

Regular and systematic casual employment counted when calculating redundancy pay

In a landmark decision yesterday at the Fair Work Commission, Senior Deputy President Drake and Deputy President Lawrence found that for the purposes of calculating redundancy payouts, a permanent employee's initial period of regular and systematic casual employment **will** count towards their period of continuous service.

This significant decision will affect thousands of businesses, and has upset the longstanding belief that redundancy pay is not affected by an initial period of casual employment. Employers who, for the reason of redundancy, terminate an employee who was once casual but transferred to permanent employment will now be forced to include the period of casual employment in their calculations of redundancy pay. This decision has changed the accepted interpretation of the meaning of "service" within the *Fair Work Act 2009* (Cth) (the "**Act**") for the purposes of redundancy pay to include initial periods of casual employment. Businesses across Australia could see thousands of long term casuals who had **converted** to permanent employment being able to claim redundancy pay for their entire period of service.

The decision arose as a result of a Newcastle shipbuilder who, when calculating redundancy payments for permanent employees, did not count their time as casual employees within the Company when calculating their notice or redundancy payments. Here, the employer only counted periods of service as casual employees for the purpose of long service leave.

The majority found that the company's enterprise agreement specified that periods of redundancy pay should be calculated according to periods of continuous employment, which, under the *Fair Work Act 2009* (Cth) would include a period of regular and systematic casual employment.

While the majority acknowledged that it might be considered "unfair" for an employee who has already been compensated by a 25% casual loading to also have that period count towards the accrual of redundancy payments, they noted that the Act doesn't specifically exclude regular and systematic casual employment from the definition of service or continuous service within section 22 of the Act.

In his dissent, Commissioner Cambridge said that it was an erroneous interpretation of section 22 of the Act, which would lead to an impractical effect upon other NES entitlements such as annual leave and personal/carer's leave as these entitlements are fixed for "each year of *service*".

This decision turns on its head the widely accepted interpretation of "service" within the *Fair Work Act* (2009) to only encompass a period of permanent employment for the purposes of redundancy pay. However, we think that due to the effect this ruling will have on Australian employers, it is likely that it will lead to an appeal.

Please contact the ACAV Employment Relations Team on 1300 854 690 for more information on how this impacts your workplace.