By Jeffrey Phillips SC and Nicholas Read

A casual approach

TO LABELS AND EMPLOYMENT LAW

This article deals with the question of how one properly characterises a casual employee under Australian law. Many important consequences flow from such a characterisation, particularly for young and/or economically vulnerable workers.

Contrivances, devices, plans, shams and stratagems, both effective and ineffective, have always been present in our economy and society to attempt to avoid costly or inconvenient applications of the law. Employment law is no exception.

Contracts of employment governed by the common law, express and implied terms, statutory entitlements, and their obligations and rights have long been targets for avoidance in Australia. Since the introduction of the Australian Fair Pay and Conditions Standard of the *Workplace Relations Act* 1996 (Cth) followed by National Employment Standards of the *Fair Work Act* 2009 (Cth) (the FW Act) the statutory regulation of employment contracts has been extended and consequently the urge to avoid such regulation has been heightened.

Many employment law cases deal with fundamental contractual questions such as does, a contract exist at all? Was there an intention to create legal relations? Who are the parties to the contract? What are the terms of the contract? Common employment law questions then arise such as, is it a contract of service or a contract for services? If it is a contract of service, is the employee covered by a modern award or an enterprise agreement? If so, which one? What classification under the award or agreement does the employee fall within, and what terms of the instrument are relevant to that person's employment?

Depending upon one's perspective, one method of compliance or evasion is to give the relationship a label. The following exchange in Lewis Carroll's *Through the Looking-*

Glass and What Alice Found There is useful:

> "'When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be the master – that's all."'

The courts have not completely ignored the word or label used by the parties but have often searched for the 'master' to overcome the word or label used.

LABELS NOT DETERMINATIVE

It is recognised that a label applied to an employment relationship is not determinative but is a starting point to identify the nature of a relationship. Whether it be that of employer/employee or principal and independent contractor, or how the documentation used can identify the true employer or the true parties to a contract. So much is said in a passage from *The Modern Contract of Employment* by Ian Neil SC and David Chin:[1]

> 'Documentation created by one or more of the parties describing or evidencing an apparent employment relationship will be relevant to, but not necessarily determinative of, the true character of the relationship. In determining the identity of a disputed employer, the court is entitled to consider the reality of the purported contractual arrangements, and to ask whether the documentation is brought into existence for other purposes, without reflecting the reality of the parties' relationship. It can be found that a purported contracting party was not in reality party to the contract even where a written contract gives it as the party (see *Gothard, in the matter of AFG Pty Limited (Receivers and Managers Appointed) (in Liq) v Davey* (2010) 80 ACSR 56 at [54], quoting *Shaw v Bindaree Beef Pty Limited* [2007] NSWCA 125 at [59]). At bottom, the determination of the entity that actually entered into a contract is based upon an objective assessment of the "practical realities of the relationship" between the parties.'

Likewise, in *Hollis v Vabu Pty Limited*[2] it was said that the label of the relationship stating one of employment as opposed to independent contract did not advance the efficacy of that designation. It was said that it: 'Did not necessarily display their legal content clearly by virtue of their semantic meaning.'[3]

This suggests that a deeper enquiry into the nature of the two relationships is required. The task was to identify and describe the essence of each of a contract of employment and an independent contract.[4]

Further, with respect to contractual arrangements being characterised to deem the relationship as something it is not, the High Court in *Hollis v Vabu* said that such statements of this kind:

> 'Are not of themselves determinative, as parties cannot deem the relationship between themselves to be something it is not.'[5]

It is only when the relationship is ambiguous that the ambiguity might be removed by including in the contract a label the parties attach to the relationship: *AMP Society v Allan & Chaplin*.[6]

In *San Remo (Southland) P/L v Farrell* [1987] 22 IR 291, Macken J in the then Industrial Commission of New South Wales had to consider a prosecution which put in issue whether an employee was covered by the *Shop Employees (State) Award*. The employee in question was designated a 'manager'. As a consequence, the defendant employer argued that the employee was outside the scope of the award. Macken J observed (at p294):

> 'While the designation of "manager" is not an indicator of the employment contract which should be ignored it is to the work performed that one has to turn to determine the application of the award to the employment.'

