence Leave.
Instances which may require an employee to take family and domestic violence could include making arrangements for their safety or the safety of a family member, attending court hearings or accessing police services.

When taking Family and Domestic Violence Leave an employee is required to let their employer know as soon as possible, this could even be after the leave has started. An employee is also expected to inform their employer how long they expect the leave to last.

It should be noted that employees who are experiencing family or domestic violence may also want to take annual leave or personal/carer's leave which depending on the circumstances, they may be entitled to take.

When an employee takes Family and Domestic Violence Leave an employer can request evidence to demonstrate that the employee took leave to deal with family or domestic violence. Forms of acceptable evidence can include:

- documents issued by the police or by a court;
- family violence support service documents; or
- a statutory declaration

If you are unsure how to address an employee with a criminal history please call the VANA Telephone Advisory Service on (02) 9083 0091.

The Importance of a Proper Performance Management Process

Poor performance is a common issue that can cause significant problems in all workplaces. This article will educate readers on the importance of following a thorough performance management process and outline the associated risks that arise if a proper process is not followed.

Which employees do businesses need to performance manage?
It is fairly well known that permanent employees, particularly those who have passed their probationary and minimum employment period, must be performance managed before an employer may terminate for underperformance.

However, businesses may also be required to performance manage casual employees in certain circumstances if there is a view to terminate. This is because a casual employee who has completed their minimum employment period (6 months, or 12 months for a small business with less than 15 employees) and is regular and systematic will have access to unfair dismissal.

Performance management during probationary and minimum employment period.
Most businesses will put new staff on a probationary period to determine if the employee is suitable for the role and the business. During this time, provided the employee is still within the minimum employment period defined by the *Fair Work Act* 2009, there is no requirement to undertake a structured performance management plan if a business wishes to terminate for poor performance. This is because employees in their minimum employment period do not have access to unfair dismissal and therefore there is little recourse that can be taken.

However, being in probation does not stop an employee from bringing other employment related claims such as a discrimination or a general protections claim. Therefore where there are other risks associated with a termination within the minimum employment proper performance management and a paper trail can be important.

How to properly performance manage an employee.
Whilst it is common for businesses to adopt an informal approach when performance managing an employee, this can expose the business to risk of being faced with an unfair dismissal claim.

To protect against this risk managers should adopt a formal and thorough approach when performance managing an employee. To do this the manager should at a minimum ensure they:

- gather all relevant evidence;
- invite the employee to a meeting giving at least 24 hours' notice in writing;
- present all concerns to the employee and give them proper a chance to respond;
- take a break in the meeting and consider the employee's response before a decision is made as to the most appropriate outcome; and
- reconvene the meeting and present the employee with an outcome.

Throughout this process, extensive notes should be taken and documented.

Risks of failing to properly performance manage an employee
Failure to follow a proper process when managing an employee for poor performance may leave a business open to an unfair dismissal claim.

When performance managing an employee that ends in termination, to mitigate risk of an unfair dismissal businesses must ensure that the termination is not harsh, unjust or unreasonable in the circumstances.

The *Fair Work Act* 2009 sets out a number of criteria for considering whether a dismissal was harsh, unjust or unreasonable these include, however are not limited to:

- whether there was a valid reason for the dismissal;
- whether the person was notified of that reason before being dismissed;
- whether the employee has previously been warned about unsatisfactory performance; and
- whether the employee has been given an opportunity to respond to reasons related to their capacity.

In addition to the above, the Fair Work Commission may also consider any other matter they consider relevant. Other relevant factors may include the length of the employee's service, the employer failing to follow their own disciplinary processes or the employee having an unblemished employment record.

If an employee has been found to be unfairly dismissed the Fair Work Commission may order that the employee be reinstated or order compensation for lost wages up to a maximum of 26 week's pay.

If you are concerned about an underperforming employee or would like more information on the performance management process please contact the VANA Employment Relations Team on (02) 9083 0091.