

TOO CASUAL: A COSTLY REMINDER FOR EMPLOYERS

January 2019

Failing to recognise the correct status of an employee can result in not providing them with their correct entitlements. This was an expensive mistake one employer came to discover recently.

COALGATE TAVERN CASE

Malcolm and Claire Bennett owned and operated the Coalgate Tavern in Selwyn for over 30 years. In a recently issued Employment Relations Authority determination, the Bennett's were ordered to pay a total of \$30,000 in penalties for various breaches of the Holidays Act, including failing to pay their employees correct holiday pay and other statutory entitlements. By the time of the Authority determination, the Bennett's had paid holiday arrears for two of their employees and additional sums for sick pay, public holiday pay and alternative holiday pay and they had agreed to reinstate all accrued annual holiday entitlements for their existing employees.

The Bennett's misfortune stemmed from the fact they believed their hospitality workers (including bar and kitchen staff) were casual employees not entitled to sick leave or bereavement leave. They were paid "pay as you go" holiday pay at a rate of 8%.

The Bennett's allowed a practice where employees could routinely swap shifts amongst themselves according to their needs. They also claimed it was common practice in the hospitality industry to employ casual workers and said they did not know the correct status of these workers until advised by an inspector from the Labour Department.

The Authority deemed the workers to be permanent part-time employees under law. This was because of the regularity of the days and hours worked and their length of service. The Authority identified numerous breaches of the Holidays Act by Coalgate Tavern, including:

- 12 employees were entitled to four weeks of paid annual holidays but had not been provided with them;
- 15 current and former employees had not been provided with the correct paid sick leave entitlements;
- Alternative holidays entitlements (i.e. a day in lieu) had been paid out automatically without the employees actually being able to take a paid day off; and
- The holiday pay that was paid was not recorded as an identifiable component on pay slips.

The Labour Inspectorate spoke with affected staff as part of their enquiry. One claimed she did not take time off after her mother died because of the financial pressure that would come from not being able to take bereavement leave (which she was entitled to take). The Authority considered these impacts when deciding upon the total penalty, balancing this against the remedial steps taken by Coalgate Tavern once they were made aware of their breaches.

The Holidays Act imposes significant penalties upon employers for non-compliance and, when assessing quantum, the Authority can impose a penalty in respect of each individual employee affected (i.e. each is a separate breach), which can quickly multiply the amount an employer is required to pay. Coalgate Tavern were in many ways fortunate they did not receive a larger penalty.

In the Bennett's case, the Authority took account of the fact the breaches of the employment legislation had occurred over a significant period and were only rectified as a result of the Labour Inspectorate's involvement. What the Authority described as the Bennett's recklessly shutting their eyes to their obligations as employers warranted penalties being imposed. The scope of the breaches in this case did result in the Authority determining there was a starting point for penalties of \$300,000. This provisional maximum starting point was reduced to take account of various factors, including an assessment of the severity of the breaches and other mitigating factors such as the fact the Bennett's had rectified the breaches after becoming aware of the problem and had cooperated with the inspection. The overall penalty was reduced to \$30,000.

KEY TAKE AWAY

Employers should not place workers on casual employment agreements unless they are truly casual. Employees that have a regular pattern of work, an ongoing expectation of work and have had a lengthy period of service are likely to be recognised as permanent employees at law and have enhanced entitlements under the Holidays Act. This is irrespective of a written agreement which might label them as casual employees.

True casual employment exists when the employer does not have to offer any work to the employee and the employee does not have to accept work if it is offered. A new period of employment is created each time a casual employee accepts work.

Disclaimer: The information contained in this publication is of a general nature and is not intended as legal advice. It is important that you seek legal advice that is specific to your circumstances.

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HOW CAN WE HELP

Jackson Russell's employment team can assist employers who are unsure about the correct status of their employees or what their employees' legal entitlements are. To discuss your particular situation, or for more information, please call or email one of the Jackson Russell employment lawyers listed below.

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