In a contract which labels an employee as a casual employee, the true nature of that status needs to be investigated in a similar way to the investigations conducted to determine other relationships or incidents of employment. The correct characterisation of a casual employee has statutory consequences. Chapter 2, Part 2.2 of the FW Act contains the National Employment Standards (NES), which are minimum standards that apply to the employment of national system employees. Casual employees are excluded from a number of the standards under the NES: Division 5, s67(2) parental leave and related entitlements; Division 6 annual leave within which s86 states, 'This Division applies to employees, other than casual employees'; Division 7 (personal leave), s95 says, 'This subdivision applies to employees, other than casual employees'; Division 10, s123 notice of termination and redundancy pay; and Division 10, public holidays – casual employees are not paid unless rostered on for the public holiday.

There is no definition in the FW Act of the expression 'casual employees'. In s12 of the FW Act headed 'The Dictionary', a definition of a long-term casual employee is as follows:

> '*Long-term casual employee*:
> A national system employee of a national system employer is a *long term casual employee* at a particular time if, at that time:
> (a) the employee is a casual employee; and
> (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.'

It is interesting to note that a *long-term casual employee* is not excluded either by s86 or s95 of the FW Act. If the legislature had intended to exclude long-term casual employees from rights/benefits under these sections it could have easily done so. One might be left therefore, with the common law interpretation of 'casual employee'. It is worth noting that the former *Workplace Relations Act* 1996 (Cth) devoted considerable attention to 'casual loadings' under Part VA, sub-division C, 'Guarantee of casual loadings'.

Another area where casual employee is mentioned in the FW Act is under the Unfair Dismissal Provisions found in Chapter 3, Part 3-2. Casual employees are no longer excluded from the unfair dismissal jurisdiction, save for

ones who have not (as with any other employee) completed the minimum employment period referred to in s383 (six months in accordance with the section, or if a small business employer, one year). Casual employment can count towards the minimum period of employment as referred to in s384(1) and (2)(a)(ii)–(iii).

Modern awards and enterprise agreements may provide some guidance outside the FW Act as to the meaning of 'casual employee'. A Full Bench of the Fair Work Commission in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434 (Lawler VP, Richards SDP and Lewin C) (*Telum)* found that the meaning of 'casual employee' in the FW Act should be determined with reference to any federal modern award or federal industrial instrument that applied to the employee. According to the Full Bench, the legislature intended that 'casual employee' for the purposes of the NES would be interpreted consistently with the categorisation of an employee as a 'casual employee' under a federal modern award or federal enterprise agreement (at [58]). In *Telum*, the *Manufacturing and Associated Industries and Occupations Award 2010* applied to the employees, which defined casual employee as: '…one engaged and paid as such…'. *Telum* appears to depart from reliance upon the common law in the construction of the expression 'casual employee' (at [22]–[23]). When one considers the many decades of judicial attention given by superior courts to understand the meaning of the expression 'casual employment', we find this approach to be narrow, simplistic and unconvincing.

Although casual employment is common, its precise definition has proved elusive.[7]

In *Doyle v Sydney Steel Company Limited*,[8] Starke J said:

> 'The description "casual worker" is not one of precision: it is a colloquial expression, and where, upon all the facts, there is a reasonably debatable question whether the work is casual or regular, the question is one of fact for the commission.'[9]

In that case, Dixon J referred to the English Court of Appeal decision in *Cue v Port of London Authority*[10] and the statement of Swinfen Eady LJ, who said:

> 'It is not a case of concurrent contracts of service. Perhaps these may be called successive contracts, because technically, even with casual employment, for the time of the actual employment there was a subsisting contract, but it was merely casual employment; that is to say, there was no running contracts under which the employer was entitled to require the labour of the workman or under which the worker was entitled to demand employment from the employer.'[11]

