13 WENTWORTH

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW

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The most significant development in Australian employment law in recent years has been the troika of decisions in the High Court in *WorkPac Pty Ltd v Rossato*[1] (Rossato), *Construction Forestry Maritime Mining and Energy Union v Personnel Contracting Pty Ltd*[2] (Personnel Contracting) and *ZG Operations Australia Pty Ltd v Jamsek*[3] (Jamsek).

For reasons upon which I will expand that troika of decisions underlines the very strong reasons for employers and employees to ensure that every employment relationship is documented in a written contract; that the contract accurately reflects their agreement and that it is kept up to date.

The employment relationship and contracts of employment

The central conception of Australian employment law is the distinction between the employment relationship on the one hand and the contract of employment on the other. Because they are two separate concepts the law recognises that the employment relationship may be brought to an end (for example by the employer wrongfully terminating the relationship) while the contract of employment remains on foot (in the example given, pending the employee's acceptance or otherwise of the repudiation of the contract).[4]

The employment relationship is a legal relationship: that is, it is a relationship comprised of legal rights and duties. The sources of those rights and duties are the contract of employment, statute and the general law (including equity). So for example while an employment relationship subsists the employee will ordinarily be a fiduciary of the employer and equity imposes upon the employee a number of fiduciary duties.

There are two main ways in which the contract of employment on the one hand and the employment relationship on the other interact with and affect each other. First, the employment relationship can affect the construction and content of the contract of employment. As the plurality observed in *Commonwealth Bank of Australia v Barker*[5]:

> "The employment relationship, in Australia, operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment."

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[1] [2021] HCA 23; 95 ALJR 681.
[2] [2022] HCA 1.
[3] [2022] HCA 2.
[4] *Concut Pty Ltd v Worrell* [2000] HCA 64; 75 ALJR 312.
[5] French CJ, Bell and Keane JJ at (2014) 253 CLR 169 at 178 [1].

The second interaction works in the opposite direction. That is the construction and content of the contract of employment can inform or answer the question whether particular statutory provisions apply to the employment relationship and in that way affect the relationship. Those two distinct directions of interaction give rise to room for dispute and sometimes confusion. If it is the contract to which one looks to decide whether a statutory provision applies to the relationship, and the application of that statutory provision to the relationship would inform the construction and content of the contract, there is obvious room for debate about where to start the analysis. In its troika of recent decisions the High Court has provided very clear answers to those questions when the question is whether the *Fair Work Act 2009* and its national employment standards provisions apply to the relationship.

Rossato

The question in Rossato was whether Mr Rossato was entitled to annual leave in accordance with ss.86, 87, 90, 92, 93 and 94 of the *Fair Work Act*. The answer to that question depended upon whether Division 6 of Part 2.2 of the Act applied to Mr Rossato. Section 86 provided that that Division "applies to employees, **other than casual employees**". The question was "Was Mr Rossato a "casual employee" within the meaning of s.86?"

A counterpart question arose under the WorkPac Enterprise Agreement which provided annual leave entitlements for employees performing Mr Rossato's role "other than casual employees". Thus the question under the Enterprise Agreement was the same as under the *Fair Work Act*. Was Mr Rossato a "casual employee"?

The Court accepted the basis upon which the parties argued the case that a "casual employee" is an employee who has no "firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work".

In reasoning of wide import, which was also dispositive of the dispute in Rossato, six Judges of the Court[6] held:

> "A Court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent that Bromberg J expressed the notion that the characterisation exercise should have regard to the entirety of the employment relationship his Honour erred. …
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> Nothing in the statutory framework within which the employment relationship in the present case has been established relevantly inhibits the freedom of parties to enter into a contract for casual employment. So far as casual employment is concerned, the Act leaves the making of such an arrangement to be agreed between employer and employee."

The plurality further reasoned:

> To insist that nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee is also necessary in order to avoid

[6] Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ at [57] and [58].

