

HIGH COURT OVERTURNS FEDERAL COURT'S DECISION IN ROSSATO: CASUALS ARE CASUALS EVEN WHEN THEY HAVE EXPECTATIONS OF CONTINUING EMPLOYMENT

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The High Court of Australia has handed down a decision in WorkPac's challenge to a finding of a Full Court of the Federal Court of Australia that a coal mineworker, Robert Rossato, was not a casual worker and was entitled to paid leave and public holiday pay. The High Court unanimously upheld the appeal, finding that Mr Rossato was a casual employee and that no "firm advance commitment" to ongoing work or a regularity of hours could be found.

This finding was made by looking at the terms of the contractual agreement between WorkPac and Mr Rossato, which was held by the majority as the only relevant consideration. A copy of the High Court's decision *Workpac Pty Ltd v Rossato & Ors* [2021] HCA 23 can be found [here](#).

THE FULL COURT'S DECISION

In 2018 the Full Court of the Federal Court held that Mr Rossato was not a casual employee, and could access paid leave entitlements in line with the earlier decision of *Workpac Pty Ltd v Skene* (2018) FCAFC 131 (Skene).

Justice Bromberg expressed support for the notion that in determining a "firm advance commitment", regard should be had to the entirety of the employment relationship while Justice White expressed preference for the contrary position that a firm advance commitment was to properly be assessed at the time of the commencement of the employment relationship.

However, it was held by all three judges that the regular and predictable employment of Mr Rossato, shown by weekly rosters made far in advance, demonstrated there was in fact a firm advance commitment of ongoing employment and regularity of hours.

WORKPAC'S SUBMISSIONS

In its appeal to the High Court, WorkPac submitted that:

- The characterisation of an employee as a "casual" depends entirely on the express or implied terms of the employment contract and without reference to post-contractual conduct;
- The FW Act, prior to this year's amendments inserting in a definition of 'casual employment', recognises that casual employment can be "long term", and can involve "*a reasonable expectation of continuing employment ... on a regular and systematic basis*";
- There was no firm advance commitment in any of Mr Rossato's engagements;

- White J erred in the significance he accorded to the rosters pursuant to which Mr Rossato worked, and that regularity of work is consistent with casual employment;
- It was not obliged by the contracts to offer any assignments to Mr Rossato and he could accept or reject any offer of an assignment; and
- Mr Rossato had been categorised as a "casual" for the purposes of the applicable WorkPac Enterprise Agreement, and Mr Rossato had accepting each offer of casual employment.

MR ROSSATO'S SUBMISSIONS

Responding to Workpac's appeal, Mr Rossato submitted that:

- He had a firm advance commitment to his working hours, agreed by roster, such that neither party ever had to confirm or query whether he was required for work or whether he would attend work on a particular day;
- The work he was employed to perform was ongoing and indefinite, and WorkPac's need for him to perform the work was stable and predictable
- He was engaged to work a "standard work week" according to rostered hours, alongside full-time employees; and
- He worked at the mine on a drive-in, drive-out basis and stayed in accommodation arranged by WorkPac in advance.

THE HIGH COURT'S FINDINGS

The High Court unanimously allowed WorkPac's appeal, holding that:

A "casual employee" is an employee who has no firm advance commitment from the employer as to the duration of the employee's employment or the days (or hours) the employee will work, and provides no reciprocal commitment to the employer.

The High Court held that:

- Mr Rossato was employed expressly on an "assignment-by-assignment basis";
- He was entitled to accept or reject any offer of an assignment;
- WorkPac was under no obligation to offer further assignments; and
- The fact that Mr Rossato worked in accordance with an established shift structure fixed long in advance by rosters did not establish a commitment to an ongoing employment relationship beyond the completion of each assignment.

Accordingly, Mr Rossato was **properly characterised as a casual employee** for the purposes of the FW Act as it then stood, and the Enterprise Agreement.

Further, the previous decision of Skene was also held to have been wrongly decided.

The Act Contemplates Casual Employment May Be Regular and Long Term

The High Court considered that sections [65\(2\)](#) (requests for flexible working arrangements), [67\(2\)](#) (length of service in relation to parental leave) and [384\(2\)](#) (period of employment for protection from unfair dismissal) of the FW Act explicitly recognise that casual employment can be "long term".

The High Court considered that these contextual considerations are strong indications that a mere expectation of continuing employment, however reasonable, is **not** a basis for distinguishing the employment of other employees from that of a casual employee. These were provisions that had not been properly considered by the Full Court.

Specifically, the FW Act:

- Contemplates that an employee may be a casual employee even though the employee is a "*long term casual employee*";
- Does not regard the existence of "*a reasonable expectation of continuing employment ... on a regular and systematic basis*" to be inconsistent with the nature of casual employment; and
- Provides that to be protected from unfair dismissal, a casual employee must have been employed for six months as a regular casual employee with a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Mr Rossato Had No Firm Advance Commitment to Ongoing Work

The High Court considered that the existence of a "firm advance commitment" must be made in enforceable terms, rather than unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. In particular, the High Court stated that Bromberg J erred insofar as he considered the characterisation exercise should have regard to the entirety of the employment relationship.

Mr Rossato's employment contracts evidenced that he was employed on an "assignment-by-assignment basis", whereby he was entitled to accept or reject assignments and WorkPac was under no obligation to offer any further assignments.

The High Court found that based on the plain and ordinary meaning of the relevant clauses, WorkPac deliberately avoided a firm commitment to ongoing employment once a given assignment had been completed, and accordingly Mr Rossato was a casual employee during the relevant period.

Too Much Significance Placed on the Roster System

The High Court found that the Full Court placed "inordinate emphasis" on Mr Rossato's rostering arrangements.

Specifically, the High Court noted that:

- The Full Court erred in attributing such significance on Mr Rossato's rosters that this became pivotal to its characterisation of Mr Rossato's employment as one that involved a firm advance commitment to continuing work beyond the completion of the particular assignment;
- Insofar as the rosters exhibited regularity and systematic organisation during the period of each assignment, those qualities remained entirely compatible with the notion of "casual employment" in the FW Act; and
- Regardless of what the rosters showed in respect of each individual engagement, there was still no firm advance commitment of continuing work beyond the completion of the particular assignment.

CONCLUSION

So what does all this mean:

- now that the FW Act has been amended to include a definition of casual employment; and
- in light of binding decisions that have already been made by a court about casual employment?

In light of the changes to the FW Act that were made in March 2021 (a summary of these changes can be found [here](#)), this case has a more limited application than was previously contemplated when the High Court agreed to hear the appeal in December.

Justice Gageler, in a separate judgment, commented that the importance of the question had diminished, as the new statutory definition of a casual employee now operates comprehensively for the future. This decision only impacts casual employment where a binding decision has already been made by a court about casual employment that is subject to appeal. All other issues relating to casual employment will now be determined in accordance with the new provisions of the FW Act.

Despite this, it was raised by Counsel representing WorkPac that the new statutory definition for casual employees bore a close relation to the definition that was advanced by WorkPac and ultimately accepted by the High Court.

Finally, the High Court did not consider the controversial aspect of the Full Court decision that held that the casual loading could not be monetarily offset against the entitlements of non-casual employees. The High Court did not deal with this because it found as a threshold issue that Mr Rossato had been a casual employee throughout his employment.

What Should You Do Now?

Employers should now review all casual employment agreements to ensure they are aligned with the recent amendments to the FW Act. This includes the new statutory definition of casual employment that is closely related to the definition accepted in this case by the High Court.

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