Dixon J said:

> 'In the case of such typical casual work as wharf labouring, all this causes little or no difficulty. But unfortunately what is casual employment is ill-defined. Indeed it is scarcely too much to say that it seems open to a tribunal of fact to treat most forms of intermittent or irregular work as casual. Where the employment involves a contract of service lasting some weeks followed by a long interval of idleness and then another such contract of service and so on, more difficulty arises, if the view is taken that the employee is a casual worker.'[12]

Dixon J was looking at a worker who had successive weeks of idleness in the period under consideration and had worked for a number of different employers.[13] Dixon J stated:

> 'The evidence shows that the worker's employment was always, so to speak, *ad hoc* and could not be expected to last indefinitely. The computation could not be made by means of any period which was so short that it would not reflect the intermittent character of his employment.'[14]

In relation to the question of casual workers, McTiernan J said (at 565):

> 'Each case is to be determined on its own facts, consideration being given not only to "the nature of the work" but also the way in which the wages are paid, or the amount of the wages, the period of time over which the employment extends, indeed all the facts and circumstances of the case, the question being one of fact…'[15]

In *Reed v Blue Line Cruisers Ltd*[16] *(Reed)*, Moore J, of the then Industrial Relations Court of Australia, considered the term 'casual employee' as follows:

> 'A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual' (at 425).

In *Reed*, the applicant had been employed as a master of a vessel operated by the respondent in Sydney Harbour. His written contract of employment expressly noted that he was a 'casual employee'. The written contract also had these terms:

> '3. Salaries
>
> Your salary will be $17.43 an hour and paid in weekly instalments to your bank account. This rate will be held to comprehend and include any entitlements that may arise by way of any award coverage. This includes all holiday pay and holiday loading'(at 421).

Regard was had to Regulation 30B of the *Industrial Relations Regulations* 1988 (Cth) (Regulations). His Honour noted that the Regulations excluded a person 'engaged on a casual basis for a short period' (Reg 30B(1)(d)). His Honour commented on that expression:

> 'It does not refer to a "casual employee", though plainly that expression and the word "casual" would, in many instances, be descriptive of the same type of employment' (at 424).

With respect to the characterisation of Reed's employment, either Reed or representatives of the company expressed the characterisation in a document. However, his Honour said these are:

> 'Simply matters to be taken into account in determining the true character of the employment' (at 424).

In *Reed*, Moore J identified that 'casual employment' must proceed on the basis that as a matter of fact the engagement has not been 'regular and systematic' and that casual

employment has 'inherent informality, uncertainty and irregularity' (at 425).

In looking at the facts in *Reed,* Moore J noted:

> 'It was accepted that Reed would do work he was offered. It was also the case that there was no issue that Reed had other employment commitments' (at 426).

In *Reed,* the worker had said that he was willing to do as many shifts as were available but the company needed to give him adequate notice (at 426). If given shifts on short notice he may not be able to do them because of 'other work commitments' (at 426).

His Honour found:

> 'It was a feature of Reed's engagement that he would do the work he was allocated subject to the company accommodating his other employment commitments. It was not a question of Reed being offered work on the basis that he could accept it or reject it for whatever reason whether that was because of other work commitments or a desire on his part to have the day off' (at 427).

His Honour also found that some other clauses of the written agreement were not indicative of informality and were not suggestive of casual employment. His Honour said this:

> 'Some further, though limited, support for the view that Reed's employment was not as a casual is to be found in clause 6 of the agreement of 20 October 1995 dealing with termination. It appears to me that a clause requiring termination by notice if there is no consensual termination in the absence of serious misconduct, is suggestive of a formal arrangement incompatible with casual employment as I earlier described it' (at 427).

Further, the agreement 'contemplated' that Reed would work as directed in accordance with the roster (at 427).

