Court rebuffs labour supplier's claim that worker a casual

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A court has found that a driver engaged as a casual under a labour hire arrangement is an employee who is entitled to annual leave payments under the Fair Work Act.

The driver argued he was not a casual but a permanent full-time employee of Workpac Pty Ltd, a labour hire company that supplies labour to mining companies across Queensland.

The driver claimed he was entitled to payment in lieu of annual leave once his employment with Rio Tinto Coal Australia Pty Ltd's Clermont mine in central Queensland ended amid allegations of misconduct in 2012.

The driver had started worked as fly-in, fly-out worker at Clermont in 2010.

Workpac contended it engaged the driver as a "casual or fixed term employee term employee" under the Workpac Pty Ltd Mining (Coal) Industry Workplace Agreement, making him ineligible for annual leave, other entitlements claims or payments in lieu of annual leave

The driver, however, argued his employment was, continuous, predictable, and determined in advance by rosters.

He said he worked 12.5 hours each shift on "a 7-days-on, 7-days-off continuous roster arrangement", rotating between day and night shifts.

Workpac assigned him permanent camp-style accommodation, which he shared with another employee working the opposite roster.

The driver claimed he had regular and predictable working arrangements, as his shifts were set 12 months in advance and followed a stable and organised rotating roster.

He said his employment was continuous, apart from taking seven days unpaid leave, arranged with approval from Clermont.

He also claimed that the fly-in, fly-out arrangement with Clermont, which included flights and accommodation, facilitated his employment.

As a result, he did not elect the days he worked, nor did he work for any other employer.

He said this arrangement conflicted with claims he could choose when and where to work because there was an expectation that he was available, on a continuing basis, to perform his duties in accordance with the roster.

Federal Circuit Court Judge Michael Jarrett said it did not matter how Workpac or the driver described their relationship, it was their mutual intention that had to be ascertained from the words of the agreement.

He said the offer of "casual employment" was sufficient to engage clause 5.5.6 of the Workpac agreement and "impress upon [the driver] the status of "casual FTM".

"Having regard to the way in which the parties conducted the case, that finding must mean that [the driver] is not a "permanent FTM" and clause 19.1.1 has no application to him," he found.

Although Judge Jarrett said the driver had failed to establish an entitlement to annual leave under the Workpac Agreement, he found the driver entitled to benefits under the Fair Work Act.

"However", he said, "there is no evidence at all, that workers would choose which days of their roster periods they would work or not work.

"There was no element of choice in the daily working arrangements during the course of [the driver's] employment at Clermont Mine.

"There was no opportunity for him to choose not to work any particular shift or hours offered to him by [Clermont]," he said.

Judge Jarrett concluded that the driver should be classified as other than a casual employee for the purposes of s86 of the Fair Work Act.

"The essence of casual employment, as described by the Full Federal Court in Hamzy v Tricon International Restaurants and applied in MacMahon, is missing.

"There is no absence of a firm advance commitment as to the duration of [the driver's] employment or the days (or hours) he would work.

"Those matters were all clear and predictable.

"They were set 12 months in advance," he said.

Slater and Gordon principal lawyer Andrew Rich told *Workplace Express* the case recognised the driver's right to annual leave under the Act and was of particular importance for the mining industry.

"It is significant for the industry because a large number of employers rely on labour hire arrangements.

"We have seen a shift away from permanent ongoing employee relationships in favour of more flexible, casual labour hire arrangements.

"The decision might have wider ramifications for all sorts of employers reliant on labour hire as we see more and more of these arrangements crop up in the workplace," he said.

The case returns to court on December 12 to determine penalties.

Skene v Workpac Pty Ltd [2016] FCCA 3035 (24 November 2016)

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