> the descent into the obscurantism that would accompany acceptance of an invitation to enforce "something more than an expectation" but less than a contractual obligation. It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain.[7]

Mr Rossato's employment was pursuant to six separate contracts in writing and was regulated by an Enterprise Agreement. The Court proceeded to closely examine the terms of those contracts and of the Enterprise Agreement. There was not to be found in those terms any firm advance commitment as to the duration of Mr Rossato's employment or to the days or hours that he would work and it followed that he was a casual employee.

The immediate significance of the decision in Rossato to the characterisation of an employee as casual or not was reduced by the Parliament passing amendments to the *Fair Work Act* dealing with the definition of casual employment prior to the judgment in Rossato.

Those amendments do not diminish the importance of the decision in identifying the only point from which the analysis proceeds in determining whether an employee is a causal employee: it is only binding legal instruments which are relevant and so attention is directed to any contract, award or Enterprise Agreement which governs the employment relationship; and regard may not be had to anything else.

Personnel contracting

Personnel Contracting was directed to an even more fundamental question.

Personnel Contracting was a labour hire company in the construction industry. It engaged Mr McCourt a 22 year old British backpacker on a working holiday visa to undertake the duties of an unskilled builder's labourer on a construction site being operated by Personnel Contracting's client, Construct.

The so called Administrative Services Agreement was the only contract entered into between Mr McCourt and Personnel Contracting. It characterised Personnel Contracting as facilitating the placement of independent contractors in the construction industry and characterised Mr McCourt as a self-employed contractor.

The question for the Court was whether Personnel Contracting was a "national system employer" for the purposes of the *Fair Work Act* and Mr McCourt a "national system employee".

The answers to those questions determined whether the *Fair Work Act 2009* regulated the relationship between Mr McCourt and Personnel Contracting or had no application to it.

There were then two key matters in play in Personnel Contracting: first, how and where to draw the line between an employment relationship on the one hand and an independent contractor relationship on the other; and second, to what material might the Court have regard in drawing that line.

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[7] At [63].

Independent contractor/employee

As to the first question the plurality[8] identified as a meaningful framework to guide the characterisation of the relationship the question whether the labour supplier is conducting his or her own independent business as distinct from serving in the business of the employer: what the plurality described as the "own business/employer's business" dichotomy.[9]

Their Honours warned nevertheless that the central question remained whether or not a person is an employee and that the own business/employer's business dichotomy may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs. Nevertheless their Honours embraced the dichotomy as bearing directly upon the question whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.[10]

Gordon J with whom Steward J relevantly agreed, disagreed with the plurality's reliance upon whether the person was carrying on business of their own. Gordon J reasoned that the better question to ask is whether the person is contracted to work in the business or enterprise of the purported employer. Her Honour saw the advantage in that approach as being that it was focused on the contract and the nature of the relationship disclosed by the contract and did not permit any enquiry into subsequent conduct.[11]

On the first question Gageler and Gleeson JJ must be considered to be in the minority as to their reasoning.[12] They adopted a fundamentally different doctrinal basis for the characterisation of a relationship as one of employment. Their Honours identified that the ultimate question will always be whether a person is acting as the employee of another or on his or her own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

In every case it was the totality of the relationship between the parties which their Honours said must be considered.[13]

To what can the court look?

The second issue in *Personnel Contracting* was to what might the Court have regard in answering the first issue. On that second issue the plurality further developed the emphasis in Rossato of characterising the legal relationship in question by reference only to enforceable legal rights and duties. Their Honours referred, in addition to any employment contract to statutory provisions and provisions of awards.

The Administrative Services Agreement was in writing and constituted a complete agreement it would only be appropriate to look beyond that document:

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[8] Kiefel CJ, Keane and Edelman JJ.
[9] At [35] and [36].
[10] At [39].
[11] At [182] and [183].
[12] Noting however that all judges, other than Steward J agreed as to the outcome – and so all reasoning of all judge's apart from Steward J's additional comments is reasoning in support of the Court's decision and to that extent authoritative.
[13] At [121].

