Article Information

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WorkPac v Rossato – Apparently double-dipping is fine

The decision in WorkPac Pty Ltd v Rossato [2020] FCAFC 84 has confirmed the earlier decision in WorkPac Pty Ltd v Skene [2018] FCAFC 131 which held that a casual employee who worked regular and systematic hours was also entitled to the paid leave entitlements of a permanent employee. However, Rossato's case goes further and potentially prevents an employer from claiming back the casual loading.

In the 2018 decision of WorkPac v Skene [2018] FCAFC 131 (***Skene***) , the Full Court of the Federal Court confirmed that employees who receive casual loadings may still accrue permanent employment benefits such as annual leave and personal leave if the employee's working arrangement included a firm advance commitment as to the duration of the employee's employment or the days/hours the employee will work.

WorkPac chose not to appeal the *Skene* decision to the High Court possibly due to difficulties associated with Mr Skene's contract of employment (noting that it did not have a separately identifiable casual loading).

As an alternative to appealing the decision in Skene directly, WorkPac commenced separate proceedings seeking declarations that another employee, Mr Robert Rossato was a casual employee and therefore not entitled to paid annual, personal/carer's, or compassionate leave entitlements or payment for public holidays.

Crucially, WorkPac made a number of alternative arguments in Rossato's case if its primary case (that Mr Rossato was a true casual) failed. The key arguments included:

1. Mr Rossato was paid more than the minimum rate of pay under his enterprise agreement for permanent employees (including the casual loading portion of his pay) and accordingly, WorkPac is entitled to "set off" any amount owed to Mr Rossato in respect of leave and public holiday pay. In this regard, WorkPac sought to rely on the common law grounds for set off and on Reg 2.03 of the Fair Work Regulations 2009 (the **Regulations**);
2. WorkPac is entitled to restitution of either the difference between the permanent employment rate and the casual rate under the relevant enterprise agreement, or the casual loading by reason of mistake or alternatively a failure in consideration.

Having regard to the definition of casual employment contemplated in the Skene decision, the Court found that Mr Rossato was not a casual employee either under the *Fair Work Act 2009* (Cth) (the **Act**) or under the relevant WorkPac enterprise agreement (the **EA**).

The Court's decision in this regard was perhaps not that unexpected, noting that the nature of Mr Rossato's employment was similar to that of Mr Skene and the Court was likely to follow the *Skene* decision.

It follows that WorkPac had an obligation to pay leave and public holiday entitlements to Mr Rossato. However, Rossato's case goes a step further than the *Skene* decision because the Court found that WorkPac could not claim back the casual loading that it paid to Mr Rossato once it had been determined that he was not actually a casual employee. We explore the Court's reasons for this in greater detail below.

Background Facts

WorkPac is a labour hire company, and Mr Rossato was employed by WorkPac as a drive in/drive out production employee engaged to work on various mines within the Glencore Group.

Between 28 July 2014 and 9 April 2018 Mr Rossato was employed pursuant to six consecutive contracts of employment with WorkPac. Some contracts required Mr Rossato to work in accordance with a roster which allocated shifts up to 7 months in advance.

Most of Mr Rossato's contracts contemplated the payment of a casual loading. However, WorkPac did not simply pay Mr Rossato at the casual rate provided in the EA, but paid Mr Rossato a higher rate which was different to the EA rates.

It was not contested by WorkPac that Mr Rossato's hours were as regular and predictable as the Glencore full-time employees working on the same rosters, and were no less regular and predictable than any permanent full-time employee.

Mr Rossato's employment contract did not contain an express set off clause. Further, there was no contractual mechanism available in his contract that could have enabled WorkPac to claim back the casual loading. Accordingly, WorkPac had to rely on common law principles and Reg 2.03A of the Regulations to make this claim.

The "Set Off" Claim

WorkPac claimed that because it had paid Mr Rossato more than what he was entitled to under the EA (most relevantly the casual loading), it was entitled to "set off" the amount of the overpayment against any other entitlement Mr Rossato was found to have.

As noted above, there was no express set off provision included in Mr Rossato's contract and accordingly WorkPac had to rely on the common law principles. The general position at law is that if a payment is made for a contractual purpose it cannot be used to satisfy an award obligation, unless there is a close correlation between the contractual purpose and the award obligation.

So, if a payment is made to an employee as wages for work performed, an employer cannot seek to use that payment to satisfy the payment of leave entitlements.

