



Is your Business at Risk of Claims from Casual Employees?

It's no secret that legislators, employers and employee groups are often at odds about how best to define casual employment. Now, a Federal Court decision has set the cat among the pigeons with an interpretation that will potentially affect all organisations with a casual workforce.

When is a casual employee deemed to be a permanent employee?

The Full Federal Court of Australia recently considered this question in *WorkPac Pty Ltd v Skene*¹. A worker, Skene, made claims for annual leave payments against a labour hire company. Skene said that he was a permanent full-time employee. The employer claimed that he was a casual employee pursuant to his contract of employment and the relevant industrial agreement. This meant that he would not be entitled to the payments.

The Court decided that Skene was in fact a permanent employee. It said that a true casual worker would have "no firm advance commitment to continuing and indefinite work" and that indicators of casual employment were the "irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work".

It said that in determining whether an employee is truly a casual employee, it was necessary to consider:

- *The conduct of the parties; and*
- *the real substance, practical reality and true nature of the relationship.*

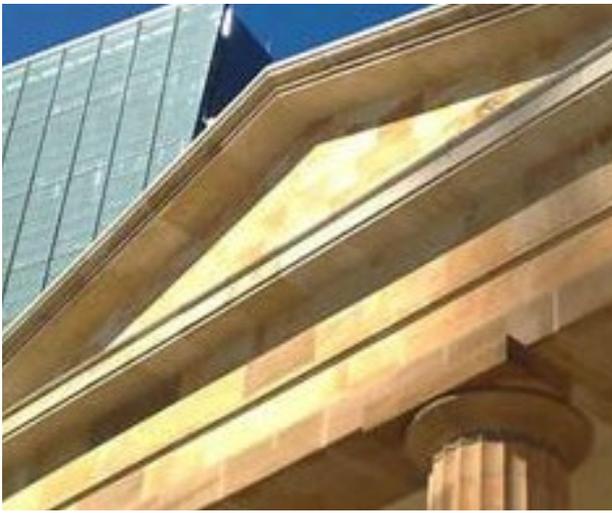
The Court found that Skene was a permanent employee, even though his contract of employment said otherwise, noting:

... the payment by the employer and the acceptance by the employee of a casual loading ... speaks to the intent of the parties to create and continue a casual employment. But the objective assessment will need to consider whether that intent has been put into practice and if achieved, has been maintained.ⁱⁱ

Why is the decision significant?

This case opens the way for any casual employee to claim that their employment should be characterised as permanent. This means that they could potentially make a claim for paid leave and other entitlements in addition to having received casual loading payments. It's a double-dip scenario because the employee can potentially receive a casual loading as well as leave entitlements.

For some time, employers have been able to pay above-award rates to employees. These payments could be used to offset any entitlement claims that employees may later make under the employment instrument (for example, the contract of employment, enterprise agreement or industrial award). This can happen when there is a lawfully drafted offset clause in a contract of employment. However, in this case, it was not clear that the employee had in fact received a casual load despite his high hourly rate.



This means that there is the potential for casual employees to make claims for annual leave, back-pay for personal leave and possibly even notice payments upon termination of employment. Companies may also face punitive fines for breaching the *Fair Work Act* and there may be a higher risk of unfair dismissal claims being made by casual workers. There may also be implications for compulsory superannuation payments.

What next for employers?

Employers of casual workers should immediately review their casual workforce to determine whether:

- *Employment terms and conditions fit within the definition of casual employment.*
- *The parties intend to have a casual employment relationship.*
- *The documented intention is being practically achieved.*
- *There are any ongoing work expectations beyond the end of each shift or roster period.*
- *Permanent employment arrangements would be more appropriate.*

Employers should urgently seek legal advice about the impact of this decision.

The Commonwealth Government may legislate to close this loophole for casual workers and the decision may also be appealed to the High Court of Australia. But for now, we will have to wait to see what happens next.

This decision potentially gives casual workers more rights than ever before, and creates more difficulties for employers. It's a crucial time to take stock of your workforce and to seek legal advice.

We are highly experienced in analysing and reviewing employment arrangements. We can review your casual work force and assess your risk exposure to any potential litigation. [Contact us today](#) to find out more.

ⁱ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (16 August 2018)

ⁱⁱ At 181

**bradbrook
lawyers**

Level 1, 81 - 89 Hutt Street, Adelaide SA 5000
T 08 8227 2829 | M 0410 318 220 | F 08 8227 2832
jodie@bradbrooklawyers.com.au

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