

The Federal Government moves to block '*Double-dipping*' in relation to casuals.

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On 16 August, 2018, the Full Court of the Federal Court of Australia handed down its decision in '*WorkPac Pty Ltd v Skene*'; the court decided that engaging an employee as a casual and paying a casual loading does not mean that an employee will necessarily be a casual for the purposes of the National Employment Standards (NES) in the '*Fair Work Act 2009 (Cmth)*'.

Background:

In essence the decision ruled that an employee who was treated as a casual – and paid a casual loading – was in fact entitled to be paid annual leave because of his regular pattern of hours and expectation of continuing work.

The case in question related to the use of contracted workforces engaged by labour-hire companies in the Mining Industry. Subsequently various parties have lodged back-payment claims totalling many millions of dollars.

The ramifications of this decision will impact most in sectors who regularly (systematically) engage casual employees e.g; Outdoor Recreation or the Fitness Industry.

Response:

WorkPac Pty Ltd has now sought to appeal the decision, supported by both employer groups and the Federal Government.

Further, the Industrial Relations Minister moved on December 13 to promulgate a regulation – the '*Fair Work Amendment (casual loading offset) regulation 2018.*'; in order to "*describe the existing circumstances in which payments may be taken into account and are intended to facilitate clarity and certainty for employers and employees of their existing rights.*"

The new regulation will apply to employment periods before, on or after the commencement of the new regulation. The new regulation is intended to apply if the person has been mistakenly classified as a casual during all or some of their employment.

For the regulation to come into play a set of pre-conditions must be met:

- The person was employed on the basis that they are a casual employee;
- The employer pays an amount (the **loading amount***) that is clearly identifiable as an amount paid to compensate for not having one or more

relevant NES entitlements during a period (the **employment period**), typically known as a “*casual loading*”;

- During all or some of the *employment period*, the person was in fact an employee other than a casual employee for the purposes of the NES; and
- The person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements, that is, the person claims NES entitlements that a person other than a casual is entitled to (i.e an ongoing full-time or part-time employee).

(*examples of where it may be ‘*clearly identifiable*’ an amount has been paid to compensate a person for not having one or more NES entitlements include in correspondence – ‘*letters of offer of employment*, pay slips, contracts and relevant industrial instruments (EBAs or IFAs made under the provisions of the Fair Work Act).

It must be noted that it will still remain a matter for the court to determine whether a payment may be taken into account in a particular factual circumstance.

Doubts remain:

It remains to be seen if the Ministers’ approach in focusing on payments made will satisfactorily address the totality of the issues raised in the case in question. Whilst ‘payments’ is one part of the equation, the other, and arguably paramount consideration relate to the ‘*nature*’ of the employment undertaken (**the regular pattern and expectation of continuing employment**).

Further, by relying upon a new regulation to respond, the Federal Government introduces an element of political uncertainty leading up to the next general election. A hostile Senate can overturn the regulation, upon the resumption of parliament in February.

Concurrently, award-based entitlements, such as annual leave loadings are not caught up by the application of the regulation.

Finally, whilst NES entitlements specifying ‘pay’ are within the scope of the regulation, it is not at all clear how obligations to give ‘notice of termination/redundancy’ are either modified or nullified by the regulation.

By relying upon ‘regulation’ as opposed to seeking to amend the Act through parliamentary processes, the Minister may well have compounded the problems raised in this and other recent cases relating to the nature of casual employment.

January 2019.