

## EMPLOYMENT LAW

**Williams Love & Nicol is a premier commercial law firm providing full client services from our base in Canberra. Our practice is focused on providing commercially realistic and practical advice that is timely, accurate and delivers value for money.**



**JOHN WILSON - PARTNER,  
EMPLOYMENT AND INDUSTRIAL  
LAW GROUP**

### When is a Casual Not a Casual?

Case: *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321

Employers might be forgiven for thinking that a casual employee is simply an employee who is engaged as such under their relevant contract, especially when the employee is paid a loading in lieu of paid leave entitlements.

However these assumptions have been called into question in the recent single judge decision of the Federal Court in *Williams v MacMahon Mining Services Pty Ltd*.

The court found that even where an employee working on a regular basis contracts with their employer as a casual employee, the employer may be liable, at least under the (now repealed) *Workplace Relations Act*, to pay that employee accrued annual leave entitlements on termination.

What relevance, if any, this decision will have on casual employees engaged under the *Fair Work Act* is yet to be determined. In principle though, the ramifications are significant - particularly in the retail and hospitality sectors where the incidence of regular and continuous casuals is particularly high.



### Next newsletter:

What can employers require employees to do? What constitutes a 'reasonable and lawful' direction?

Find out in the next edition of Williams Love & Nicol Lawyers' Employment Law newsletter.

### The Decision

Mr Williams was employed for over a year by MacMahon and paid a flat hourly rate of \$40.00 as a "casual miner".

For the final eight months of his employment Mr Williams consistently worked the following regular pattern: seven consecutive day shifts, then seven consecutive night shifts, and then had seven days off.

The contract of employment even stated that: 1) 'Mr William's pay included an amount in lieu of paid leave entitlements,' and 2) 'The contract could be terminated with one hours notice.' Despite this, the culmination of all other factors caused the court to hold that Mr Williams was not a casual employee.

Essentially this is because the essence of casual employment is the absence of a firm and advanced commitment.

It is, of course, possible that the reasoning in *Williams* will not be followed in future Federal Court cases or found not to apply to the FW Act.

In the interim, employers cannot be certain that their obligation to provide employees (particularly so-called 'permanent casuals') with annual and personal leave is displaced simply through the description of an employee as 'casual' and the payment of a loading expressly in lieu of such entitlements.

## WORKPLACE INVESTIGATION

### Operation Jarek: NSW Independent Commission Against Corruption

Williams Love and Nicol is currently providing advice and representation to several local councils in relation to the ICAC investigation into the provision of gifts and benefits to public officials known as 'Operation Jarek'.

We have broad ranging experience in acting for local government and have provided assistance to a number of councils in relation to the carrying out of investigations into the conduct of council officers, including in relation to possible breaches of the Code of Conduct.



Williams Love & Nicol Lawyers is now on Twitter! Our page will provide updates on legal news and firm information, as well as linking to popular articles on our website. You can follow us 140 characters at a time:  
<http://twitter.com/#!/wlnlawyers>

### WILLIAMS LOVE & NICOL LAWYERS

- John Wilson: NSW Accredited Specialist in **Employment and Industrial Law**
- Alan Bradbury: NSW Accredited Specialist in **Planning and Local Government Law**
- Mark Love: NSW Accredited Specialist in **Business Law**
- David Toole: NSW Accredited Specialist in **Property Law**

There are times in the life of an organisation when simply leaving a problem to resolve itself internally is no longer viable. Such situations often involve uncertainty as to what has occurred, what is happening, or what may happen. It might be a case of alleged harassment, a breakdown in workplace harmony, or inappropriate conduct.

Or it might involve allegations of misbehaviour, or even suspicions of criminal conduct, such as fraud or theft of information. These are not situations to leave to the unqualified, no matter how well intentioned.

As Canberra's premier employment law specialists, Williams Love & Nicol Lawyers is uniquely placed in having its own integrated in-house investigation capacity. We are able to undertake discreet factual inquiries of the highest standard into a broad range of commercial concerns.

This unique in-house service provides seamless integration between our highly experienced and legally trained investigative consultant Glenn Jones and our Employment and Industrial Relations partner John Wilson, who understand the focused use of investigations to support legal and human resource activities, and at a reasonable price.

Importantly, when you engage Williams Love & Nicol Lawyers to perform your workplace investigations, all of your communications with us are protected by legal professional privilege. This is not the case with non-lawyer investigation firms.

### Glenn Jones, Workplace Investigations Consultant

With nearly four decades of experience conducting complex criminal, Code-of-Conduct, grievance and similar investigations, including sophisticated fraud inquiries, Glenn is one of the most experienced investigations and intelligence specialists in the region.

Glenn was a decorated NSW police officer for nearly two decades. His service included managing sensitive national/international organised crime investigations and intelligence activities with the Australian Bureau of Criminal Intelligence.

After leaving the police, Glenn took up a senior position with Australian Customs where he was involved in managing border protection intelligence and complex international commercial investigations for six years. Glenn was then appointed to the role of Director of the Fraud Unit within the Aboriginal & Torres Strait Islander Commission.

After more than thirty years of government service, Glenn took up the position of Principal Forensic Consultant, first with WalterTurnbull and then with PricewaterhouseCoopers, before joining Williams Love & Nicol in 2011.