(a) in accordance with the usual law of contractual construction to mutual conduct at the time the parties entered into the contract to provide context to its construction; or

(b) to the extent that there is a contention that the contract is a sham, was entered into by reason of undue influence or had been varied by subsequent conduct regard may be had to evidence bearing on those questions.

Thus the plurality reasoned:

> "The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider "the totality of the relationship between the parties" by reference to the various indicia of employment that have been identified in the authorities. What must be appreciated, however, is that in a case such as the present, **for a matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice** but bearing no necessary connection to the contractual obligations of the parties."

That did not mean that Mr McCourt was an independent contractor because that was how the contract described him. Indeed, the plurality reasoned in terms which called into question whether the parties' description of the relationship as an independent contractor relationship was even relevant to the question of characterisation for the Court. The Court's task was "to characterise the relationship by reference to [the parties'] rights and duties" and the opinion of the parties on that question of law is irrelevant.

Gageler and Gleeson JJ also disagreed with the plurality on the second question and their reasoning on that question must also be regarded as in the minority. Their Honours concluded that in characterising a relationship as one of employment it was permissible and necessary to have regard not only to the terms of any contract but also to the manner of its implementation. That having been said their Honours in deciding the case recognised they were engaged in an exercise of legal characterisation and identified three reasons for the relationship between Mr McCourt and Construct being one of employment. First, that the Administrative Services Agreement provided for Mr McCourt to supply Construct with nothing other than his labour combined with the fact that he in fact supplied that labour and was paid an agreed hourly rate for that supply. Second, that Mr McCourt's supply of labour was clearly for the purposes of Construct's business and was not in any meaningful sense for the purpose of any business of his own and third, that the effect of the Administrative Services Agreement was that Mr McCourt was subject to the direction and control of Construct's client because of the combined operation of the Administrative Services Agreement and Construct's contract with the client.

Gordon J, with Steward J agreeing, reasoned to like effect to the plurality:

> Where the parties have entered a wholly written employment contract, as in this case, the totality of the relationship which must be considered is the totality of the legal rights and obligations provided for in the contract, construed according to the established principles of contractual interpretation. In such a case the central question

> neither permits nor requires consideration of subsequent conduct and is not assisted by seeing the question as involving a binary choice between employment and own business."

All judges, other than Steward J found that Mr McCourt was an employee: his description as an independent contractor was simply irrelevant because the substantive rights and duties created by the Administrative Services Agreement showed that he was obliged to work as part of Personnel Contracting's business and in doing so was wholly subordinated to the directions of Construct, Personnel Contracting's client.

In reasoning which was unusual in the High Court Steward J agreed with Gordon J's statement of principle (which led Gordon J to conclude that Mr McCourt was an employee) but disagreed with the outcome because to agree in the outcome involved disapproving a number of long standing intermediate appellate court decisions. Of importance to the future is Steward J's agreement with Gordon J's statement of principle.

Personnel Contracting – the result

In the result while there remains some uncertainty as to the precise test as to where to draw the line between an employee and independent contractor a clear majority of the Court has held that the characterisation of a relationship as one of employment is to be undertaken by reference only to enforceable legal rights and duties and that where they are sourced in a contract in writing regard may only be had to the contract and other material to which regard may be had under the usual principles of contractual construction. No regard may be had to material post-dating the contract except in cases where there is a claim that the contract is a sham, was entered into by reason of undue influence or has been amended.

Further, the description of the legal status of the relationship by the parties to the contract is not decisive and may be given no weight. The question for the Court is the legal consequence of the substantive legal rights and duties created by the contract.

Jamsek

In Jamsek the issue was again whether Mr Jamsek was an employee.

However the commercial context was different from *Personnel Contracting*. There was no question of labour hire. Rather Mr Jamsek worked since 1977 for ZG Operations and only for ZG Operations driving a delivery truck for 40 years from 1977 to 2017.