His Honour described Reed's employment as 'continuing employment' (at 427) and that his employment was 'regular' in that it also 'lacked the informality of casual employment'.

The Full Federal Court considered the notion of casual employees in *Hamzy v Tricon International Restaurants trading as KFC* (2001) 111 IR 198. This was also a case which looked at the terms of reg 30B of the *Workplace Relations Regulations* 2006 (Cth). The Full Court, when considering either the expressions 'employees engaged on a casual basis for a short period' or a 'casual employee engaged for a short period' said, at [38]:

> 'Both descriptions embrace an employee who works only on demand by the employer (or perhaps only by agreement between employer and employee) over a 'short period' (whatever that may be). The essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work. But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic.'

Another case of some relevance is *MacMahon Mining Services Pty Ltd v Williams*[17] *(MacMahon Mining),* which was before Barker J in the Federal Court of Australia. The facts in that case are set out in the headnote as follows:

> 'The employee was engaged under a written contract that described him as a casual employee, and which specified that he would receive an hourly rate of pay that included a loading in lieu of paid leave entitlements. He worked to a set roster until his employment was terminated. On termination he did not receive payment for any annual leave entitlements payment under s235(2) of the Workplace Relations Act, an entitlement that was part of the Australian Fair Pay and Conditions Standards (AFPCS)' (at 123).

The precise terms of the description of what the hourly rate of $40.00 per hour encompassed is set out at p125 of the report at [9]. In conclusion: 'The Federal Magistrate found that Mr Williams (the worker) was not a casual employee.' MacMahon Mining Services appealed.

In *MacMahon Mining*, Barker J said that one needed to take into account the fact that merely describing the contractual relationship as one of casual employment is not determinative. However, such terms 'provide a substantive indication of the parties' understanding of the nature of the relationship between them at the date of the execution of the contract' (at [22]).

In considering the matter, Barker J referred favourably to Moore J's comments in *Reed*:

> 'Nonetheless, the concept of a casual worker being involved in work which is discontinuous – intermittent or irregular – remains relevant and helpful in understanding the concept today' (at [33]).

He described Moore J's general observations as 'a helpful commentary on what the early authorities had to say on the topic of what casual employment is under the general law today' (at [34]).

Approval was given by Barker J to what was discussed in *Hamzy* with respect to a casual employee embracing 'an employee who works only on demand by the employer and that the essence of casualness is the absence of a firm advanced commitment as to the duration of the employee's employment or the days (or hours) the employee will work' (at [35]).

Barker J found at [38] that notwithstanding the label the parties put on the relationship as 'casual employee':

> 'It is well understood that the description supplied by such an instrument will not override the true legal relationship that arises from a full consideration of the circumstances: *see Hamzy* (2001) 115 FCR 78 at [24]-[25]].'[18]

Barker J at [17] of the decision set out the factors which influenced the Federal Magistrate's findings that Mr Williams was not a casual employee:

- 'At [36], that there was no expectation that Mr Williams would be available, on an ongoing basis to perform the duties required of him, in accordance with the roster until such time as the contract came to an end. This was not a contract where the availability of work was the subject of significant fluctuation one day, or one week, or one

month, to the extent so as to make the work, and hours of work irregular and uncertain. Rather, there was a stable, organised and certain roster that governed work until the contract was ended, either for some cause or because the head contract had come to an end.

- At [37], that there was a mutual expectation of continuity of employment subject only to termination of employment for cause, or termination as a consequence of the head contract ending.
- At [38], that this was not a case of an employee working for short periods of time on an irregular basis.
- At [39], the fact that Mr Williams is paid a flat hourly rate, that purported to include a loading for various leave entitlements, including annual leave, was more indicative of a casual relationship than not.
- At [40], that Mr Williams was not regularly contacted and asked to work, rather the work was organised and he knew when and where he was required, and how he was to get there.'

