

FAIR WORK DECISION GIVES CASUALS ACCESS TO UNFAIR DISMISSAL REMEDIES

Fair Work Australia has clarified the circumstances in which casual employees can qualify for protection from unfair dismissal under the new Act.

Under the Act employees must have served a six-month period of employment to qualify for protection from unfair dismissal and provides that, ***for casuals employment must have been regular and systematic and the employee must have had a reasonable expectation of continuing to work on that basis.***

As a consequence, while under the old Act there had been a focus on establishing whether an employee was a casual, the focus is now on whether the employee was employed regularly and systematically.

The Fair Work Act also requires employees to have a reasonable expectation of continuing employment during the "period of service", rather than at the point of termination as under the old Act.

On the "regular and systematic" requirement, FWA said it applied to the employment itself and not to the hours or days of work the employee performed.

The Commissioner said "the fact that an employee works more hours in one week or one month than another and the fact that an employee might have variable start and finish times is not conclusive evidence of irregular, occasional, or non-systematic employment or engagement,".

The guiding principles are (according to the Commissioner):

- If the number of hours worked is small and the gaps between days and times worked is long and irregular, this means that there needs to be other evidence that the employment of a casual is regular and systematic; or
- Conversely, if there is a clear pattern or a roster for the hours and days worked then this would be strong evidence of regular and systematic employment.

Or, in the absence of evidence of regular and systematic employment can be established where:

- The employer regularly offers work when suitable work is available at times when the employer knows that the employee has generally made themselves available; and
- Work is offered and accepted sufficiently often that it could no longer be regarded as simply occasional or irregular.

Such evidence indicates regular and a systemic employment and a reasonable expectation of continuing employment.

The Commissioner found that a casual employee working full-time hours over a lengthy period would also have strong evidence of regular and systematic employment.