



MINTERELLISON

CPD Legal Studio Continuing Legal Development

Underpayments

March 2020

Agenda

- 1 Underpayments – Law and practice
- 2 What is a casual employee – *Workpac Pty Ltd v Skene*
- 3 Personal leave - Mondelez
- 4 Annualised salary clauses in modern awards
- 5 Some alternatives



Underpayments

Law & practice

MinterEllison

Employer conduct.... the underpayment issue

- Employers big and small are dealing with cases of underpayments
- Although unions and Labor are calling it ‘wage theft’ – most often the result of use of annualised salaries without adequate checking, errors, misunderstandings or not keeping up with changes
- FWO Sandra Parker has advised Boards they are ‘on notice’
- Christian Porter (Industrial Relations Minister) says the Government has ‘zero tolerance’ for underpayments and has reiterated commitment to introduce criminal penalties for employee exploitation
- Essential:
 - understand and audit payroll, working patterns and awards / EAs
 - communication between finance, HR and legal & proper governance

Obligations

- An employer must comply with an applicable award or enterprise agreement
- Person/entity liable as an accessory if have *'been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention'*.
- For breaches after 15 September 2017, holding company is liable:
 - if knew or should have known; and
 - failed to take reasonable steps to prevent contravention.
- Similar provisions re franchisors

Mechanics

- Prosecution can be brought by Ombudsman, a relevant union or affected employee
- Usually Federal Court or Federal Circuit Court
- Orders include penalties, interest and injunctive orders
- Limitation period
 - six years
 - but, in the case of under-accrual of annual leave, liability only crystallises on termination of employment



Fair Work Ombudsman

- As part of its standard practice, prosecutes individuals involved. Can include directors, executives and HR professionals, even payroll providers and potentially lawyers
- Uses publicity.
- Can seek enforceable undertakings – which might go somewhat further than obligations under FW Act
- Can also issue formal cautions, compliance notices and on the spot fines

Class actions and litigation funding

- Examples
 - against Workpac alleging workers engaged as casual employees rather than permanent employees
 - against Airservices in relation managerial contracts undercutting EBAs
 - against various sales and marketing companies
- Adero – applicant law firm. Funded by Augusta – UK Litigation funder

The screenshot shows the homepage of the 'FairGO' website, which is a platform for class actions. The header includes the 'FairGO' logo with the tagline 'YOUR FairGO' and the 'ADERO' logo. A navigation menu contains links for 'MINING', 'PUBLIC SECTOR', 'DIRECT SALES & MARKETING', 'OTHER INDUSTRIES', 'ABOUT US', and 'CONTACT US'. A 'GET IN TOUCH' button is also present. The main content area features a large image of a yellow mining truck in a desert landscape. Overlaid on this image is a text box with the heading 'Are you a casual worker in the mining industry?' and a paragraph of text: 'We are investigating several labour hire companies at multiple mines across Australia for underpayment of wages and misclassification of workers. Workers are engaged as casuals but are working the same job as permanents. The coal mining workforce is now steeped in second-class workers who have been denied their entitlements for years and costing hundreds of miners tens of thousands of dollars a year. Find out if you have also been underpaid now!'. Below the text are two buttons: 'REGISTER INTEREST - GENERAL' and 'REGISTER INTEREST - MT ARTHUR'. At the bottom left, there is a 'Latest News' section with a link to '21 April: 2018: Mt Arthur (Trainees) — Trainees are now to be included in the class action against Chandler Macleod and TESA and Mt Arthur. If you are a trainee, register now!'.

Penalties for breach of industrial instruments

- Ordinary penalty, up to \$63,000 for corporations or up to \$12,600 for individuals.
- For a 'serious contravention' on or after 15 September 2017, up to \$630,000 for corporations and up to \$126,000 for an individual (that is, ten times the usual penalties).
 - '*serious contravention*' if an employer knowingly contravenes the provision (which includes tacit authorisation) and if the conduct was part of a systematic and deliberate pattern of conduct relating to one or more other persons.
- Court can order penalties be paid to union or employee

What is the maximum penalty?

