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The implications of WorkPac v Rossato – not just a casual issue

In the recent decision of WorkPac v Rossato[1] the High Court unanimously held that Mr Rossato, a former employee of WorkPac, was a casual employee and therefore not entitled to benefits such as annual leave. Piper Alderman considers the High Court's reasoning in this case and explore the implications that the Court's findings have for the future of employment law.

How did we get here?

Labour hire company WorkPac is no stranger to litigation concerning the correct classification of its workers.

In 2015 Mr Paul Skene commenced proceedings alleging that he was a permanent employee of WorkPac, rather than a casual (as WorkPac treated him). A dump truck operator, he was deployed to work at coal mines over periods totalling two years. The arrangements involved working full-time on rosters set well in advance.

The Federal Circuit Court held, with the Full Federal Court of Australia confirming on appeal,[2] that Mr Skene was *not* a casual worker for the purposes of the *Fair Work Act 2009* (Cth) (Fair Work Act), a statute which at the time had no definition of the term "casual". That entitled him to claim payment for annual leave he had accrued but not taken.

The decision in *Skene* confirmed that the essence of a casual employment relationship is the absence of a "firm advance commitment" as to the duration of the employee's employment or the days or hours the employee will work.

Skene was not ground-breaking. Back in 2010, Federal Court Justice Barker had come to a similar conclusion, in a case brought under the *Workplace Relations Act 1996* (Cth).[3]

However, since most modern awards (and many enterprise agreements) have tended to define casuals as employees "engaged and paid" as such, many employers believed that treating an employee as a casual was enough to give them that status for all purposes under the Fair Work Act. But that reasoning, previously accepted by the Fair Work Commission,[4] was rejected in *Skene*.

A second go for WorkPac

Two months after the appeal decision in *Skene*, Mr Robert Rossato, whose working arrangements were similar to those of Mr Skene, wrote to WorkPac seeking payment of annual leave and other entitlements.

In response, WorkPac sought declaratory relief in the Federal Court, seeking to confirm that Mr Rossato's employment status *was* that of a casual employee. It accepted what had been said in *Skene* about the classification hinging on the presence or absence of a "firm advance commitment". However, it contended that the assessment should be made by reference only to the terms of the employee's written contact (or contracts, as in the case of Mr Rossato), and not on how the employment relationship was managed in reality.

WorkPac also argued that if Mr Rossato was *not* a casual employee and should have been afforded the entitlements of a permanent employee, the casual loading paid to him should be "set off" against any money it owed. Alternatively, it sought restitution of the loading amounts Mr Rossato had received.

In effect, WorkPac was attempting to avoid a "double dip", because the payment of a casual loading is intended (at least partially) to compensate for the very entitlements that were now being claimed.

The Full Federal Court found for Mr Rossato on each of these points. [5] It held that the assessment of whether or not an employee is a casual should be based on the circumstances throughout the period of employment, rather than just what was agreed when the employment commenced.

The Court drew some interesting comparisons with cases regarding the determination of employment status. It highlighted that when determining whether a worker is an employee or an independent contractor, very little weight is given to the label used by the parties to describe the relationship and that post-contractual conduct can be taken into account in establishing the correct characterisation.

The Court also refused to permit WorkPac either to set off or recoup any part of the casual loading paid to Mr Rossato.

Fast forward to 2021…

Undeterred by its losses in the Federal Court, WorkPac appealed to the High Court of Australia. The High Court determined to hear the appeal, and in August 2021 handed down its decision.

In the meantime, the federal government had taken matters into its own hands. By the time the High Court published its decision, the Fair Work Act had already been amended to include a definition of a "casual" – the first of its kind. The new section 15A, which has been given retrospective effect, was drafted to mirror precisely what WorkPac had argued so hard for in the Federal Court in *Rossato*.

Another new provision, section 545A, seeks to protect employers who misclassify permanent workers as casuals by allowing them to plead the type of set-off urged unsuccessfully by WorkPac. Once again, this change is expressed to operate retrospectively.

Further changes made by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) were less beneficial to employers. These include new obligations – accompanied by a great deal of red tape – to assess whether long-term casuals should be offered the chance to convert to permanent full-time or part-time employment.

The Fair Work Commission has also been obliged to review and rewrite awards to mesh with the new statutory provisions. Among other things, that will see the old and well-understood "engaged and paid as such" definitions being jettisoned, in favour of references to the far less clear section 15A.[6]

As it turned out, none of this was really necessary. Because on 4 August 2021, the High Court handed down its decision, finding unanimously in favour of WorkPac that Mr Rossato was a casual. That conclusion rendered it unnecessary for the Court to consider the set-off and restitution arguments.

