

Casual Employees – Serious Issues

Many businesses employ casual employees to help in times of increased workload or staff shortages. However, there is no legislation defining exactly what constitutes a casual employee. This can place employers at risk if they think they have hired a casual employee when in fact the employment is not casual, or when the work starts as casual but changes to permanent employment over a period of time.

While there is no legislative definition of a casual employee, the Employment Court has now given employers some clear guidelines on what constitutes casual employment. First and foremost, the Court will look at the “real nature of the relationship”.

A recent Court decision involved a mining company called Oceana Gold (NZ) Limited and an employee, Tracey Jinkinson, who worked as a Grade Controller. Ms Jinkinson had worked for Oceana for 19 months when her employment ended due to redundancy. She had an employment agreement that stated she was employed on a casual basis. Her agreement also stated she would work hour by hour as and when required, that there would be no guarantee any hours would be offered and that there was “no minimum or ordinary hours of work”.

When Ms Jinkinson was made redundant she took her case to the Court and challenged whether she was a casual employee. The Court said that, while the employment agreement was relevant, it did not necessarily answer the question. The Court then looked at a number of factors to determine the real nature of the relationship.

The Court said that one of the common factors which indicates whether an employee is permanent rather than casual is that with permanent employment there is an obligation on the employer to provide ongoing work and an obligation on the employee to carry out the work.

The Court decided that Ms Jinkinson’s employment was permanent, rather than casual. In reaching this decision, the Court considered a number of factors that indicated her employment status was permanent. These included:

- Even though the employment agreement described the employment as “casual”, it didn’t actually say that Ms Jinkinson was able to decline work offered to her by the company;
- The employment agreement said that Ms Jinkinson needed to give two weeks notice if she wanted to take annual leave;
- The employment agreement said Ms Jinkinson was required to work overtime. She was rostered to work through rosters which covered a six week period;
- There were detailed provisions in the employment agreement if her employment was to be terminated for medical incapacity or redundancy;

- Ms Jinkinson could not take on other employment without the agreement of the company;
- Ms Jinkinson worked extensively and consistently and averaged 45 hours per week over the 19 months of her employment. She became an integral member of the company's workforce receiving quarterly bonuses based on the company's overall performance;
- When her employment ended, Ms Jinkinson was paid wages in lieu of notice and she was also paid redundancy compensation.

The Court said the time for determining the nature of the relationship was not when the employment started but rather at the time it ended. The Court paid particular notice to the distinction between casual and ongoing (or permanent) employment, saying the difference lies in the extent to which the parties have mutual employment related obligations to each other. If there are obligations only when the employee is working, this indicates casual employment whereas if there are obligations between periods of work there is an ongoing employment relationship.

The Court said that, while the parties may have originally intended the employment relationship to be casual, over time the parties had varied the relationship by their conduct and what was originally an agreement for casual employment had been replaced by an agreement for permanent employment.

SUMMARY

This case illustrates that even where both parties have agreed the employment is only on a casual basis, in the event of a dispute, the Court will look beyond what was agreed. If some or all of the above factors are present, especially where the work is ongoing and consistent, there is a good chance the employment will be deemed to be permanent.

We recommend that employers who employ casual employees regularly review their employment documentation to ensure that it is updated to reflect any change to the nature of the employment relationship.

For more information, please contact Paul Wallace.

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