- Starting point is that each breach is a separate breach
- However, multiple breaches treated as a single breach where part of single course of conduct. Section 557.
- However, this does not apply to:
 - different instruments;
 - different provisions of the instrument;
 - different employing entities (etc)
- Section 557 does not apply where prior contraventions



How Courts determine penalties

- Penalty must be proportionate to offending conduct and respondent's circumstances
- Contraventions of industrial laws regarded more seriously than in the past
- Relevant factors include
 - need for deterrence
 - nature and extent;
 - whether deliberate;
 - contrition and history of previous contraventions
 - whether part of course of conduct



Example

Rocky Holdings Pty Limited v Fair Work Ombudsman [2014] FCAFC 62

- Medical Practice underpaid a visually impaired, 19 year old receptionist – including paying her \$7 to \$8 per hour
- Practice and two doctors prosecuted
- Prosecution included 8 separate contraventions of Clerks Award

The practicalities: How to fix the problem

- Two inter-related aspects to fixing the problem
 - fixing the past; and
 - fixing the breaches for the future.
- Not a viable option to either continue, or fail to rectify, underpayments (at least for last 6 years)



Fixing the past

Process

- **calculating the underpayments**

- **communicating with the employees**

- **consulting with unions**

Simple in theory!

Fixing the future

- Increasing salary to correct level
- Correcting other entitlements
- Problems
 - employees receiving '*best of both worlds*'
 - contractual impediments
 - adverse action because of entitlements under industrial instruments



Common issues with the past

- Attribution of payments to entitlements under instruments
- Whether interest is paid (and at what rates)
- Whether 6 year limitation period is applied
- How former employees are dealt with
- How to calculate entitlements in absence of proper records (e.g overtime)
- Timing – problem of whether to rectify past and future together or fix future with commitment to fix past underpayments
- Income tax
- Payment of superannuation contributions in relation to the back payments
- Payroll tax
- Workers compensation premiums
- Requesting releases?
- Whether to voluntarily disclose to the Fair Work Ombudsman

Enforceable Undertakings with Fair Work Ombudsman

- Self Reporting
- Usual terms include
 - Admissions of contraventions;
 - Back-payments (to the extent not already paid) – often beyond limitation period;
 - Contrition Payment;
 - Periodic Audits by external body for several years, with provision to Ombudsman;
 - Apology;
 - Advertisements;
 - Employee hotline;
 - Training;
 - Co-operation with FWO.
- Usual terms are evolving



What is a casual employee?

Workpac v Skene

Legal definition

- National Employment Standards – does not define casual employee
- Industrial instruments – some contain definitions of casual employee (e.g an employee 'engaged and paid as such')
- Two basic approaches to National Employment Standards
 - Character Test
 - Industrial Instrument Test

***Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434**

WorkPac Pty Ltd v Skene [2018] FCAFC 131

Facts

- Casual dump truck operator, engaged from 2010 to 2014.
- 7 days on, 7 days off, fly in, fly out.
- Flat rate of \$50 per hour (later \$55)
 - no reference to casual loading
- Covered by EBA
- Notice of offer of casual employment
 - Included standard work week of 38 hours
 - Length of assignment – 3 months
- In 2011 and 2012, provided a 12 month roster in advance
- Claimed unpaid annual leave on termination



WorkPac Pty Ltd v Skene [2018] FCAFC 131

Decision

- Mr Skene not a casual employee for the purposes of the NES
- Look to common law for meaning of casual for NES
 - not the industrial instrument
- Absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work
- Indicators of casual employment include irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability



WorkPac Pty Ltd v Skene [2018] FCAFC 131

Decision

- Mr Skene not a casual employee under the EBA either
- Clear language required if employer given power to unilaterally determine whether casual
- If does provide power, must be exercised expressly
- Correctly interpreted, EBA applied common law definition
- In any event, not engaged by hour
- Remitted to Circuit Court for determination of compensation and penalty



Post Skene

- Workpac filed application seeking declaration that another employee was a casual employee (Rossato) – including claim for set off of casual loading. *Heard by Full Court of Federal Court in May 2019– decision reserved*
- Two class actions launched: CFMMEU (Ben Renyard) and Adero (Matthew Petersen). *Adjourned, pending outcome of Rossato*
- *Fair Work Amendment (Casual Loading Offset) Regulations 2018 made*
- FWC sometimes asking for undertakings re Skene in applications for EBA approvals

Post Fair Work Amendment (Casual Loading Offset) Regulations 2018

- If a purported casual employee is paid casual loading that is *'clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during a period'*, employer may seek to offset that loading against any such NES entitlements
- ALP's attempt to disallow regulation failed – defeated 33 -29 in Senate
- But questions have been raised about effectiveness by Andrew Stewart.

