Adding to COVID-19 woes for business with *not so casual* underpayments – *WorkPac Pty Ltd v Rossato [2020] FCAFC 84*

Date:	21 May 2020
Court:	Federal Court of Australia
Judge(s):	**BROMBERG, WHITE AND WHEELAHAN JJ**
Judgment date:	20 May 2020

Catchwords:

Mischaracterisation of casual employee – Indicia of casual employment – Firm advance commitment - Application of *Fair Work Regulations 2009*, Reg 2.03A

Restitution – Set-off against leave entitlements under the *Fair Work Act 2009* (Cth) and an enterprise agreement

Abstract:

WorkPac Pty Ltd (WorkPac) engaged Mr Rossato as a casual employee.

Mr Rossato was engaged under six consecutive contracts and the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012* (Enterprise Agreement). As he was a "casual employee", he was not paid leave entitlements either under the *Fair Work Act 2009* (Cth) (FW Act) or the Enterprise Agreement.

Adopting the approach in WorkPac Pty Ltd v Skene [2018] FCAFC 131 (WorkPac v Skene), the Full Court decided Mr Rossato was not a casual employee but was an ongoing employee under the FW Act and the Enterprise Agreement because he had a "*firm advance commitment from … his employer to continuing and indefinite work according to an agreed pattern of work*". He was entitled to paid annual leave, personal/carer's leave, compassionate leave and a payment for public holidays.

WorkPac argued that the 25% casual loading payable under the Enterprise Agreement was impliedly incorporated into the flat hourly rate paid to Mr Rossato under his contracts. However, the Full Court found that even if the leave entitlements were capable of being set off (which the Full Court doubted), the implied casual loading did not "set-off" the entitlements in this case. WorkPac could not claim restitutionary relief and the "double-dipping" *Fair Work Regulations 2009*, reg 2.03A did not apply.

This decision has sent shock waves through the business community, already struggling in the face of the COVID-19 pandemic.

Read the full text of the court's judgment here: ***WorkPac Pty Ltd v Rossato [2020] FCAFC 84***.

The arguments between WorkPac and Mr Rossato

The recent decision in ***WorkPac Pty Ltd v Rossato [2020] FCAFC 84*** was about a casual employee engaged by a labour hire company (WorkPac) to provide labour services on WorkPac's behalf to its clients in the black coal mining industry. He was employed by WorkPac for almost 3.5 years, between 28 July 2014 and 9 April 2018.

Mr Rossato claimed he was an ongoing employee under the FW Act and a permanent Field Team Member (Permanent FTM) under the Enterprise Agreement, relying on the WorkPac v Skene decision. If that was correct, WorkPac had failed to pay Mr Rossato paid annual leave, paid personal/carer's leave, paid compassionate leave or public holiday pay. WorkPac denied this, saying the employment contracts identified Mr Rossato as a casual employee and contracts were king.

WorkPac also said there was a casual loading paid to Mr Rossato under the Enterprise Agreement which "set-off" any unpaid leave entitlements. Alternatively, WorkPac was entitled to restitutionary relief because Mr Rossato would be unjustly enriched by his 'double-dipping'.

Contract is not king but is a mere servant

Their Honours disagreed with WorkPac's submission that the court could not look beyond the express terms of the six consecutive contracts to characterise the employment relationship.

The contract was not king. Bromberg J said that while the employment is "*created by and is governed by the contract, an employment is not just the contract*" [52]. Characterising an employment relationship must consider the course of dealing between the parties as this ensures that the contract does not usurp "*what has been truly created and truly subsists*" based on the "*existing facts and reality of the employment*" [58].

No *firm advance commitment* indicates a casual employment relationship

The Full Court approved the approach taken in WorkPac v Skene. Whether a person is a casual employee is a question of fact based on whether there was an implied or express "*firm advance commitment from … [Mr Rossato's] employer to continuing and indefinite work according to an agreed pattern of work*". The contract is relevant but not definitive.

According to Bromberg J, key factors suggest either the presence or absence of that firm advance commitment.

Factors indicating casual employment - no *firm advance commitment*	
1	irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – noting that regular work does not mean regular hours
2	the employee provides services only in response to a specific demand that a specific period of working time be worked, ie. ad hoc demand-based work
3	an employee can in practice choose whether to work a period of working time
4	the contractual notice of termination period is short
5	the term of employment is short
6	the extent and pattern of periods worked is irregular and not pre-determined well in advance
7	the work is "task-based" rather than "time-based" (ie, similar to the employee/independent contractor analysis)

First step in the analysis is the contract but it is not the last step

While the contract is not king, the court confirmed it as the first step in determining the employment relationship.

