



## Does your casual employee have access to unfair dismissal?

*A recent ruling by Fair Work Australia enabled a casual employee to access the unfair dismissal regime as the casual employee was seen as being engaged on a regular and systematic basis. As a result of this decision Fair Work Australia has outlined some indicators to help determine whether a casual employee has been employed under these circumstances.*

### Background

A recent decision in Fair Work Australia in the case of *Ponce v DJT Staff Management Services Pty Ltd [2010] FWA 2078* has provided guidance as to circumstances in which a casual employee may have access to an unfair dismissal remedy.

In normal circumstances, a casual employee is excluded from making an unfair dismissal claim. However, if a casual employee is employed on a 'regular and systematic' basis and has a 'reasonable expectation of continuing employment', Fair Work Australia may provide them with access to the unfair dismissal regime. The employee must still meet the minimum employment period, which is twelve months for an employee of a small business employer, and six months for all other employees.

### What constitutes regular and systematic employment?

A casual employee who works a clear pattern of hours or who is on a regular roster or has an agreed arrangement with an employer may be found to be engaged on a regular and systematic basis.

### Key Indicators

- It is the employment that must be regular and systematic, rather than the hours or days of work.
- If there is a clear pattern or roster of the hours and days worked, this is strong evidence of regular and systematic employment.



- If the employer regularly offers work when available and the employee generally makes themselves available for work, the employee is more likely to be found to be engaged on a regular and systematic basis.
- If work is offered and accepted sufficiently often the employee is more likely to be found to be engaged on a regular and systematic basis.
- If the hours of a casual employee meet or exceed 38 hours a week, the employee is more likely to be found to be engaged on a regular and systematic basis.

### **Practical Implications**

In cases of termination, an employer should consider the following in determining if an employee may have access to the unfair dismissal regime:

- The fact that an employee works more hours in one week or one month than another, and might have variable start and finish times, is not conclusive evidence of irregular, occasional or non-systematic employment.
- If the number of hours worked is small and the gaps between days and times worked is long and irregular, other evidence that the employment is regular and systematic will need to be provided.

For these reasons, in any instances of termination, it is advisable to seek professional advice before acting.

**For more information please contact HR Navigation on 1300 669 747 or email [enquiries@hrnavigation.com.au](mailto:enquiries@hrnavigation.com.au)**