



DON'T BE CASUAL WITH YOUR CASUALS

"Casuals employed on a 'regular and systematic' basis may receive unfair dismissal regime protection."

Casual work is just that – casual, with no guarantee of hours or continued work. Many employers therefore feel that it cannot be possible for a casual to claim unfair dismissal.

Recent decisions at Fair Work Australia (FWA) have shown that casuals employed on a “regular and systematic” basis and who have a “reasonable expectation of continuing employment” may receive unfair dismissal regime protection.

Building up a regular pattern

One example of such an employee is a casual employee who said he was dismissed for refusing to pay for tools and equipment that were stolen from a worksite he was guarding. He had worked as a casual for at least 84 weeks over a 20 month period. The employee worked night shift for 33 of those weeks over two separate periods, during which time FWA found he worked as part of a regular crew, had a reasonable expectation that he would work from Sunday to Thursday, almost always started between 6.30PM and 8:00PM and finished between 3:00AM and 7:00AM, and had little day-to-day contact with managers.

FWA found this constituted regular and systematic employment, as the employer offered the employee work almost every week, on average four days work on day shift and close to five days work on night shift. This meant the employee had a reasonable expectation the work would continue and FWA therefore granted the employee access to unfair dismissal.

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.

Are your casuals protected?

Some key indicators that your casual employee may have access to unfair dismissal are:

- 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, 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.

Another thing to note is that you don't need to actually terminate to be at risk.

Many business owners will avoid the actual termination of a casual employee simply by not calling them for work anymore. This can constitute a dismissal if a regular and systematic casual can argue that they had a reasonable expectation of ongoing work.

An example of this situation can be found in the case of two casual motel cleaners who were compensated for unfair dismissal after their employer stopped calling them in for work. The cleaners had worked for over one year, averaging 20 hours of work each week. They were also the only cleaners at the motel. When the motel was acquired by new owners their shifts were altered and they were sent text messages saying they weren't required for various shifts and then all contact ceased.

While the two cleaners were never told that their employment had been terminated, FWA found it was “natural” for them to assume that termination had taken place.

Commissioner Connor relied upon s384 of the Fair Work Act 2009, which affords protection to casual employees if their employment was “regular and systematic” and they had a “reasonable expectation” of continued employment and found the cleaners were entitled to protection under the Small Business Fair Dismissal Code and were unfairly dismissed, as no reason or notice for the end of their employment, or opportunity to respond, was given to them.

Compensation was awarded with one cleaner awarded \$2500 and the other cleaner awarded \$1050.

Casual employees can no longer be treated casually. If you are considering terminating or ceasing to use a casual employee it is important to consider any access the employee may have 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.

If you are at risk then tread carefully, consider your obligations to follow the Small Business Fair Dismissal Code or seek professional advice before acting. ■

Robyn Anderson is a fellow of Australian Human Resources Institute and the Managing Director of HR Navigation Australia, an HR/Workplace Relations Consultancy specialising in providing Outsourced HR Manager Services to Small and Medium Businesses. To contact HR Navigation call 1300 669 747 or visit www.hrnavigation.com.au