

## Casual Conversion Series

24 May 2021

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*This is the second in a series of articles about the recent industrial relations reforms relating to casual employees.*

Need more information?

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# Casual Employees



## How do you know who is a casual employee?

As an employer, you may be aware that the Federal Government recently passed changes to the law relating to casual employees.

The changes introduced a definition of 'casual employee' into the *Fair Work Act 2009*. This legislative definition, which will override the meaning of 'casual employee' that has evolved over time through the courts, reflects recent statements made by the courts that the essence of casual employment is the **absence of a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work'**: *WorkPac v Skene* [2018] FCAFC 131 and *WorkPac v Rossato* [2020] FCAFC 84.

An offset mechanism has also been introduced into the Fair Work Act. It will allow a court to offset casual loading amounts paid to an employee against any claim made by them to be back paid for leave and other entitlements. The offset mechanism will provide protection for an employer if an employee is later found not to be a casual employee.



This article explains the new definition of casual employee, why it's relevant to you, and how the offset mechanism will apply.

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## Who is a 'casual employee'?

The new legislative definition of **casual employee** applies from 27 March 2021.

A person is a casual employee of an employer if:

- △ the offer of employment by the employer is on the basis that there is **no firm advance commitment** to continuing and indefinite work according to an agreed pattern of work for the person; and
- △ the person accepts the offer on that basis (that is, knowing that there is no firm advance commitment); and
- △ the person is an employee as a result of that acceptance.

## How do I work out if my employee is a casual employee?

### What do you need to determine?

You need to determine whether you made *no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person*. To determine whether you made no firm advance commitment to continuing and indefinite work, you can **only consider the following**:

- (a) whether you can elect to offer work and whether the person can elect to accept or reject work;
- (b) whether the person will work as required according to your business needs;
- (c) whether the employment is described as casual employment;
- (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument (such as a modern award).

### Timing?

This determination is made based on what happened at the start of the employment relationship. That is, when an offer of employment is made by you, and accepted by the person.

### Examples

The Annexure to this article contains an example of a scenario where there is an absence of a firm advance commitment, and an example of where the employment is described as casual but there exists a firm advance commitment to continuing and indefinite work.

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## I have a casual employee ... now what?

If your employee meets the legislative definition of casual employee there are certain obligations on you relating to casual conversion that flow from that status. Therefore, it is important to review your workforce.

→ **The requirements for casual conversion will be discussed in another article in this *Casual Conversion Series*.**

## What if I get the classification wrong ... will I have to pay twice?

The recent law changes introduced an offset mechanism into the Fair Work Act. This is a key protection for employers. Many employers do their best to correctly classify their employees and pay the appropriate entitlements. But if an employee is incorrectly classified as a casual, and later found to be a permanent employee, this provision protects the employer from effectively paying entitlements twice (ie a casual loading and then other leave entitlements that a casual employee would not otherwise be entitled to).

### Why is the offset mechanism significant?

#### Casual Loading and Long Term Casual Employees

The casual loading amount paid to a casual employee is intended to compensate the employee for not being paid various leave entitlements (such as sick leave and annual leave) that a permanent employee accrues. A long term casual employee who works on a regular and systematic basis has additional rights after 12 months' employment (such as access to parental leave).

In 2020, a person who was a regular and systematic casual employee was found by the Federal Court to be a permanent employee\*. Despite being paid a casual loading amount throughout the employment period, the Federal Court determined that the employee was entitled to back pay for his accrued and untaken annual, personal and compassionate leave entitlements.

For employers with long term casual employees, this decision created a very real risk of being liable for back pay for unpaid leave entitlements for these employees, despite them having been paid a casual loading.

\**WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (Rossato decision)

**Keen to know more? Read our blog post about the Rossato decision [here](#).**

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## The Offset Mechanism

The offset mechanism recently introduced into the Fair Work Act applies where a person:

- △ has been employed and paid on the basis that they are a casual employee;
- △ is later found not to be a casual employee; and
- △ makes a claim to be paid an amount for entitlements that casual employees do not receive (e.g. a claim for annual leave).

