

Legal Aid ACT

The Chair
Standing Committee on Education, Employment and Youth Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601



By email: committees@parliament.act.gov.au

15 November 2017

Legal Aid ACT Supplementary Submission – Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT – Unfair Dismissal and Casual Employment

This letter is a further submission by Legal Aid ACT to the Standing Committee on Education, Employment and Youth Affairs Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT. The material presented here arises out of a question taken on notice during the 12 October 2017 hearing asked by Chris Steel MLA concerning unjust casual shift reductions. In asking this question, Mr Steel noted

I just wanted to ask you about casual work in particular because we had a conversation about it in relation to the Master Builders Association, where they were claiming that there is no difference between casual work and full-time employment with regards to unfair dismissal, but this case study seems to suggest that there is a pretty fundamental difference between casual employment and full-time work, in that an employer might choose just not to provide someone with hours, and then they do not have any work. Is that a situation that comes up regularly?

Claiming there is “no difference” between casual and full-time employment in regards to unfair dismissal, respectfully, represents a severe mischaracterisation of the differences between casual and permanent employment, and is an attitude which could further contribute to the level of insecurity surrounding many types of casual work.

1. Unfair dismissal and casual employees under the *Fair Work Act 2009*

Legal Aid ACT wishes to clarify the difference between casual and full-time employment in regards to unfair dismissal. Under the *Fair Work Act 2009* ('FWA'), casual employment will ordinarily not count towards an employee's period of employment for the purposes of assessing whether they are protected from unfair dismissal.¹ However, if a casual employee is employed on a regular and systematic basis and during the period of their employment and they had a reasonable expectation of continuing employment on a

¹ *Fair Work Act 2009* (Cth) s384(2)(a).

regular and systematic basis, that period of casual employment will count towards the assessment of their period of employment.² In effect, this means a casual employee can be protected from unfair dismissal provided they not only worked on, but had a reasonable belief they would continue to work on, a regular and systemic basis for the minimum period of employment (12 months for a small business, 6 months for all others³).

However, while casual employees must prove they are working on such a basis, full and part-time employees do not need to prove they are working with any regularity and their entire period of employment is taken to count towards the period of employment. This is a key distinction, meaning it is not the case that “there is no difference” to casual and full time employment in regards to unfair dismissal.

2. “Regular and systemic” employment

Proving “regular and systemic” employment can be difficult. The terms “regular and systemic” were discussed in *Yaraka Holdings Pty Ltd v Giljevic*⁴, where they were given a wide meaning, with regular being interpreted to mean frequent or often rather than uniform or constant.⁵ While systemic employment was taken to be evidenced by a constant pattern of work where the employee is paid not by the number of jobs completed but at a particular time.⁶ The FWC and courts however will assess the nature of the employment on the facts of a particular case. Examples of the factors considered include:

- Whether an employee was not rostered on for certain weeks;⁷
- Whether an employee received shifts on days in certain weeks in addition to any “regular” shifts;⁸
- Whether an employee was subject to a “stable and organised” roster, particularly if set well in advance of the employee’s engagement;⁹
- Whether an employer offers work at times they know the employee can accept that work on a basis that could be considered more than “occasional and irregular”;¹⁰

² Ibid s384(2)(a)(i) and (ii).

³ Ibid s383. A small business is classified as a business with fewer than 15 employees at the time as per s 23 of the FWA. Additionally, a small business must comply with the Small Business Fair Dismissal Code when dismissing an employee to comply with the unfair dismissal provisions.

⁴ [2006] ACTCA 6.. Note this case was decided before the FWA was enacted, however the principles regarding the meaning of “regular and systemic” have been cited in numerous FWC decisions regarding unfair dismissal (see *Robinson v Grandviews Bowling Recreation Club (t/as Club Grandviews)* [2016] FWC 1463, [19]).

⁵ *Yaraka v Giljevic* [2006] ACTCA 6, [68].

⁶ Ibid [69].

⁷ *Robinson v Grandviews Bowling Recreation Club (t/as Club Grandviews)* [2016] FWC 1463, [33].

⁸ Ibid.

⁹ *Skene v Workpac Pty Ltd* [2016] FCCA 3035, [81]. Note this decision was in relation to whether an employee should be regarded as a casual or permanent full-time employee, however it still reflects what a casual employee must show to be regarded in a similar manner to part or full-time employees.

¹⁰ *Massey-Ross v Richmond Fellowship Tasmania Inc* [2014] FWC 5372, [35] (Wells DP), quoting *Mr Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078, [76] (Roe C).