For the first 8 or 9 years of the relationship Mr Jamsek was undoubtedly an employee of ZG Operations. However in 1985 of 1986 as part of a restructuring the company indicated it would no longer employ Mr Jamsek and that it would only continue to use his services if he purchased the truck that he used and entered into a contract to carry goods for the company.

Mr Jamsek and his wife then entered into a partnership, the partnership purchased the truck and the partnership executed a written agreement with the company for the provision of delivery services.

Applying the principles articulated in *Rossato* and *Personnel Contracting* the plurality found that the partnerships were engaged in the conduct of their own businesses and that Mr Jamsek was not an employee of JG Operations. That conclusion was reached conformably with those reasons, by reference to the contract between JG Operations and the partnerships.

Importantly for observing the likely future directions of employment litigation the plurality reasoned:

> "61 On the orthodox approach to the interpretation of contracts, regard may be had to the circumstances surrounding the making of a contract. The 1986 contract between the partnerships and the company came to be made because of the company's insistence that the only ongoing relationship between the respondents and the company would be that established by the 1986 contract and that the partnerships would own and operate the trucks which would transport the company's deliveries. Given that the genesis of the contract was the company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it is difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.
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> 62 The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company. To say this is not to suggest that disparities in bargaining power may not give rise to injustices that call for a legal remedy. The law in Australia does provide remedies for such injustices under both the general law and statute. Those remedies were not invoked in this case. As has been noted earlier, the respondents did not claim that the contracts with the partnerships were shams. Nor did they seek to make a claim under statute or otherwise to challenge the validity of the contracts that were made by the partnerships. In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation."

Conformably with their reasons in *Personnel Contracting* Gageler and Gleeson JJ would not limit the matters that were relevant to the characterisation of the relationship to the contract. Nevertheless, their Honours agreed that Mr Jamsek was not an employee and in doing so identified two features of the relationship only which were sufficient to come to that conclusion. The first was that Mr and Mrs Jamsek were obliged to, and did, maintain the truck which was used to perform the contract. A relationship of employment is a relationship of personal service. Personal service is not inherently inconsistent with the individual who provides service being responsible for the physical means by which his or her service is provided. Their Honours went on to give as examples bicycle couriers who provide their own bicycles may nevertheless be employees. However, where work contracted for and actually performed by an individual and paid for involves use of substantial items of mechanical equipment for which the provider of the work is wholly responsible the personal is overshadowed by the mechanical. Thus the inclusion of the truck and its maintenance pointed inexorably against the relationship being one of employment. The second was that the contracting party was the partnership of Mr and Mrs Jamsek and not Mr Jamsek alone.

A cross-appeal highlighted the need for close attention to each statutory question which is addressed in an employment dispute. One of the claims made by Mr Jamsek was for unpaid superannuation contributions. The *Superannuation Guarantee Act* provided that:

> "If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

The High Court was unanimous in finding that the conclusion that Mr Jamsek was not an employee for the purposes of the *Fair Work Act* was not an answer to the question whether he was "an employee" for the purposes of the *Superannuation Guarantee Act*. Even though the contract was with the partnership and was for the supply of trucking services it did not follow that it was not a contract that was principally for the labour of Mr Jamsek. As a result that question was remitted to the Federal Court for further hearing.

At their narrowest the troika of High Court decisions tell us that in deciding whether a relationship is an employment relationship so that those working under it are employees and those obtaining the benefit of the work are employers and in deciding whether any employee is a casual employee regard may only be had to the contract of employment and to other instruments which create enforceable legal rights or duties forming part of the employment relationship.

That is so unless there be a claim to set aside or vary the contract on the basis that it is a sham, was procured by undue influence or has been varied by subsequent conduct. Added to that list is necessarily any claim for variation of a contract under statutory provisions, including the unfair contract provisions of the *Australian Consumer Law* to which I will return.

Absent a claim to set aside a contract, in cases of contracts in writing the only evidence that will be relevant and admissible on the characterisation question will be that which is relevant and admissible under general principles of contractual construction. Evidence of post-contractual conduct will be irrelevant as will generally any evidence that does not bear upon context known to both contracting parties.