According to the six judges who delivered the main judgment, the process of determining whether there was a "firm advance commitment" of the kind described in *Skene* must involve a search for the "*enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement*".

The judges rejected the idea that the Court should look to the "totality" of the employment relationship, explaining that mere expectations and matters not specifically agreed at the formation of the employment relationship should be disregarded.

The Court was prepared to leave open the door to some exceptions to this, for instance where:

- there was some kind of "sham" arrangement that was not intended to be given effect according to its tenor (which Mr Rossato did not contend to be the case, and which by its nature is a difficult contention to prove); or
- the parties had agreed to vary their original terms of employment to create an employment relationship that was no longer casual (although presumably there would need to be something greater than mere expectations in order to satisfy the rules of contractual variation).

As a result, Mr Rossato was found to be a casual employee, given that on a plain and ordinary reading of his employment contracts (he had six in total over the course of his engagement), he was not guaranteed work, and could accept or reject any assignment offered to him. The fact that this bore no relation to the reality of how he was rostered and expected to work, was irrelevant.

How does *Rossato* affect the status of casual employees?

The recent changes to the Fair Work Act have meant that the legal effect of *Rossato* has been diminished, particularly as the Act now contains prescriptive criteria for determining what would be demonstrative of an absence of a "firm advance commitment".

The decision does not even affect the legality of arrangements made prior to the recent changes, given their retrospective effect. There has been talk of a constitutional challenge to that aspect of the amendments. But for the time being it must be assumed that it is the new provisions, not the Court's determination, that must be used to determine entitlements under the Fair Work Act, even in respect of years past.

Rossato may prove to be influential in determining the meaning of the term "casual" in other legislative contexts. It should also serve as a reminder for employers to carefully consider how casual offers of employment are made, and the written terms on which casual employment is offered.

At the same time, however, it is important to be aware of the risks around making "sham" offers of casual employment that are at complete variance with how the parties anticipate the employment operating in practice. Employers should also:

- avoid oral representations about the employment relationship that are inconsistent with the written terms; and
- be aware of any conduct that could signal an agreement to vary the employment contract, so that an engagement is permanent rather than casual.

A new approach to determining employment status?

Where the decision in *Rossato* may have the greatest long-term impact is in relation to an issue that did not arise in the case itself – the determination of whether a worker is an independent contractor or an employee.

In *Hollis v Vabu*,[7] a 2001 decision which has been the lynchpin of many subsequent rulings on that point, the High Court emphasised the importance of looking at the totality of the relationship to determine employment status. The decision was relied upon by the Federal Court in both *Skene* and *Rossato* to support the need to look beyond contractual terms in determining whether an employee was a casual.

But when *Rossato* reached the High Court, six of the seven judges went out of their way to downplay the relevance of what was said in *Hollis*. They suggested that the decision "*affords no assistance, even by analogy, in the resolution of a question as to the character of an employment relationship, where there is no reason to doubt that the terms of that relationship are committed comprehensively to the written agreements by which the parties have agreed to be bound*".

The import of these comments was not lost on the Fair Work Commission. Only two days after the High Court handed down its decision, a Full Bench of the Commission hearing an appeal about the status of a food delivery worker questioned whether in light of what was said in *Rossato*, it was still appropriate "to assess the substance and practical reality" of the relationship in question.[8] The Bench suggested that it might be advisable to await the decisions in *Personnel Contracting* and *Jamsek*,[9] two appeals that the High Court has agreed to hear concerning the proper classification of workers who had been treated as independent contractors but claimed to be employees. On 13 August 2021, the Full Bench decided that it would await the High Court's judgments in those matters, before determining the appeal.

It would be unwise to predict the outcome of those cases. Nevertheless, what was said in *Rossato* may indicate that the High Court will be prepared to give the parties' stated contractual intentions precedence over an examination of the substance of their relationship and their post-contractual conduct. If that proves to be correct, such an approach may have a profound effect on the capacity of businesses to source labour from contractors rather than employees.

[1] *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rosatto*).

[2] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*).

[3] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321.

[4] See eg *Telum Civil (Qld) Pty Ltd v CFMEU* [2013] FWCFB 2434.

[5] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84

[6] See *Casual Terms Award Review 2021* [2021] FWCFB 4928.

[7] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

[8] *Deliveroo Australia Pty Ltd v Franco* [2021] FWCFB 4840.

[9] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2021] HCATrans 30; *ZG Operations Australia Pty Ltd & Anor v. Jamsek* [2021] HCATrans 27.