Australian Financial Review, Australia
27 Nov 2020, by Jennifer Hewett

General News, page 4 - 403.00 cm²
National - circulation 38,015 (MTWTF--)

ID 1364562970 BRIEF AMMA INDEX 1

Jennifer Hewett

jennifer.hewett@afr.com

High Court test for 'double-dip' casuals

Christian Porter's grand ambitions for major industrial relations reform are sadly diminished. But the High Court is now set to rule next year on one of the most divisive issues in the labour market – as well as one of the biggest threats to the viability of many small businesses.

The High Court announced yesterday it would grant labour hire company Workpac special leave to appeal a federal court judgment allowing casuals employed on regular hours to claim the same holiday and sick leave payments as permanent employees.

Not only is this contrary to the standard practice of paying casuals more per hour in lieu of such entitlements, it means many casual employees would be able to retrospectively claim years of back pay. Such casual work is also extremely common in precisely the sectors hardest hit by COVID-19 – retail, hospitality and tourism.

Failure to reach much substantive agreement among working groups of unions and employer representatives – along with the difficulties of getting contentious legislation through the Senate – mean the federal government's "package" of industrial relations reforms to go to Parliament next month will involve only modest changes overall.

That has disappointed employers who had hoped for much greater flexibility in areas such as enterprise bargaining and award simplification rather than tinkering around the edges.

The High Court has at least reduced pressure over the potential costs of casual employment. Federal Industrial Relations Minister Porter's bill will also include provisions to block the option for such "double dipping" in exchange for giving casuals employed on systematic rosters the choice of becoming permanent – probably after one year.

But employers have still been nervous about potential liability over claims of back pay – estimated to be tens of billions of dollars by the Australian Industry Group.

Already eight class action lawsuits have been filed on behalf of casuals seeking additional compensation for their previous work. Porter's new reforms should assist – with the government confident any problem in getting bills passed will now have the safety valve of a High Court appeal.

The Andrews government in Victoria has further complicated the issue by unexpectedly announcing last week it will set up a state-funded two-year trial to provide casual workers with paid sick leave. The Victorian plan is for businesses to eventually fund this sick leave through industry levies.

Porter says this means a massive new tax on business in an "employment and business-killing approach". He also intervened to support the special leave application, saying the Federal Court decision has caused confusion and uncertainty for employers and their employees.

"[It] has the potential to expose businesses to significant financial liability – up to $39 billion on some estimates – during a period where businesses are facing their greatest ever challenge as a result of the COVID-19 pandemic," he said.

Employer groups have also welcomed the appeal.

Steve Knott, chief executive of the Australian Mines and Metals Association, described it as one of the most important employment law decisions the High Court has had to consider.

"Today's development shows there are serious and significant concerns with the Federal Court's judgment that must be examined by the highest court in the land," he said.

According to Ai Group, the Federal Court's decision has alarmed businesses and is operating as a barrier to employers taking on casual staff.

"With more than half a million casual jobs lost since March, any barrier to casuals being re-employed is not in the interests of employees or employers," chief executive Innes Willox said.

James Pearson from the Australian Chamber of Commerce and Industry believes the High Court decision to allow an appeal offers relief but not yet a remedy.

"Thousands of businesses who believed they have fully complied with their lawful obligations under industrial awards have instead been exposed to legal double jeopardy which could send many over the edge," he said.

But unions argue casualisation of the workforce has created increasing levels of insecure work which must be reversed. That is even though the percentage of casual employees in the workforce – about 20 per cent – has not changed in about two decades.

The CFMEU has been determined to fight the use of labour hire companies, particularly in the coal mining industry, in a long-running legal battle.

Former truck driver Robert Rossato was employed by mining labour hire firm Workpac on a casual but regular basis between 2014 and 2018 over six different times at two different mines. He asked the company for accrued annual leave and other entitlements despite having received typical pay

Australian Financial Review, Australia
27 Nov 2020, by Jennifer Hewett

General News, page 4 - 403.00 cm²
National - circulation 38,015 (MTWTF--)

ID 1364562970 BRIEF AMMA INDEX 1

loadings for casual work.

A full federal court decided in Rossato's favour last May.

Peter Strong from the Council of Small Business Organisations Australia says the Rossato case has caused consternation.

Of about 2.6 million people employed on a casual basis pre-COVID-19, some 1.6 million worked regular hours. About half worked for businesses with fewer than 20 employees. Those on awards can ask to go permanent if they have worked for the same employer for 12 months but many still prefer to take the extra pay per hour and flexibility of casual work.

The federal government's industrial relations bill will make the ability to choose permanent employment a right for all rather than a request and more clearly define the status of casual workers. Small steps – but big consequences otherwise.

Employers have been nervous about potential liability over back pay.