The firmness and clarity of the majority reasoning in the troika of decisions is such that there is no reason to think it will not apply to other questions of characterisation arising in employment law where the statutory question is one of legal relationship.

Implications

Employment contracts should be in writing

The High Court's reasoning provides a clear opportunity for employers to greatly limit the scope of disputes in which they might become embroiled arising out of employment. An employer with an effectively drafted employment contract will be able to point to the contract as providing the unimpeachable answer to many issues that might arise in an employment relationship. By greatly limiting the scope of factual enquiries which might occur on such claims the High Court's reasons not only confine the scope of potential employment litigation, they greatly confine the scope for dispute in the first place.

That is not to suggest that all conduct in the conduct of an employment relationship will be irrelevant to employment disputes. Far from it.

Nor is it to suggest that employers now have carte blanche on what they may include in a contract of employment. That too is a very long way removed from legal reality.

The clearest indication of the continuing relevance of actual conduct and of continuing significant limitations upon employers is found in the terms of the national employment standards in the *Fair Work Act*. It is sufficient to consider the first of those which concerns maximum weekly hours.[14] The prohibition in that section is on an employer requesting or requiring an employee to work more than a specified number of hours in a week unless the additional hours are reasonable. Further, an employee has a right under that provision[15] to refuse to work additional hours if they are unreasonable.

In the face of that employment standard, it would not assist an employer to include in a contract of employment a provision for direction of employees to work such hours as the employer determines. Depending upon the construction of such a provision it might itself be a breach of the national employment standard in requiring the employee to work more than the specified number of hours and in any event the contractual term could not operate to avoid the prohibition on the employer requesting the employee to work the additional hours when and if the occasion for those additional hours to be worked arose. It follows that a dispute on whether there has been a contravention of the maximum weekly hours employment standard is one which will raise questions of practical conduct during the employment relationship.

As importantly, if a contractual provision is inconsistent with the national employment standard set by the *Fair Work Act* by prescribing a standard which is lower than that available to the employee under the national employment standard it is contrary to s.61(1) of the *Fair Work Act* and therefore contrary to public policy and void.[16]

The result is that employers must ensure close attention is paid to the National Employment Standards both in drafting of contracts and in the conduct of employment relationships.

Employment Contracts should be accurate

A great deal of Australian employment practice is built on employers and their advisers applying labels – such as independent contract or casual – to their relationships with employees and relying upon those labels to follow what may be an industry practice.

As Australian labour law continues its transition from industry-wide practices based on the awards of last century to the approach exemplified by the troika of High Court decisions of relationships based on individual contracts a continuation of the approach of labelling of relationships is replete with risk.

The decision in Personnel Contracting is just one example of those risks: Personnel Contracting and its clients proceeded on the basis that the label of independent contractor was enough. They had in their favour a number of intermediate appellate Court decisions – the collection of which was sufficient to persuade Steward J that the label should be given effect. But the clear majority of the High Court disregarded the label and went directly to the substance of the legal relationships created by the contracts and found the relationship between Mr McCourt and Personnel Contracting to be that of employment. The result was that the National Employment Standards, including with respect to leave, applied.

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[14] Section 62.
[15] Section 62(2).
[16] *Construction Forestry Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* (2012) 213 FCR 549.

That is one example of the risks of relying on labels rather than substance. There is another form of labelling, which is not uncommon, but invites a further substantial risk particularly in a tightening labour market. A clear learning from *Rossato* is that all that is required for the characterisation of an employee as casual is to ensure that there is no firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work.

It is of course relatively easy to avoid giving such a firm advance commitment in a contract of employment and it is an easy drafting task to make explicit that there is no such firm advance commitment. But employers who draft their contract that way need to be prepared in the current labour market and particularly with Generation X employees for it to be the employee who takes advantage of the absence of any firm advance commitment – by simply not turning up and giving no notice. An employer who has expressly contracted that there is no advance commitment cannot complain about that.