### What does the offset mechanism do?

Basically, this applies if you have a 'casual' employee who the courts later determine is actually a permanent employee.

If this happens, and the employee makes a claim for back pay for unpaid leave entitlements, the casual loading they were paid can be offset against any amounts owing for unpaid leave entitlements.

This will reduce the amount of back pay to be paid by the employer to the employee. Effectively, the offset mechanism may result in the employer only having a small (or nil) amount to back pay (providing there have been no underpayments).

### The importance of well drafted casual employment contracts

One of the factors to be considered when determining if a person is a casual employee is how the employment is described in the employment contract (or other agreement between the parties).

While the new offset provisions in the Fair Work Act will help protect employers, the new provisions won't help if you have a poorly drafted casual employment contract.

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For example, if you have an employment contract that contains clauses that are reflective of permanent employment, you could find yourself in a situation where you have to back pay leave entitlements and you may not be able to rely on the offset provision.

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**Loading amount** – Under the terms of the offset mechanism, an identifiable amount must be paid by the employer to the person in compensation for not having one or more relevant entitlements during the employment period.

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The employment contract, or other fair work instrument:

- ✓ must include a clearly identifiable casual loading amount paid to compensate a casual employee for the absence of one or more of the relevant entitlements;
- X does not need to state precisely which entitlements the loading is compensating for;
- X should not refer to a flat hourly rate where it is not clear whether that rate includes a casual loading.

## Next steps for employers

- Review your workforce – who is permanent or casual?
- Determine whether each ‘casual’ employee meets the legislative definition of *casual employee*.
  - This is relevant for casual conversion, which will be covered in the next article in this series.
- Review the terms of the employment contract you use for casual employees. Does it accurately describe the employment relationship? Is it reflective of casual employment or permanent employment?

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## Annexure

### Examples of Scenarios Relating to 'No Firm Advance Commitment'

(Taken from the Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Notes on Clauses* - Schedule 1 – Casual employment, p. 4-6)

#### **Illustrative Example – Absence of firm advance commitment**

José works as a shop assistant in a boutique clothing store owned by Lucy. Lucy advertised a casual position because she needed a shop assistant to help out in periods of peak demand and when other staff are on leave, but cannot guarantee work every week. Casual employment suits José who lost his job due to COVID-19 and wants the freedom to refine his invention when he is not working.

José's offer of employment provides that his hours of work will depend on the needs of the business and he is free to accept or reject any shift Lucy offers to him. The offer describes the position as casual and provides that Lucy will pay him as a Retail Employee Level 1 under the General Retail Industry Award 2020, including the 25 per cent casual loading in addition to the minimum hourly rate for this classification. José accepts the position on this basis. As such, José's offer and acceptance satisfy the terms of the definition [*of casual employee*] in section 15A and he is therefore a casual employee.

#### **Illustrative Example – Employment described as casual but existence of firm advance commitment to continuing and indefinite work**

Jaqueline owns and runs a dental practice. She hires Marie as a receptionist to work on the front desk. The position is described as casual in Marie's written offer of employment. The offer provides that Jaqueline will pay Marie a casual loading on top of her hourly rate of pay. The offer says Marie's employment can only be terminated by the employer or by Marie by two weeks' notice in writing and that she will work from 9am to 5pm Monday to Friday with a one hour lunch break each day for the foreseeable future unless advised otherwise. At the time of providing the written offer, Jaqueline informs Marie that she will not be able to refuse shifts and will need to seek Jaqueline's prior approval to take time off work.

Even though Marie is described as a casual and is entitled to a loading, she will not meet the definition of casual employee in new section 15A. This is because Marie's fixed weekly hours, the indefinite nature of her engagement and the absence of a requirement to work only as required indicate that Jaqueline has made a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.