



# Notable Case

## Casual Employment – “regular and systematic”

Date of decision: 25 January 2018

### Overview

A casual employee at a health service appealed a decision to continue their employment as casual rather than convert them to permanent. The employee was engaged casually to fill vacancies arising from planned and unplanned leave of permanent employees at the health service. A roster review confirmed the employee had no fixed days or times of work, no guaranteed hours of work, had some weeks with no work, and was utilised to backfill emergent or planned leave.

Over a three year period, there were only eighteen weeks where the employee did not work any hours, which is equivalent to the annual and sick leave entitlement for a full time employee for the same period.

### Decision

The Commissioner found that the question of whether the basis of employment is regular and systematic should not be considered by reference to the week by week hours of the employee but a more global approach should be taken. On that basis, it was found there was a pattern of engagement.

The employee was engaged most weeks of the year, showing an ongoing reliance on the employee's services. The fact that the days worked and the hours worked on each day varied did not preclude a finding that overall the employment was regular and systematic. It was found that the employee was employed on a regular and systematic basis for at least two years.

While the question of whether there were genuine operational reasons was returned to the health service chief executive for a decision, the Commissioner tended to the view that a substantive vacancy is not required to convert a casual employee to permanent employment. There was some discussion of whether the existence of funding to backfill planned and emergent absences was evidence of an ongoing role, and of the impact of conversion on the available hours for the employee, as well as the difficulties of rostering or finding meaningful work for a permanent part-time employee in the same way as for a casual used for backfilling absences. These issues were left for the consideration of the chief executive of the health service.

### Key messages and reminders for managers

- Consider the overall employment arrangement and total employment period when determining whether a casual employee is employed on a regular and systematic basis. Week to week variations in hours and days worked do not preclude a finding that overall employment is regular and systematic.
- Work may be regular if, over time, it has been usual or normal for the employee to be engaged.



- Periods where an employee does not work any hours does not preclude a finding of regular and systematic employment, particularly where the periods are similar to annual leave and sick leave entitlements of a full-time employee.
- Systematic employment or a pattern of engagement may be found where there is an ongoing reliance on the employee's services over a period of time. An employee employed to backfill absences most weeks of the year may have a pattern of work even though the days and hours of work vary from week to week.
- A permanent vacancy is not required before conversion can occur – provided there is an ongoing need for the role.
- Failure to make a decision is a deemed decision to continue the casual employment status of an employee, and may be found not fair and reasonable if no reasons were provided on the relevant criteria.
- An agency *may consider* a casual employee for conversion under the casual conversion directive where engaged as a temporary employee at the time of applying for conversion if:
  - it is unclear that the employee had a reasonable expectation of ongoing temporary employment; and
  - the employee's predominant employment with the agency has been as a casual employee.