# WORKPAC PTY LTD V ROSSATO: MANAGING YOUR CASUAL WORKFORCE

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On 20 May 2020 a Full Bench of the Federal Court dismissed WorkPac's bid to overturn the 2018 *Skene* decision, and determined that another of its 'casual' employees, Mr Rossato, was not a casual employee and was entitled to be paid accrued leave and public holiday entitlements. A critical part of the decision is that attempting to offset these entitlements against the casual loading paid to an employee to compensate for not receiving these entitlements will likely fail ie the employee keeps the loading.

## BACKGROUND

Following *Skene*, WorkPac sought a declaration from the Court that Mr Rossato (who was employed under similar, but not identical circumstances to Mr Skene) was a casual employee, and therefore could not make claims with respect to paid annual leave, personal/carer's leave, compassionate leave, or payment for public holidays. WorkPac's bid was unsuccessful.

## FINDINGS

The Court found that Mr Rossato was not a casual employee. In particular, the Court considered that Mr Rossato and WorkPac had agreed on employment of indefinite duration which was stable, regular and predictable, and critically, there was a firm advance commitment of continuing work.

In short, the Court found that the essence of casualness was missing. There was not an absence of a firm advance commitment to indefinite work nor any evidence of the characteristics of casual employment of irregularity, uncertainty, discontinuity and intermittency of work or work patterns.

In making its finding, the Court placed significant emphasis on the following factors relating to Mr Rossato's employment:

- Mr Rossato was engaged under six consecutive contracts over a period of three years and eight months
- he was subject to a regular pattern of work, work which was determined via long term rosters containing pre-determined hours
- he did not have any meaningful mechanisms to accept or reject such shifts
- whilst completing work he was able to use free on site accommodation during a roster cycle because he lived a long distance from the mines where he was employed as a production worker
- overall, there appeared to be mutual assumptions of ongoing and continuing work.

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In light of the above, Mr Rossato was found to be entitled to payment under the Fair Work Act with respect to paid annual leave, paid personal/carer's leave, paid compassionate leave and payment for public holidays.

### When is a casual a casual?

It is important to remember that this case presents an extreme example of what is not a casual, and it will be interesting to see how generally it can be applied in different situations.

WorkPac's unique engagement structure, and the fact that its casuals are frequently engaged on full time hours with advance rosters, made it almost implausible on the bystander test that its employees were true casuals, regardless of the terms of the written contract.

Casual employment exists on a broad spectrum, across different industries and *Rossato* does little to address the significant grey area.

Where there is little difference between the way in which casual employees are engaged when compared with part time or full time employees (other than one group accruing leave, and the other not), then there may be a real question as to whether the casual employees are truly casual. As the Court asserted, casuals don't receive annual leave because they are not tied to their employer on an ongoing basis.

### Inability to set off casual loading

The other key takeaway from *Rossato* is that the Court found that WorkPac was not entitled to use any payments or casual loading to set off these entitlements. This was despite "set-off" clauses contained in each engagement with respect to the casual loading that had been paid to him, and legal principles that can enable one party to recover from the other because of a mistake at law or to avoid unjust enrichment.

This means that even if employers have mistakenly classified an employee as casual, notwithstanding any setoff clauses, they are likely to be liable for payment of accrued entitlements on top of any casual loading that has been applied.

## WHAT SHOULD EMPLOYERS DO?

If employers weren't on notice after *Skene*, that long term casuals may not be true casuals now they are, and they should monitor the relationships closely, and regularly. Employers must make assessments about each employee on an individual basis, and consider whether there is a firm advance commitment being made to casual employees, in particular:

- patterns of engagement
- predictability of rosters
- the period/length of service
- any expectation of ongoing work
- an employee's ability to reject shifts
- the number of hours per week, and
- the extent of any reliance on casual employees.

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If the casual engagement has some of the above features an employer will need to put in place a strategy to deal with the problem such as living with the risk or negotiating new terms of employment with the affected staff.

## WHAT TO CONSIDER INTO THE FUTURE

Employers will need to consider what works best for their business in terms of engaging casuals, and consider avoiding the engagement of long term casuals where possible and practical.

Where casuals are engaged, employers should ensure that it is clearly conveyed that:

- each engagement is discrete
- there is no guarantee of ongoing employment
- casual availability will be regularly obtained to reflect the ad hoc relationship
- employees may decline shifts
- their hourly rate is inclusive of a specified casual loading percentage, and
- working hours and days are not set and may be irregular.

It may be prudent to review casual engagements on an initial 6 - 12 month period, then reconsider whether it is still appropriate to classify those employees as casuals after such period. After 12 months it may be that the employee is functionally a part time employee, which may result in non-renewal/termination of the casual contract, and reengagement on a part time basis.

Where this is not practical, employers will need to accept that with the convenience of employing casuals comes the risk of this status being challenged. This is particularly pertinent given several instances of irresponsible reporting regarding *Rossato* in mainstream media, which overstate the scope of the decision, suggesting that it may apply to all casual employees.

## WATCH THIS SPACE

At the time of writing, WorkPac is yet to comment on whether it intends to apply for special leave in the High Court. Of course even if this occurs, there is no guarantee of special leave being granted, let alone the decision being overturned.

The Federal Government has indicated some preparedness to 'consider legislative options', particularly in the context of the current COVID-19 pandemic and subsequent economic concerns. Any legislation is unlikely to have retrospective benefit.

In the meantime, employers should take steps to closely review the engagements of any casual employees, and consider their appetite for the risk that these employees are not true casuals.

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