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Workers can double-dip casual and holiday pay

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Workplace correspondent

Regular shift workers who have received 25 per cent pay loadings in lieu of benefits such as annual leave may be able to double-dip billions of dollars of annual leave backpay following a Federal Court ruling on the definition of casual work.

In a huge win for unions and class-action law firms, the full court of the Federal Court handed down its long-awaited decision, which held that regular, ongoing casuals are entitled to paid annual leave, paid personal/carer's leave and paid compassionate leave. Employers cannot use extra pay to set off that liability.

The ruling upturns the common understanding of casuals as those who are paid an extra 20 to 25 per cent loading in lieu of permanent employee entitlements, defining them by their pattern of work instead.

The decision has spurred calls for urgent government intervention. Employers fear the decision will affect between 1.6 million and 2.2 million regular casuals across the economy, from retail and hospitality to mining and healthcare, and exposes businesses to a backpay bill of up to $8 billion.

Industrial Relations Minister Christian Porter, who had intervened to support employers in the case, said the decision was another hit to businesses already struggling with the coronavirus crisis and said the government was open to changing the Fair Work Act.

"What appears fairly obvious on the face of the decision is that it has immediate practical implications for the bottom line of many Australian businesses at a time when so many have taken a huge hit from the COVID-19 pandemic," he said.

"There is of course potential for an appeal in the matter and if that were to occur, the government would closely consider the merits of intervening.

"Given the potential for this decision to further weaken the economy at a time when so many Australians have lost their jobs, it may also be necessary to consider legislative options."

Australian Industry Group, which defended the case, said Parliament

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Innes Willox

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needed to urgently change the Fair Work Act to define a casual as someone who is "engaged and paid as such".

"An employee engaged as a casual and paid a casual loading [or a loaded rate that accounts for a casual loading] should not be allowed to turn around years later and claim the entitlements of a permanent employee, like annual leave," Ai Group chief executive Innes Willox said.

"With unemployment and underemployment rapidly increasing during the COVID-19 crisis, employers need to be encouraged to retain and take on casual employees – not deterred from doing so."

The case upholds the precedent WorkPac v Skene ruling in 2018, where the Construction, Forestry, Maritime, Mining and Energy Union successfully argued that a casual miner who had regular and predictable shifts was entitled to permanent employee benefits.

Instead of appealing to the High Court, labour hire firm WorkPac sought to challenge the judgment in a new full court, using a different employee, Robert Rossato.

WorkPac argued Mr Rossato was a casual because of the lack of "firm advance commitment" as to his days and hours and that this was to be determined solely through his written contract of employment, not the way he performed his job.

However, in a 273-page ruling, the full court justices Mordy Bromberg, Richard White and Michael Wheelahan unanimously held that Mr Rossato was not a casual based on his pattern of work, "even taking WorkPac's case at its highest".

"The court has found that the parties had agreed on employment of indefinite duration which was stable, regular and predictable such that the postulated firm advance commitment was evident in each of his six contracts."

Justice Bromberg said if employers failed to pay the National Employment Standards, which included leave, they breached the Fair Work Act and risked civil penalties.

"That would be so even if Mr Rossato had agreed to accept something else in lieu of or in substitution of the entitlements because WorkPac and Mr Rossato cannot contract out of those entitlements or the timing and manner of their provision."

Since the WorkPac precedent, the CFMEU has launched a $12 million class action against WorkPac over unpaid entitlements while Canberra law firm Adero has filed its own $84 million claim against the firm.

BHP Billiton, Hays Recruitment, Programmed and Stellar have also been hit with multimillion-dollar class actions.

The cases, effectively suspended pending the Rossato case, are now expected to move forward rapidly.

CFMEU national president Tony Maher said: "This is a fantastic decision that puts an end to the 'permanent casual' rort that has become a scourge in the coal mining industry and across the workforce. When a job is full-time, regular and ongoing, it is permanent and deserves the security and entitlements that come with permanent work."

He said the union would now fight to "restore rights and lost pay for casual labour-hire workers across the coal mining industry who have been illegally ripped off".

Australian Council of Trade Unions secretary Sally McManus said the decision was a "massive step forward" in fighting insecurity of work.

The mining union estimates that about 40 per cent of coal miners are now employed as labour hire casuals, performing the same work as permanent staff but with no job security or entitlements and earning about one-third less.

However, the ruling would also apply to businesses across the economy as

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long as they employ casuals with regular and predictable shifts. More than half the total casuals work in businesses with less than 20 employees.

Australian Mines and Metals Association chief executive Steve Knott said the decision would be "highly damaging to business confidence and will see more internationally-funded class action law firms … circling Australian businesses like sharks".

Opposition industrial relations spokesman Tony Burke said that if there was any "double dipping" it was employers who took advantage of the insecurity of casual work while still getting permanent hours out of their workers.

The court ruling is a huge victory for unions and class-action law firms.