

EMPLOYEE RELATIONS UPDATE – APRIL 2004

ARE YOUR CASUAL EMPLOYEES REALLY CASUAL?

A recent decision of the Queensland Industrial Relations Commission ('the QIRC') of 26 February 2004 has challenged previous beliefs regarding the access to unfair dismissal provisions for short-term casual employees.

In the case of *Banks v Australian Aquaculture Pty Ltd* the QIRC viewed that, based on the definition of 'short-term casual employee' in the Industrial Relations Act 1999 (Qld) ('the Act'), the first criteria that must qualify for exemption from unfair dismissal provisions is to determine whether an employee can truly be defined as a casual employee.

The Act, at Section 72 (8) defines a short-term casual employee as:

Meaning a 'casual employee, other than a casual employee who:

(a) is engaged:

- I. by a particular employer on a regular and systematic basis; and
- II. for several periods of employment during the period of at least 1 year; and

(b) apart from the employer's decision not to offer the person further employment, had a reasonable expectation of further employment by the employer.'

Therefore, it has previously been the accepted view that for a casual employee to have access to unfair dismissal provisions, they must:

- be engaged on a regular and systematic basis; and
- have been employed for at least 12 months; and
- have a reasonable expectation of further employment.

The decision of the QIRC in the Aquaculture case has now challenged this view. The QIRC said that unless a person is a casual employee, the exclusion for short-term casual employees does not apply.

The QIRC referred to the criteria of informality, uncertainty and irregularity as indicative of true casual employment. Conversely, regular and systematic engagements with a reasonable expectation of ongoing employment are not characteristic of a casual engagement.

The facts relating to the engagement of the employee in the Aquaculture case were that the employee was:

- informed his employment was casual;
- paid on an hourly basis;
- paid a casual loading on top of his hourly rate of pay;
- not paid annual leave or sick leave; and
- had been employed over a 4 month period.

However, the QIRC stated that the following indicia meant that the employee was not a short-term casual employee:

- The employee was informed prior to commencing employment the days and hours he was required to work;
- Those days and hours did not vary, that is, he was working Monday to Friday inclusive and 8am to 5pm on each day;
- The work performed did not vary greatly;
- At the time of engagement he had a reasonable expectation, subject to performance issues, that he would be employed at least until the completion of the project.

Taking into account all the circumstances, the QIRC said that the characteristics of regular days and regular hours of work outweighed the categorisation by the parties of the relationship as casual. The QIRC therefore found that the employee was not a short-term casual and was not excluded from making an application in the unfair dismissal jurisdiction.

Employers engaging casual employees must pay particular attention to the nature in which these employees are engaged. Next month's MJ Smith & Partners Update will provide you with some tips on what to look for when determining whether your casual employees truly are casual.

Further Information

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