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Article Information

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New casual offset loading regulation to prevent 'double-dipping' – is it all bark, no bite?

A recent amendment to the Fair Work Regulations 2009 has raised some interest among employers and employees.

In the 2018 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 judgment (the *Skene* decision) the Federal Court opened the door to employees who receive a casual loading under an award or enterprise agreement in lieu of permanent employment benefits *also* being entitled to accrue those permanent employment benefits under the National Employment Standards (**NES**), if their casual employment has sufficient indicia of ongoing permanent employment.

How could an employee be casual and paid a loading and able to accrue annual leave at the same time?

The inconsistency arises when employees are casual for award/agreement purposes because those instruments define casuals as those *"engaged and paid"* as such, even if their pattern of work looks permanent. The *Skene* decision was that the NES uses a different assessment, and the same employees may be ongoing employees for the purposes for the NES because of indicia of permanence in their pattern of work and rostering. As a result of the *Skene* decision, there is very real exposure to underpayment claims, potentially stretching back even further than the usual six-year limitation period that ordinarily applies under the *Fair Work Act 2009*. At least one class action claim in pursuit of underpayments is already on foot.

What is the new regulation and does it do anything to change the risk?

The first attempt to deal with this significant development legislatively was the introduction in December 2018 of new Fair Work Regulation 2.03A by the *Fair Work Amendment (Casual Loading Offset) Regulations 2018*. That new regulation simply declares that an employer affected by a NES underpayment allegation *"may claim"* that any NES entitlements owing, including to leave entitlements, have been offset by the earlier payment of a casual loading (where the earlier loading is clearly identified).

There is nothing new in this. An employer could always make an offset claim of this kind, but with limited prospects of success. The new regulation explicitly does not change the existing law to make such an offset claim more or less likely to succeed, something confirmed in even more stark terms in the explanatory statement.

What else is happening to limit 'double-dipping' claims?

Rather than looking to the new regulation, the new development with real prospects of affecting whether an employer can succeed in an offset claim is in a further case currently before the Federal Court, *Workpac v. Rossato*.

That case is likely to test the issue of when and to what extent the law will assist employers to offset amounts owing under the NES by establishing they were intended to have been 'bought out' by a casual loading in lieu of those entitlements.

The *Rossato* case will have to wrestle with other earlier authorities which establish that annual leave under the NES, as one example, cannot be pre-paid but must be made available as and when it falls due (including on termination of employment). If annual leave cannot be pre-paid, payments in the form of casual loadings during the employment would not be able to offset the payout of annual leave entitlements on termination.

Stay tuned

The *Rossato* case will likely be head before the Federal Court in early 2019 (with final scheduling likely to be known by late

February 2019).

In the meantime, employers should at least ensure that where they are paying casual employees a loading in lieu of permanent employment entitlements, contracts and payslips make this clear so that if there is scope to seek an offset, the loading and what it pays for have been clearly identified.