If the contract supports a casual employment relationship, the court will then consider circumstances beyond the contract to ensure that the contract reflects what happens in practice. For example, whether the employee worked in the same way as fellow employees engaged on an ongoing basis or whether the nature of the employment relationship has morphed over time.

In Mr Rossato's case, the six consecutive contracts each separately pointed to a "*firm advance commitment from … [Mr Rossato's] employer to continuing and indefinite work according to an agreed pattern of work*". On that basis the court did not need to consider any post-contractual circumstances.

The key indicia common to each of Mr Rossato's contracts and which indicated there was an ongoing employment relationship are set out below.

As highlighted in **bold text**, the shift roster arrangement was a key factor indicating ongoing employment. (See also: WorkPac v Skene and Angele Chandler v Bed Bath N' Table Pty Ltd [2020] FWCFB 306).

Mr Rossato - factors indicating Workpac's *firm advance commitment* and ongoing employment		
Contract was unlimited in duration	**Pre-programmed long in advance (ie, > 12 months) shift roster arrangement.**	Standard work week (38 hours) plus reasonable additional hours
Ability to stand down	No notification requirements for allocation of irregular or intermittent work	No support for electing not to work and penalties applied for not completing an assignment

Factors in Mr Rossato's contract which could have but did not indicate a casual relationship are set out below.

Mr Rossato - factors that were not influential in this case and why		
The ability to elect not to accept an assignment was supportive but the penalty applied for not completing an assignment negated this	WorkPac was not obliged to offer further assignments but this was equally applicable to both casuals and non-casual employees (eg, fixed or maximum term employees) – so zero impact	The hourly rate of pay was supportive but there was nothing in the contract indicating that employment was on an hourly basis
Timesheets had no relevance – they merely reflected that he worked off-site and enabled monitoring of his completion of the scheduled work	Calling him a "casual employee" was not determinative as it contradicted the effect of the contract as a whole	One hour's notice of termination requirement was helpful but probably of less relevance in the context of a labour hire employer

In the last three contracts, WorkPac tried to beef up its descriptions around the casual nature of the relationship with the amendments as set out below. However, this new wording was really just 'window dressing' as the overall effect of the contract still indicated a "firm advance commitment" from WorkPac to Mr Rossato's ongoing empoyment.

The underlined text indicates new wording inserted into Mr Rossato's contracts and the deleted wording is in [*square brackets*]

Attempt to bolster the "casual nature" via the contract was not successful	
Daily Working Hours:	As you are a casual, the hours you will be required to work may vary from day to day, week to week. Additionally, as this is a casual assignment, you have the ability to refuse and cancel shifts. The number of hours worked will be dependent on your availability, WorkPac's business needs, the Client's needs and safety considerations. There may be some regularity in your shifts as a result of these requirements but this does not change the fact that you are a casual employee ***[deleted text** – (This may vary and is a guide, any significant changes notify WorkPac)]*

	*[**deleted text** - Unless you have prior authorisation from WorkPac*],Please note, the following will not be recognised or paid for unless pre-approved by Workpac in writing: a) hours worked over 12 hours in a shift b) shifts worked over 13 continuous shifts, and; c) rest periods of less than 10 hours between shift. *[**deleted text** - Your ordinary hours of work shall be a standard work week of 38 hours. Additional reasonable hours may be worked in your rostered arrangements.* *The employee will be engaged for the hours prescribed in the [NOCE]. The hours of work will be defined in the Relevant Industrial Instrument and your [NOCE]. Ordinary working hours are generally between 35 - 38 hours per week over a 6 month period. The employee may be requested to work such reasonable additional hours as requested by the employer.]*
Where You terminate your Assignment or Refuse a Shift:	As this is a casual assignment, you have the ability to refuse and cancel shifts (as per the Daily Hours/ indicative shifts required) or terminate your assignment as set out below. You may terminate your employment in accordance with the terms of the Industrial Instrument and applicable law.
If you cannot attend a shift:	If you wish to cancel a shift, you must contact WorkPac AND the Client Supervisor as soon as possible before the start of the shift you wish to cancel. For more information, please refer to your Industrial Instrument. You must directly speak with your WorkPac Contact Person or WorkPac's Site Account Manager AND the Client Supervisor to confirm that you will not be working a shift. This is a working away from home assignment: ☐No ☒Yes If yes, in circumstances where you terminate your assignment and/or refuse a shift, you will be responsible for any applicable accommodation, travel, meal and other incidental costs which WorkPac incurs as a result of you terminating your assignment and/or refusing to work your shift.
How WorkPac may terminate your employment:	WorkPac may terminate your employment in accordance with the terms of the Industrial Instrument and applicable law.

