

Employment & Industrial Case Note

October 2007

SCOTT AND PROACTIVE THERAPIES AUSTRALASIA PTY LTD

Casual Employee- Entitlements On Termination

This is an important case for employers to be aware of for this reason – know fully the obligations you owe to employees you regard as casual. Of an extension of this, know whether your employees are casual or not.

Scott made Application through section 661 to the Australian Industrial Relations Commission for payments owing to her upon termination – appropriate Notice Payments. Termination Notice Payment was not made to her in accordance with the Act as it was apparent the employer considered Scott to be a casual employee with no entitlements.

An important section to look at is section 638 – it in brief provides that casual employees employed for a short period are excluded from the legislation. Casual employees are taken to be engaged for a short period unless:

- (a) *Subject to subsection (5) – the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and*
- (b) *The employee has, or but for a decision by the employer to terminate the employee's employment, would have had a reasonable expectation of continuing employment by the employer.*

Scott had been employed since 29 March 2005 to the time of her termination on 15 May 2007. At the time of termination she was paid a sum equivalent to 20 hours pay. As it turned out, she had already worked 15 hours in the week of termination and as such received 5 hours in lieu. Scott contended that this was short of the two weeks' notice she was entitled to and that her average hours were 60 per paid period (fortnightly). Scott produced evidence of her hours worked in each fortnight for the previous five months and but for two periods, where the hours were just short of 60, the rest were 60 plus hours. Proactive took the position throughout that Scott was a casual with the apparent assumption this was the answer to the claim. No evidence was produced to contest the regularity of hours nor to suggest that but for the termination, there was no reasonable expectation of employment – indeed the position of both parties was that termination was not performance related but financial.

The Commission had to assess the claim pursuant to section 638

and came to the obvious conclusion that Scott was not an employee engaged for a short period – she was employed for regular periods over 12 months and that but for the termination there was a reasonable expectation of ongoing employment. The Motion for Dismissal by the employer was rejected and the matter referred for conciliation.

COMMENT

Most employers assume a casual employee has no or limited rights. Employers need to be very careful about long term casuals and their actual status and rights. Advice to this employer at an early stage would have avoided the time and expense of the challenge to the employee's Application in the Commission.

For further information concerning employment related matters including queries on the question of casuals, please do not hesitate to contact our Employment & Industrial Team.