



# Fact Sheet

## EMPLOYMENT LAW

### Termination of Casual Employees

A casual employee is an employee who has no fixed hours of work and therefore works in accordance with the operational needs of the business<sup>1</sup>. Casual employees are often paid a higher hourly rate of pay but do not have the benefit of tenure of employment, annual or sick leave and other benefits usually provided to permanent employees.

#### Risks

There are principally two risks associated with engaging casual employees.

The first is that if the employee is engaged for a significant period of time then he or she may claim they are in fact a permanent employee entitled to leave and other benefits afforded to permanent employees.

Working out whether an employee is a true casual as opposed to an ongoing employee at common law is often difficult in circumstances where the employee has been working regular and systematic hours over an extended period. In such circumstances it is possible

that the employee is a permanent employee as a matter of common law or a part-time employee under the applicable Award or relevant enterprise agreement. In order to determine whether a person is a casual or permanent employee the courts will examine closely the reality of the relationship to determine the true nature of the employment status and not just the label. Simply calling an employee a casual when in fact they are not, will not prevent the courts from determining otherwise. One of the key cases in this area says 'if it walks like a duck and quacks like a duck then it's usually a duck.'

The other risk is that a casual employee may be able to bring a claim of unfair dismissal. This is explored in further detail below.

#### Fair Work Act

The *Fair Work Act 2009* (Cth) (**FW Act**) provides employees with the right to bring a claim for an unfair dismissal remedy when they have been dismissed or constructively **dismissed** from their employment<sup>2</sup>.

Casual employees are excluded from bringing unfair dismissal claims unless they:

- worked on a regular and systematic basis;<sup>3</sup>
- had a reasonable expectation of ongoing employment;<sup>4</sup> and
- worked in excess of 6 months (if their employer is not a small business employer) or 12 months (if their employer is a small business employer)<sup>5</sup>.

#### Jurisdictional Objections

Generally, any employee, including a casual employee, who has resigned is unable to bring an unfair dismissal claim (unless he or she can demonstrate that the employer's actions forced them to resign).

In the case of a casual employee, not offering the person further shifts after a prolonged period of the person providing regular and systematic work which has given rise to a reasonable expectation of ongoing work could constitute a termination of employment.

If it is possible that your casual

1. *Hamzy v Tricon International Restaurant t/a KFC* [2001] FCA 1589; *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321

2. s386(1)

3. s384(2)(a)(i)

4. s384(2)(a)(ii)

5. s383

employee may in fact be a permanent employee, then before terminating his or her employment you should consider:

**1. Do I have a valid reason for termination?**

It is always advisable to have a lawful, legitimate and defensible reason for termination. Consider how you would feel about giving evidence before a commission or court about the reason for termination before proceeding.

**2. Do I need to follow a disciplinary process?**

Consider notifying the employee of the proposed reason for termination and giving them a reasonable opportunity, either in person or in writing, to respond to it.

**3. Is any notice payable?**

In the event that termination occurs the FW Act states a casual employee is not entitled to notice or a payment in lieu of notice. However, if the employee is in reality a permanent employee (despite the 'casual' label given to the person), then you may need to consider paying notice.

**4. Is any redundancy payable?**

If a casual employee's role is no longer required for operational reasons then a redundancy situation may arise obliging the employer to pay redundancy pay.

If you are unsure about the true nature of your employee's status you should seek legal advice before taking any action to terminate.

Employers should also be aware that a casual employee is entitled to the 'minimum payment' for each time an employee starts work as prescribed by the relevant Award. This requirement may be relevant in circumstances where an employer seeks to terminate or simply elects not to provide further shifts.

If termination has occurred, and the casual employee meets the qualifying criteria of s386 referred to earlier, he or she will be entitled to bring a claim for unfair dismissal remedy. Whether that claim succeeds will depend on the individual facts and circumstances in each particular case.

For further information please see our Fact Sheet entitled Unfair Dismissal Remedy.



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