

INDUSTRIAL RELATIONS UPDATE

CASUAL EMPLOYMENT

Yasmin S.B. Certin v Ripon Pty Ltd t/as Parkview Hotel

An employee who had been employed as a casual employee made an application to the Australian Industrial Relations Commission (the Commission) for unfair dismissal.

Initially the Commission had dismissed the application stating that the employee was a 'casual employee engaged by a particular employer for a short period of time' and therefore did not have access to unfair dismissal provisions.

However on appeal the Commission found that the employee who had been employed as a casual was not a casual for the purposes of the Workplace Relations Regulation 30B(1)(d) which states:

"a casual employee is engaged by a particular employer for a short period if the occasions on which the employee works for that employer under that engagement occur within a period of less than 12 months"

The Commission came to this conclusion even though the employee had only been employed with the employer for 7 ½ months.

The employer stated that the employee was a casual employee because:

- At the employee's interview she was informed that she would be employed as a casual;
- On the tax file declaration completed by the employee the employee had selected the 'casual employment' choice;
- The employee was paid casual loading, was not paid for public holidays and did not accrue annual or sick leave; and
- The employee had only been employed for a period of 7 ½ months.

On appeal the Commission found that the employee was not a casual employee because:

- At the interview the employee was told that she would be employed as a casual employee but in the future regular shifts would be available in the restaurant.
- There had been changes in the character of the employee's employment. The employee initially worked fluctuating hours and did not have regular engagements, however was then transferred to another position at which

point her employment became regular and systematic with a reasonable expectation of continuing (i.e. worked the same 4 shifts each week);

- If the employee was unable to work on one of those particular shifts she was expected to provide notice; and
- Any fluctuation in the employee's hours were due to fluctuations on the restaurant's closing time on any one particular night.

The full bench explained that the nature of employee's employment at the time of dismissal was required to be examined and not at the time of the initial employment. Therefore for the above reasons the Commission determined that the employee was **not a casual employee** even though she was employed as a casual, paid casual loading, not entitled to public holidays and not entitled to annual and sick leave.

What implications will this decision have for Employers?

This decision was made within the Federal jurisdiction however should be seen as a reminder to all employers that calling an employee 'casual' and paying casual loading does not necessarily mean they are a casual employee.

Employers will now need to be aware that if a casual employee is provided with **regular and systematic employment** they may not be considered as a casual and hence may be able to access unfair dismissal provisions.

Further Information

For further information on this decision please contact Kylie Reed on 07 3221 7455.