Another topical example concerns working from home arrangements. Where a person is unambiguously an employee because they are working within the business of the employer but they are either required or permitted to work from home, what are the responsibilities of the employer and employee for the provision of desks, computers and the like? They are questions of potentially substantial economic consequence to the parties to the employment contract and unlikely effectively to be dealt with by silence.

Employment contracts should be kept up to date

In a great many businesses employment relationships evolve over time. Only in a minority of businesses is attention paid to keeping employment contracts up to date with the relationship.

The troika of High Court cases powerfully underlines the risks to both parties of allowing the relationship to move ahead of the contract: if a dispute arises involving characterisation of the legal relationship it will be to the contract only that regard will be had. Unless conduct amounts to a variation of the contract regard will not be had to it.

The home office example again makes the point. There are many employers who have contracts for the performance of office work that specify the employer's office location as the place at which work is to be performed. Many of those employers have required over the last 2 years, and continue to permit, work to be performed from home. If by that conduct the contract has been varied, what are the terms of the variation concerning provision of computers, desks and the like?

Future directions

Australian Consumer Law review

I referred above to the reasoning of the plurality in *Jamsek* where their Honours pointed to the possibility of statutory review of contracts.

One of the matters for employers to consider when choosing between independent contractor engagements and employment engagements is the operation of the *Australian Consumer Law*. The definition of "services" in the Consumer Law expressly excludes services supplied under a contract of service but otherwise expressly includes services conferred under a contract in relation to the performance of work.

As a result the characterisation of a contract as being for work as an independent contractor and not as an employee will, in almost every case, result in the potential application of the unconscionable conduct provisions of the Consumer Law having application.

In the case of standard form contracts it will also result, in almost every case, in the unfair contract provisions of the Consumer Law applying.

It is to be expected that a result of the troika of High Court decisions to which I have referred will be fewer attempts to bring independent contracting arrangements within the *Fair Work Act* but a growth in litigation under the Consumer Law concerning the same contracts. Employers who are minded to seek to avoid the rigours of employment law by adopting independent contracting arrangements should carefully consider the consequence of their election: which will in many cases include exposure to the norms and remedies of the Consumer Law.

In managing independent contractor/employment arrangements it is likely to become more important to have regard to the prohibitions on so-called "sham arrangements" found in ss.357 and 359 of the *Fair Work Act*. Section 357 contains an express prohibition on misrepresenting an employment relationship as an independent contractor arrangement. That is, it is a prohibition directed at the very form of conduct which featured in *Personnel Contracting*.

Section 358 contains a prohibition on dismissal or threatening to dismiss an employee in order to engage the individual as an independent contractor to perform the same or substantially the same work. That is a prohibition likely to extend to precisely the transaction which underpinned the decision in *Jamsek*.[17]

Casual employment

As earlier noted the Parliament has enacted substantial new provisions dealing with casual employment.

The new provisions in effect codify the law in *Rossato* so that whether an employee is a casual employee is a question of construction of the contract and the relevant question of construction is whether or not there is a firm advance commitment as to the duration of employment.

Where an employee is a casual employee and the employer is not a "small business employer"[18] and the employee has been employed by the employer for a period of 12 months including pursuant to a regular pattern of hours on an ongoing basis for at least the last 6 months there is a process now prescribed in s.66AA to 66M requiring that the employee have the opportunity to become a permanent employee. The permanent employment will be either part-time or full-time depending upon the pre-existing pattern of work.

The employer must permit an employee who makes a request in accordance with the legislation to transition to permanent employment status unless the employer has reasonable grounds to refuse such a request.

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[17] Noting that the transaction in *Jamsek* occurred in 1977 substantially pre-dating the enactment of s.358.
[18] Employing fewer than 15 employees.

Those new provisions have the obvious effect of imposing a significant new compliance obligation on larger employers of casual employees. Employers affected by those provisions must carefully consider their payroll systems to ensure that employees who become entitled to consider transitioning are provided with the invitation to transition to permanent employment in the form and within the timeframes permitted.