DILEMMA - 'REGULAR CASUAL' OR 'PERMANENT'

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INTRODUCTION

The *Outdoor Recreation & Fitness Sectors* sector relies heavily on a *casualised workforce*, with many individuals rostered on regular days and in some instances at, or over, weekly hours that would otherwise be more applicable to fulltime (permanent) employment.

Both employers and employees regard such arrangements as constituting *'permanent casual'* employment. Unfortunately, such a mind-set can have significant and often unintended consequences; eg employee's entitlements arising under either one or a combination of:

- Award based, or Enterprise Agreement derived entitlements;
- State legislation;
- The National Employment Standards (NES);
- The provisions of the Fair Work Act generally

Unfunded obligations may arise relating to Long Service and other forms of paid leave, notice periods and redundancy pay.

Confusion stems from the apparent inconsistent approach to the definition of *'Casual Employment'* by the Fair Work Commission (FWC), Courts of Law (Federal and State) and other statutory bodies governing workers compensation around the nation.

PRIMARY CONSIDERATIONS

The primary test of casual employment based on a consideration of all relevant facts (including the employment history), ie: has the individual been engaged on the basis of their availability and the employers' need for their services. The circumstances must be infrequent, uncertain, and usually of either a short or fixed-term duration.

If the work performed is according to a stable roster, not subject to fluctuation, and thereby gives rise to an expectation of continuity of employment (by either or both parties), the FWC and other Tribunals are highly likely to categorise, and therefore enforce obligations that relate to weekly (permanent) employment. Even if the employer and employee have signed-off on a contract describing and paying the employee as a *'casual'*.

CONFLICTING OUTCOMES

Courts have ruled that employees are '*permanent*' by force of statute rather than contract.

This comes about due to one of the following:

- The parties enter into a contract clearly stating that the agreed intention is to create a "*casual employment*" relationship. However, with the passage of time the organisations' needs develop, and the employees' roll evolves: hours increase, the pattern of rostering settles into a routine, possibly leave periods are formally applied for and granted. The employment morphs into that of a *"permanent employee*" (likely part-time); or in the alternative:
- The parties enter into a contract for *casual employment* which they are not entitled to lawfully, due to legislative requirements or the contents of an applicable Award or Enterprise Agreement.

Simply relying upon written contracts will not always determine the true (lawful) nature of the relationship despite the expressed views of the parties.

POINTS TO ADDRESS

In order to assist an appraisal of the relationship as being of a "*casual nature*" the following points are recommended:

1. Keep strict records of hours and times worked:
2. Maintain a wage system that records the base rate, with a second figure identifying the quantum of the casual loading together with a **total hourly rate**:
3. Keep "*usual"* hours well below 38 hours during any seven consecutive day period:
4. Regularly review the hours requirement for each individual, avoid churning out pro-forma rosters with little or no variations. If an employee becomes so central to your operation, consider engaging them as a permanent part-time employee or as a part-time salaried operative.
   NB: Resistance can be anticipated from individuals as they place a greater emphasis on the higher hourly rate than on employment security.
   Be warned that caving-in to an employees' demand to be paid "***at the casual rate"*** can lead to significant economic consequences further down the line, probably in an environment in which the employment relationship has been terminated in a contested fashion
5. It is essential that a formal letter of offer, identifying the relationship as being in *"casual*" be offered and countersigned at the point of initial engagement. Yes, it is a level of surety to have a written employment contract – however, as outlined above, it does not ultimately guarantee an outcome in favour of the employer.

DEVELOPING TRENDS

During the current four yearly review process impacting all Modern Awards;
The FWC is favoring award amendment that narrows the difference between casual and weekly employment by granting rights to convert from casual to permanent employment, which hitherto have not been available to long-term casuals.

An otherwise currently uncertain situation is about to become a whole lot more challenging for small to medium size business operators in the Outdoor Recreation & Fitness Sectors.