Could the alleged "casual loading" be set-off against the unpaid leave entitlements?

WorkPac argued that the hourly rate paid to Mr Rossato included a 25% casual loading which could be set-off against Mr Rossato's unpaid leave entitlements.

However, not all of the contracts referred to this loading and when they did the wording was prefaced with the words "may". Added to this, the wage rate payable under the contract was a flat rate and Mr Rossato's pay slips did not indicate the payment of any casual loading. WorkPac argued the loading was referable to the Enterprise Agreement and it impliedly formed part of the flat rate paid under the contract. This seemed like a difficult argument to run but the Full Court appeared to provide some support to it.

However, the Full Court expressed doubt as to whether money was as an effective "pre-payment" of entitlements which had not yet accrued. Also, the Full Court suggested the nature of annual leave or personal/carer's leave entitlements which involved both a payment and an authorised absence from work were not capable of being set off by money. Bromberg J said that to allow this set-off would permit parties to contract out of the timing or manner that statutory entitlements are provided.

Even if set-off was possible, the Full Court decided the casual loading was not "severable" because WorkPac could not prove that the contractual hourly rate was determined having regard to the amount of casual loading due under the Enterprise Agreement. The set-off was therefore not effective. Restitution of the casual loading allegedly paid or the difference between the flat rates paid under the Enteprise Agreement was also not available as there had been no mistake or failure to provide consideration.

Regulation 2.03A of the *Fair Work Regulations* did not apply because Mr Rossato did not make a claim "*to be paid an amount in lieu of one or more of the relevant NES entitlements*". Mr Rossato's claim was for payments under the FW Act. This demonstrates that these regulations are not able to adequately address this type of 'double-dipping' situation.

The parties must now confer regarding the declarations and orders and if they fail to agree must file supporting submissions and replies by 3 June 2020.

Where to from here

The situation for employers has become untenable where there is no clear guidance for the correct characterisation of a casual employment relationship. Compounding this difficulty is the inability of employers to offset potentially significant liability with a casual loading that can be applied against unpaid entitlements in the event of inadvertant misclassification.

There is significant pressure on the Commonwealth Government to take legislative action to address the inevitable flood of underpayment claims from misclassified casual employees. The first step may be to introduced casual conversion as a "right" provided both under Modern Awards and the NES.

This decision also presses ***go*** on class actions against labour hire companies which have been on hold in the Federal Court pending this decision, including: VID897/2019 – Ben Anthony William Renyard v WorkPac Pty Ltd, VID 89/2019 – Matthew Petersen v WorkPac Pty Ltd, NSD448/2020 - Joseph Shorey v One Key Resources Pty Ltd & Anor, ACD 46 of 2018 -Turner v Tesa Mining (NSW) Pty Limited, ACD 47/2018 – Lawrence Ridge v Hays Specialist Recruitment (Australia) Pty Limited, VID1209/2019 – Justin Hill v Silled Workforce Solutions (NSW) Pty Ltd, VID1661/2018 -Turner v Ready Workforce (A Division of Chandler Macleod) Pty Ltd and VID 1662/2018 – Tania Kelehear v Stellar Personnel Brisbane Pty Ltd & Ors.

Acknowledging the burgeoning class action industry, the Commonwealth Government has set up an inquiry: Litigation funding and the regulation of the class action industry. Interested parties should ensure they make submissions by the closing date on 11 June 2020.

The Commonwealth Government may also potentially face significantly increased costs through the Fair Entitlements Guarantee scheme as casual employees who would otherwise be excluded from claiming annual leave and redundancy entitlements under that scheme may now be able to do so on the basis that they are "ongoing employees."

A related decision regarding the ability to set off Fair Entitlements Guarantee (FEG) claims against casual loadings already paid by insolvent employers may also now proceed: Kyle Warren v Secretary, Department of Jobs and Small Business, NSD302/2019. The CFMMEU has challenged a decision by the Administrative Appeals Tribunal where it remitted a FEG assessment back to the Department of Jobs for recalculation. The recalculation requires the Department of Jobs to set off the amounts payable under the FEG scheme against the casual loading paid to an employee who had been wrongly classified as a casual but was an ongoing

employee. See the AAT decision here: Warren and Secretary, Dept of Jobs and Small Business, Re [2019] AATA 95.

See: Underpayments of entitlements and Casual employees