APTIA Industrial Relations
e-Alert

Can Casuals vote in support of an enterprise agreement?

Recently, the Fair Work Commission, has raised requisitions relating to casual employees and their entitlement to vote in a ballot to approve an enterprise agreement.

With respect to the requirement for a casual employee to be engaged on the date of the vote, the Full Bench in **Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry** [2018] FWCFB 7224 explained:

[19] The phrase "employees employed at the time" in s.181(1) of the Act received consideration by a Full Court of the Federal Court in National Tertiary Education Union v Swinburne University of Technology. The effect of the Full Court's reading22 of s.181(1) is that an employer should only make a request under s.181(1) to employees who are employed "at the time", as opposed to those who are not employed at the time but who might otherwise be regarded as "usually employed".

[20] ... A casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. Irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability are the usual manifestations of an absence of a firm advance commitment.

[21] Ordinarily, the general contractual characteristics of casual employment is that a person who works over an extended period of time as a casual employee will be engaged under a series of separate contracts of employment on each occasion a person undertakes work, however, they will not be engaged under a single continuous contract of employment. There are some, albeit rare, cases where a casual employee has been found to have been engaged under a single continuing contract of employment, but the accepted orthodoxy of casual employment is the notion that each engagement is under a separate contract rather than a continuing contract of employment.

[22] Thus, a person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be employed on that day or during that period.

With respect to casual employees being "employed at the time" despite not being engaged to work on the date of the vote, the Full Bench further explained:

[30] As we have earlier noted, there was an absence of evidence before the Deputy President about the nature of the engagement which underpinned the casual employment of the persons who were asked to vote to approve the Agreement. It is plain on the evidence that at least some of the employees who were asked to vote to approve the Agreement did not work on the day of the vote or during the access period. It is difficult to see how one can conclude that these employees were 'employed at the time' without

evidence about the terms under which they were engaged…

[31] That the employer "considers" the employees are regular and systematic casual employees takes the matter no further. First, because the subjective opinion of the employer is not relevant to ascertaining objectively the nature of the employment. Secondly, that a person is engaged on a regular and systematic basis is not inconsistent with the person being a casual employee whose employment is ended at the conclusion of each engagement and relevantly was not "employed" at the time he or she was asked to vote or during the access period. There is no evidence, for example, of a firm advance commitment from Noorton to continuing and indefinite work according to an agreed pattern of work which was given to any particular casual employee.

[32] During the appeal, Noorton referred to the decision in McDermott Pty Ltd v the Australian Workers' Union and Anor in aid of the Deputy President's conclusion that the cohort of casual employees who were asked to vote were employed at the time. Whilst we may have some misgivings about the correctness of McDermott, it is unnecessary for us to express a concluded view. The decision is plainly distinguishable on the facts. The critical conclusion in McDermott was that the casual employees "accepted on-going employment" with McDermott as evidenced by the employer's payroll records and the evidence of Mr McMahon, and as such they were employed by McDermott at the time the Agreement was made. Their employment comprehended work within McDermott's scope of work for the Project. Unlike the facts in Swinburne, the casual employees were employed at the time, they were not in a cohort of "likely to be engaged" or "usually employed." The reasoning adopted by the Full Bench in McDermott might be said to be more akin to a conclusion that the relevant employees were not "casual employees" at all but rather were "ongoing employees" who had accepted "ongoing employment".

[33] There was no evidence before the Deputy President that the casual employees who were asked to vote to approve the Agreement accepted ongoing employment with Noorton. As we have already observed, there was no evidence about the nature of the casual employment of the employees or the terms under which these employees were engaged. The decision in McDermott therefore provides no assistance.

This approach was supported by a majority of the Full Court of the Federal Court in ***National Tertiary Education Industry Union v Swinburne University of Technology (2015) FCAFC 98*** found that only employees who are employed at the time the employer requests that employees vote upon a proposed enterprise agreement are eligible to vote. Therefore, in order to be able to vote, a casual must be employed at that time. The effect of the Full Court's reading of s.181(1) in *Swinburne* is that an employer should only make a request under s.181(1) to employees who are employed 'at the time', as opposed to those who are not employed at the time but who might otherwise be regarded as 'usually employed'. A person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be 'employed' on that day or during that period.

The Requisition:
The Deputy President provides the Applicant a further opportunity to provide evidence and submissions which establish the employees who voted to approve the Agreement: (1) were engaged to work on 23 December 2019 (day of the vote), and/or (2) were "employed at the time" for reasons other than being engaged to work on the date of the vote.

Relevant evidence would include the terms under which the employees were engaged (for example – employment contracts), rosters provided to employees which cover the period surrounding the vote and pay records for the weeks leading up to and including the vote.

What has changed?
If you have a lot of casual employees and seek to introduce a ballot for an enterprise agreement, it seems that the FWC will now want cogent evidence that your casuals:

1. Were employed on the date the vote occurred, and
2. Had received regular work prior to the vote and perhaps thereafter?

Ian MacDonald, National IR Manager

10 February 2020

Important Dates:

APTIA Breakfast – Monday 24 February, Office of Piper Alderman

IWG Meeting – Wednesday 25 March, BIC's Office, Canberra