Applications for enterprise agreement approvals

Some agreements include the following undertakings:

Despite the provisions in Clause [x] of the Agreement, the employer undertakes to apply the National Employment Standard according to their terms, consistent with the decision in Workpac Pty Ltd v Skene [2018] FCAFC 131

One example goes on to say:

and, in circumstances where an employee who has been paid the casual loading subsequently makes a claim for employment benefits, such as annual leave, the employer will claim a set-off of the amounts paid by way of casual loading against any such claim, which is also consistent with the decision in Skene.

Practical observations



If employees are not true casuals:

- Potentially significant back pay liability and penalties
- Risk of prosecution – including by Unions and Ombudsman
- Risks associated with class actions



Review contracts:

- Vital to include provision which meets requirements of Casual Offsetting Regulation
- Casual Loading also needs to be specified
- Ensure consistent with nature of casual engagement

Practical observations



Review EBAs:

- Ensure definition is clear
- Include provision as per Casual Offsetting Regulation
- Ensure casuals are clearly excluded from relevant entitlements
- Care needed around undertakings to FWC



Review practices:

- Review use of casual employees, consider when convert to permanent
- Difficulty in applying nebulous tests in practice and to large numbers of employees
- Ensure practices with casuals consistent with tests



Personal leave

Mondelez

Mondelez – accrual of personal/carer’s leave

- Decision about accrual of personal/carer’s leave for 12 hour shift workers – impacts all workers with non standard hours and also part time employees
- For part time employees, decision likely means accrual is not pro rated
- Appeal to High Court and possible legislation change – until then if part time employee has run out of leave based on pro-rata accrual:
 - reconciliation based on 10 day accrual and deduct leave taken
 - if employee would have an available accrual, pay the employee for their leave up to that amount
 - optional - advise employee that if the Mondelez decision is overturned, employer will treat the leave as leave in advance



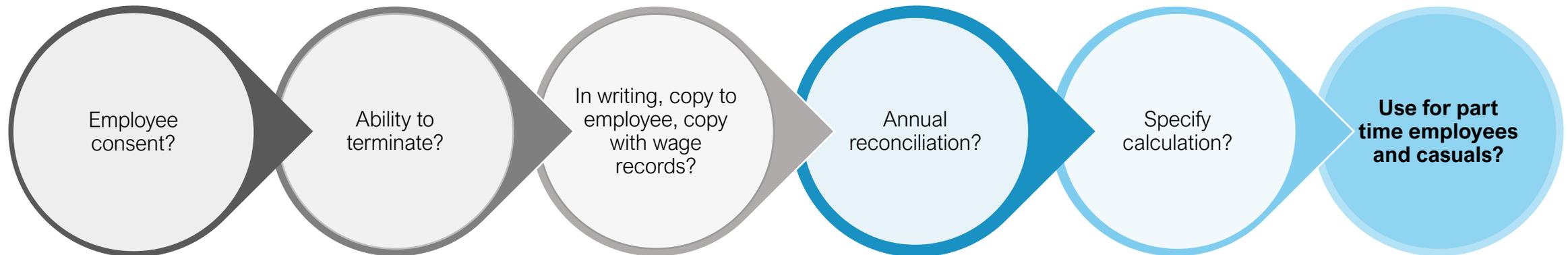
Annualised salary clauses

1 March 2020 requirements

New annualised salary clause for some modern awards

- 19 of 122 modern awards have annualised salary clause
- Reviewed as part of 4 yearly modern award review
- Concerns about use of annualised salaries
- New model annualised salary clauses – largely the same except some Awards require employee agreement to arrangement
- Took effect from 1 March 2020

28% of employers do not pay employees correctly - FWO audit



Features of both model clauses

Full time employees only

- Not permissible for part time or casuals

Method of calculation

- Tell employee in writing how calculated each component (eg, overtime, allowances etc)

Specify outer limit of ordinary hours with penalty rate and overtime for each pay period / roster

- Tell employee in writing the outer limits
- Pay employee for work outside outer limit in each pay period / roster

Annual reconciliation

- Each 12 months from commencement or on termination
- Payment of shortfall within 14 days

Record of hours

- Keep record of start and finish time and unpaid breaks
- Employee must sign or acknowledge the record for each pay period / roster cycle

Alternatives to annualised salaries...

- Offset clause in employment contracts:
 - carefully drafted to cover all relevant Award entitlements
 - pay enough each pay period – based on hours worked and Award entitlements (although consider front loading)
- High Income Guarantee
- Negotiate an EA
- Remember:
 - usual recording keeping obligations still apply – including hours worked etc
 - a reverse onus exists if you fail to keep records and there is a dispute about payment

TO DO

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