



# Casual Problems - Workpac v Rossato: Implications for Businesses

**Date :** June 15, 2020

On 20 May 2020, the Federal Court handed down its long-awaited decision in the matter of *WorkPac Pty Ltd v Rossato*. In doing so, the Court re-affirmed the conclusions reached in its 2018 decision of *WorkPac Pty Ltd v Skene*, and further undermined long-standing business assumptions relating to the engagement of casual employees using flat rates of pay.

## The Facts

In essence:

- Mr Rossato was employed by the labour hire company Workpac in the period between July 2014 and April 2018, pursuant to a series of consecutive employment contracts which characterised his employment as casual
- throughout his employment, Mr Rossato was paid a flat rate of pay that was higher than the applicable casual rate contained within Workpac's enterprise agreement, and his employment contracts did not expressly state that his flat rate of pay was inclusive of any casual loading
- Mr Rossato was required to work regular and predicable shifts that were similar to those shifts worked by Workpac's full-time employees, and several of his contracts involved rosters and shifts set several months in advance
- Mr Rossato was informed that a standard work week was 38 hours, but he was regularly required to work 42 hours per week by way of lengthy 12 hour shifts
- Mr Rossato's contracts stated that he was required to perform all shifts and hours allocated to him, and several contracts specified that Workpac could recover accommodation costs, transport costs and other damages if he failed to attend a shift
- Mr Rossato's contracts did not contain an express set-off clause or any provisions allowing Workpac to recover any amounts paid above the rates set out in the enterprise agreement (including casual loading)

## The Claim

The Court proceedings were commenced by Workpac, who sought declarations from the Court that Mr Rossato was a casual employee (rather than appealing the previous Skene decision).

Additionally, and in the alternative, Workpac sought orders that any amounts paid to Mr Rossato above the rates set out in the enterprise agreement be either offset from any sums awarded to



Mr Rossato or recovered via an order for restitution on the basis of mistake.

## The Outcome

Unfortunately this strategy proved fatal for Workpac as the Court affirmed that:

- permanent employment is *'regular, certain, continuing, constant and predictable'*, and demonstrates a *'firm advance commitment as to the duration of employment'*
- by contrast casual employment is *'unpredictable, irregular, intermittent and not pre-allocated'*
- the circumstances of Mr Rossato's employment demonstrated a *'firm advance commitment'* from Workpac that Mr Rossato would have ongoing work and thus gave rise to a true permanent employment relationship (notwithstanding the alternative characterisation within his employment contracts)

The Court therefore found that Mr Rossato was entitled to have received the same entitlements enjoyed by permanent employees under the National Employment Standards (**NES**) contained within the *Fair Work Act* eg, entitlements such as annual leave, paid personal leave and payment for public holidays.

In addition, the Court dismissed Workpac's accompanying applications to offset or recover the amounts paid to Mr Rossato above the applicable rates in Workpac's enterprise agreement.

In this respect, the Court held that:

- Workpac set the terms and conditions of Mr Rossato's employment as well as his rate of pay, and thus could not have been mistaken about these matters
- the contracts were not sufficiently worded to enable Workpac to set-off any amounts paid in excess of the rates set out in the enterprise agreement, and Workpac was not entitled to appropriate such amounts towards satisfaction of a NES entitlement such as paid annual leave (since doing so would effectively allow Workpac to contract out of its obligations under the NES)
- Workpac could not recover the equivalent value of Mr Rossato's casual loading entitlement because the casual loading had been effectively *"subsumed and lost independent significance,"* and thus could not be a separately identifiable and recoverable amount

## Take Action

The Court's decision has sent chills down the collective spines of business owners and operators, particularly for those in businesses and industries that engage a substantially casual workforce. Employers may be reluctant to engage casual employees in the future in order to



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avoid the risk of similar claims and court findings.

Given the significant potential financial risks arising out of the decision employers **MUST**:

- ensure employment agreements clearly define casual employees and clearly state that casual employees are paid a clearly and separately identifiable casual loading
- ensure casual employees work irregular and intermittent shifts, maintain flexibility over the working of such shifts, and avoid guarantees of long-term employment engagements
- regularly review their pro-forma employment agreements and ensure that such agreements contain strong and clearly-worded restitution and set-off provisions
- consider the casual conversion obligations contained in an applicable modern award, and invite regular casual employees to consider transitioning to permanent employment whenever appropriate

### **More Information**

Please call the leading employment lawyers in Parramatta, the **Matthews Folbigg Workplace Solutions employment law team** on **9635 7966** to speak with one of our employment lawyers if you require any assistance or advice.