At [42], Barker J said that the Federal Magistrate's findings pointed squarely to the fact that the employee was not in casual employment, and went on:

> 'His engagement was not for the purpose or performance of work on an intermittent or irregular basis. The future was provided for. The nature of the work required of the employee was stipulated. A roster was in place which made clear the regularity of the employment. Travel arrangements were organised to facilitate it. All this suggests that this was an employment arrangement far beyond that of casual employment.'

For a good summary of the common law understanding of the concept of 'casual employment', see the Industrial Appeal Court of Western Australia's decision in *Melrose Farm Pty Ltd trading as Miles Away Tours v Milward* (2008) 175 IR 455 at [103]-[113].

Despite the fact that a national employment system has been in place since the WorkChoices legislation, to date, not all employees have been covered by it fully or for the whole period. However, since 1 January 2010 (save for state public sector and some local government employees) most employees have been. State legislation may still have some relevance with respect to accruals of annual leave, should a person who has been designated a casual employee be found not to be one. Some long-term employees can have their leave accruals straddling various enactments, both state and federal. In these circumstances, consideration needs to be given to the application of state legislation, such as the New South Wales *Annual Holidays Act* 1944 (NSW) (the Annual Holidays Act), and whether entitlements to annual leave have been preserved by transitional provisions.

Section 4(1) of the Annual Holidays Act refers to the accumulation of unaccrued annual leave payable on termination, and has its legislative equivalent in the FW Act in s90(2). Section 90(2) provides, when the employment of an employee ends, and the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

This section is explained in *Centennial Northern Mining Services Pty Ltd v CFMEU* [2015] FCAFC 100, and the reasons of the court are stated at [38]:

> 'It is undoubtedly true the National Employment Standards are minimum standards. *Centennial* was also right when it argued that s90 must be read as a whole and in the context of the National Employment Standards. But there is no reason to conclude that the primary judge did not do this. Nor does it necessarily advance *Centennial's* case to read the section in this way. Section 90(1) creates the minimum standard: payment at the base rate for ordinary hours worked. The effect of s90(2) is that if that is the rate at which the employee is paid when he or she takes annual leave, then that is the minimum amount that must be paid for any accrued untaken annual leave…'

Further, at [42]:

> 'The intention of the legislation is that untaken annual leave is payable at the rate at which he would have been paid had the employee taken it at the time the employee was eligible for it.'

Finally, at [45]:

> 'No such issue arises on termination when all accrued entitlements must be paid to wipe the slate clean.'

If there is any difficulty in relation to the transitional provisions between the Annual Holidays Act and the FW Act, the decision of Driver J in the Federal Circuit Court in *Smith v Quasar Constructions Pty Limited* [2015] FCCA 557 provides an excellent explanation and summary of these labyrinthine provisions.

Section 87 of the FW Act provides entitlement to annual leave at four weeks of paid annual leave. Section 87(1) and (2) says:

> 'An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.'

In conclusion, when advising a client concerning issues pertaining to casual employment, regard to the words used in a contract may not be as peremptory as Humpty Dumpty suggested to Alice. ■

Notes: **1** *The Modern Contract of Employment* by Ian Neil SC and David Chin, Law Book Co. 2012 at pp46-7 at [2.50]. **2** (2001) 207 CLR 21. **3** *Ibid*, [36]. **4** *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404-5. **5** (2001) 207 CLR 21, [58]. **6** (1978) 52 ALJR 407, 409. **7** *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 146 (White J). **8** (1936) 56 CLR 545. **9** *Ibid*, 551. **10** (1914) 3 KB 892. **11** *Ibid*, 892-900. **12** *Doyle v Sydney Steel* (1936) 50 CLR 545, 555. **13** *Ibid*, 556. **14** *Ibid*, 557. **15** *Stoker v Wortham* (1919) 1 KB 499, 503-54 (Swinfen Eady MR). **16** (1996) 73 IR 420. **17** (2002) 201 IR 123. **18** *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 (30 November 2010), [38].

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