



No casual matter: Federal Court increases scope for 'casual' employees to claim leave entitlements

On 22 May 2020, in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, the Full Court of the Federal Court further examined the meaning of casual employment, following its earlier decision in [WorkPac Pty Ltd v Skene](#) [2018] FCAFC 131. The Court also examined whether an employer could set off a casual loading paid to an employee against liabilities to pay leave entitlements and also determined that an employer could not 'claim back' the casual loading paid to such an employee.

Whilst many employers of casual employees will have serious concerns in light of this decision, including about class actions for leave entitlements, there may be an opportunity to consider whether structural changes to employee engagements could create more advantageous outcomes for both employers and employees. As outlined in more detail at the conclusion of this article, we suggest employers consider taking early action to remedy any problems with the engagement of their casual employees.

Facts

WorkPac is a labour hire company, providing labour to various industries, including the coal mining industry. Between July 2014 and April 2018, WorkPac employed Mr Rossato as a 'Casual Field Team Member' and assigned him to work for the mining group, Glencore, at two mines in Queensland.

Mr Rossato's employment with WorkPac was occasioned over a series of six consecutive written contracts of employment. Additionally, at all times, a WorkPac enterprise agreement applied to Mr Rossato's employment (**Enterprise Agreement**). Under each of his contracts and the provisions of the Enterprise Agreement, Mr Rossato was paid a flat rate of pay, which included a component for a 25% casual loading. WorkPac and Mr Rossato both treated the employment as casual employment, and Mr Rossato as a casual employee.

Accordingly, during his employment, WorkPac did not pay Mr Rossato any paid annual leave, any paid personal/carer's leave, any paid compassionate leave or for public holidays on which he did not work. After his employment ceased, he demanded payment in respect of all of these entitlements.

WorkPac commenced the proceedings seeking declarations that Mr Rossato was a casual employee and/or was not entitled to the amounts claimed.

Decision

As in *Skene*, the Court held that casual employment does not have a firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. The Court also held an assessment permits looking both at the contract and the post-contractual conduct of the parties.

Applying these principles, the Court found Mr Rossato was not a casual employee as, amongst other things:

- the reality of the arrangement was for indefinite (i.e. ongoing) employment;
- Mr Rossato would work standard ordinary hours as well as additional hours, in accordance with an alternating shift roster;
- the hours to be worked were full-time hours programmed well in advance (up to 12 months in advance) and allocated by a shift roster, requiring work to be performed in regular and continuing standard blocks of time; and
- in reality, the roster presented to Mr Rossato was not a set of options from which he could pick and choose which shifts he would work (even though WorkPac said Mr Rossato was entitled to accept or reject shifts and that WorkPac was not obliged to offer shifts).

WorkPac asserted that the 25% casual loading was included in the hourly rate it had paid to Mr Rossato and that it was entitled, by way of restitution, to be paid back the casual loading or have it taken into account in determining whether it owed Mr Rossato any money. If not, it submitted, Mr Rossato would be unjustly enriched. It also argued it was entitled to set off parts of the casual loading (percentages it said were paid as compensation for Mr Rossato not having the leave entitlements) against liability to pay Mr Rossato's leave entitlements.

Put simply, the Court held that WorkPac was not entitled to be repaid/have the benefit of the casual loading because it had not made a 'mistake', for the purposes of restitutio, and neither was there a failure of consideration. Further, the Court held WorkPac was not entitled to its claimed set off, because payment cannot be a substitute for annual leave and other leave entitlements. The Court confirmed an employer cannot contract out of or compensate for leave entitlements by paying a casual loading or any other form of higher rate of pay.

WorkPac tried to rely on regulation 2.03A of the *Fair Work Regulations 2009* (Cth) to avoid paying the leave entitlements. However, the Court said WorkPac's reliance on these regulations was misplaced. The Court identified that the regulation can apply only where a person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements. However, as Mr Rossato sought payment of the NES entitlements, and not instead payments in lieu, the regulation did not apply.

Implications for employers

It is no exaggeration to say the Court's decision in *Rossato* has massive implications for employers of casual employees. Ongoing employees mischaracterised as casual employees are

entitled to annual leave and other forms of paid leave, even if they have been paid a casual loading.

We expect to see regular and systematic ‘casuals’ increasingly making such claims and demanding to be recognised as ongoing employees. These claims will now be difficult to defend, if the circumstances evidence a firm advance commitment of work according to an agreed pattern of work.

The decision also opens the door for numerous, large and high value class actions by casual employees claiming unpaid leave entitlements.

However, the Court’s decision also creates a real opportunity for employers to assess their compliance with workplace laws as far as casual employees are concerned. Employers should seize this opportunity to review their existing casual workforce and assess any exposure to liability for unpaid leave entitlements, in addition to considering how best to comply with the *Fair Work Act* in future. This may include restructuring or shifting towards permanent forms of employment and or changing the ways they engage and utilise casual employees. It should also include amending casual employment agreement templates, to ensure consistency with the law as it now stands.

As always, we recommend employers seek legal advice from an employment law expert to assist with these complex considerations. Please contact us if you would like such assistance.

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