

‘Multiple functions’ – the potential of unintentional obligations.

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Two Federal Circuit Court decisions highlight potential problems arising from engaging employees to perform multiple functions in your workplace.

Fitness Sector Case ‘Kroeger V Mornington Peninsula Shire Council’ (2019)

In the most recent case, an employee originally engaged as a *‘fitness instructor’* in 1994, and then later, and additionally, as a part-time *‘customer service officer’*, (initially at a separate location operated by her employer, then subsequently, doing both roles at the same venue), argued that the roles had “merged” into one substantive position.

The employee cited the fact that they regularly and routinely moved directly from one function to the other, during a shift, and often, back again on the same day. This, it was argued, was a framework for hours of employment giving rise to a claim for non-payment, or underpayment, of overtime totalling approximately \$119,000.

It should be noted that the employee was engaged and paid under the terms of an Enterprise Agreement, not the *‘Fitness industry Award 2010’*.

The relevant factors

In determining the matter, Justice Blake took the following into consideration:

- Both roles were the subject of a separate contract;
- Each role was separately identified in the Enterprise Agreement;
- Each function had a separate purpose and a different rate of pay.

Consistent with the earlier decision of the Federal Circuit Court (*Lacson V Australian Postal Corporation (2019)*), and given the above factors, the Court found that the claimed overtime did not arise.

Steps that should be considered

In order to avoid claims of this type being made, Outdoor Recreation and Fitness Operators should consider the following options:

- Avoid continuously rostering individuals across multiple and dissimilar functions (endeavour to arrange the hours of work in order to place significant spaces between work periods; i.e, more than one or two hours). Whilst this may attract a *‘split shift payment’* under the terms of the *Fitness industry Award*, this would be offset by any ensuing overtime obligation, if the action was not taken;

- When engaging an existing employee to perform a new or additional role, always issue a new (further) '*Letter Of Engagement*', specifying (in the event of a fixed-term arrangement), the duration, clearly aligning the function with either an award-based, (or Enterprise Agreement related), classification, the employment status and finally, the new hourly rate of pay for the new or extended role;
- As the '*Fitness Industry Award 2010*' has no specific provision relating to '*multiple roles*', (also known as "*mixed-functions*"), it is strongly recommended that either an Enterprise Agreement be struck with the workforce detailing the terms under which generally employees will be paid or; in the case of individuals, a voluntary '*Individual Flexibility Agreement*' (IFA). Most importantly;
- Ensure that contracts relating to individual employees, detail precisely the nature and agreed outcomes of any use of that person in a multi-faceted role, particular emphasis must be placed on the fact that each function will be regarded and recompensed separately for the purposes of either Agreement or Award-based entitlements.

Conclusions

Workplace relationships evolve over time, in both terms of complexity and coverage. Regularly review the specifics of your contractual arrangements to ensure that they accurately reflect what is happening in the workplace (regardless of the employment status of the individual).

Be mindful that simply using the same person at more than one workplace, does not of itself create multiple employment relationships, and therefore does not avoid the complications discussed above.

Remember always, claims for Award/EBA breaches can be made for up to seven (7) years after the alleged events. This emphasises the need to take reasonable steps to avoid nasty surprises well into the future.

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