All members of the Court found that there was not a close correlation between the payments made to Mr Rossato and the leave entitlements that Mr Rossato claimed for the common law set off to apply. In relation to the casual loading in particular, the Court noted that the casual loading was paid because paid leave entitlements were presumed to be unavailable and WorkPac could not now claim that the loading should now be used towards the payment of those entitlements.

Further, the Court held that the wages paid to Mr Rossato could not be used to set off an entitlement to annual leave or personal/carer's leave noting that the Act prohibits the pre-payment of these leave entitlements.

Reliance on Reg 2.03A

Following the decision in *Skene,* Reg 2.03A was ostensibly inserted into the Regulations to prevent double dipping in these types of matters. The provision allows an employer to have the casual loading taken into account when determining the amount payable by the employer to the person in lieu of one or more relevant NES entitlements.

The Court however held that WorkPac was not able to rely on Reg 2.03A noting that Mr Rossato was not claiming payments *in lieu* of his NES entitlements, but was claiming the actual entitlements conferred by the NES. Based on this interpretation alone, it is difficult to see how this provision can now have any substantive operation. The Court also noted that having regard to the explanatory statement for Reg 2.03A, the Regulation was never intended to change the legal principles that apply to a "set off".

The Restitution Claim

WorkPac also claimed that it should be able to claim back the amounts it paid to Mr Rossato in respect of a casual loading because, if Mr Rossato was found to be a permanent employee, those payments were made by mistake. WorkPac alternatively claimed that there had been a failure in consideration for making those payments. That is, in return for receiving the casual loading, WorkPac claimed that Mr Rossato was to have accepted that he was not entitled to the leave entitlements that would otherwise be available to permanent employees.

WorkPac's restitution claim failed primarily because the casual loading paid to Mr Rossato was not separately identifiable, nor was it severable. That is, the Court was not able to find that there was a separate portion of Mr Rossato's wage that it paid either due to a mistake or in reliance on Mr Rossato's acceptance that he was a true casual.

As noted above, Mr Rossato was paid a different rate to that provided in the EA for permanent or casual employees. In particular, White J found that the higher rate paid to Mr Rossato suggested that it was an amount that it had to pay, independently of the EA, in order to attract and retain Mr Rossato as an employee in the available market. Therefore the

casual loading was subsumed into the rate WorkPac considered necessary to pay and could not be carved out. It further could not be established that WorkPac would not have paid the loading had it known that Mr Rossato was not a true casual.

The Court also noted that in the absence of an express term in Mr Rossato's contract that required him to repay a portion of his agreed remuneration where there is an error in characterising him as a casual, WorkPac would need to demonstrate that the mistake was so fundamental that the contract wholly failed and was void.

Consideration for Employers

It is likely that WorkPac will appeal this decision to the High Court. Additionally, having regard to the current climate, it is possible we may see an amendment to the Act or Regulations to address the Rossato decision. However, until that occurs the decision in Rossato remains the current authority.

Employers should consider whether it may be appropriate to transition any casuals who have their rosters set in advance and who work on a regular basis to permanent employment. Where an employer needs to engage a worker for short term regular work, a carefully drafted maximum term or outer limit contract may be more appropriate.

This decision makes it difficult for employers to "set off" the amounts paid to an employee in respect of a casual loading. Further, employers should note that as we had earlier foreshadowed, Reg 2.03A does not provide any additional benefit beyond the current "set off" principles that already apply at law.

However, the Rossato decision does leave open the possibility that a carefully drafted restitution clause in a casual employment contract which contains a separately identifiable and severable casual loading (that is not subsumed within a higher loaded rate) might assist an employer in claiming back the casual loading where permanent NES entitlements are claimed. Accordingly, it would be prudent for employers to take the opportunity now to review the terms of their casual employee contracts.

Key takeaways

- Having regard to the employment contract as a whole, the Court found that Mr Rossato was not a casual employee either under the *Fair Work Act 2009* (Cth) or under the relevant WorkPac enterprise agreement.
- The Court confirmed the decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 that employees who receive casual loadings may still accrue permanent employment benefits such as annual leave and personal leave if the employee's working arrangement included a firm advance commitment as to the duration or the employee's employment of the days/hours the employee will work.
- The Court held that WorkPac had an obligation to pay leave and public holiday entitlements to Mr Rossato and WorkPac was not entitled to claim back the casual loading taking into account common law principles and Reg 2.03A of the *Fair Work Regulations 2009 (Cth)*.