- Whether the employee held a belief they were unable to reject shifts that were offered (shift offers were seen to constitute directions rather than offers).¹¹

If a casual employee cannot show factors such as these which indicate regular or systemic employment they will not be covered by unfair dismissal protections.

3. Casual conversion following the 4 Yearly Review into Modern Awards

In July 2017 the Fair Work Commission ('FWC') in conducting their 4 yearly review into the modern award system handed down a decision¹² proposing to extend the number of awards under which a casual employee could be converted to part or full time employment. The proposed process outlined by the FWC bears many similarities to when a casual worker is assessing whether they are protected from unfair dismissal, notably the proposed requirements to have been employed continuously for 12 months and during that period worked a pattern of hours which would not need to be significantly varied upon a switch to part or full time employment.¹³ This is very similar to the "regular and systemic basis" requirement needed to be shown by a casual employee to be protected from unfair dismissal.

The review conducted by the FWC indicates the perceived fundamental difference between casual and permanent employment, namely the regularity and consistency of work performed. It is therefore incorrect to suggest there is no difference between the two types of employment in regards to unfair dismissal, as a casual employee is assumed to not be working on a regular basis, a condition they must prove to be covered by unfair dismissal.

4. Problems with equating casual employment with permanent employment

The provisions in the *FWA*, the factors considered by the FWC in determining regular and systemic employment and the recent review into the modern award system further highlight the gap between casual and full-time employees. Considering the nature of casual work, which usually involves unskilled labour with few protections,¹⁴ any further erosion of the security of casual workers through an attitude which may embolden an employer to unjustly, harshly or unreasonably dismiss an employee is unacceptable.

As originally submitted by Legal Aid ACT, education for both employees and employers in regards to their rights and responsibilities is crucial. It is important the vulnerabilities of casual workers are understood by employers, especially in the case of young people, women and people from culturally and linguistically diverse backgrounds who find themselves engaged in casual work due to school commitments or the need for flexible

¹¹ *Predl v DMC Plastering Pty Ltd* [2014] FCCA 1066, [64].

¹² [2017] FWCFB 3541.

¹³ *Ibid* [381].

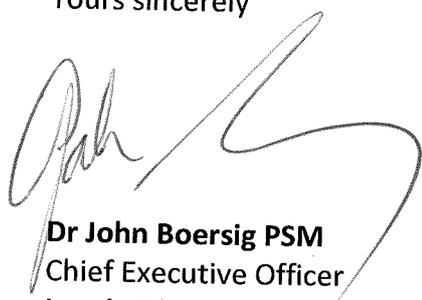
¹⁴ Graeme Orr and Joo-Cheong Tham, 'Work and employment: Fair work, fair law and fair process?' (2010) 16 *Australian Journal of Administrative Law* 135, 136.

working arrangements.¹⁵ It is unlikely these workers would meet the threshold of “regular and systemic” employment. The already insecure nature of many casual employment arrangements coupled with a heightened risk of dismissal would only compound the effects of insecure work in the ACT, notably the effects on a worker’s mental health and wellbeing relating to the anxiety surrounding their job security.¹⁶

Increasing awareness surrounding the protections available to either casual or permanent employment is critical, especially when considering the harsh effects that can follow from an unjust dismissal. Ensuring casual employees understand where they stand with their employer, and vice versa, can work to increase the security an employee feels they have in their employment.

If you have any further questions regarding any of the issues raised here, or in our original submission, please do not hesitate to contact Legal Aid ACT.

Yours sincerely



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¹⁵ Legal Aid ACT’s original submission into Insecure Work in the ACT outlined many of the issues faced by vulnerable workers, particularly those engaged to work on a casual basis.

¹⁶ This was noted in Legal Aid ACT’s original submission as an effect whose impact was hard to quantify, however could possibly have effects not only on the community in general, but on the economy at large. See Mirella Damiani, Fabrizio Pompei and Andrea Ricci, ‘Temporary employment protection and productivity growth in EU economies (2016) 155(4) *International Labour Review* 587, 589 and Australian Council of Trade Unions, ‘Lives on Hold: Unlocking the Potential of Australia’s Workforce’ (2012) *Independent Inquiry into Insecure Work in Australia*, 1, 21 (report data drawn from CFMEU, *Race to the Bottom: Sham Contracting in Australia’s Construction Industry, A Report*, March 2011).