



Casuals - High Court to hear 'Workpac' Appeal

Date : February 5, 2021

In late 2020, WorkPac was granted special leave by the High Court to appeal the Federal Court's decision in *Workpac Pty Ltd v Rossato* [2020], meaning that the High Court may finally provide authoritative guidance on what properly constitutes 'casual' employment.

By way of background, Mr Rossato was engaged by Workpac on a casual basis, his employment agreement specified that he was a casual employee, and he was paid a casual loading throughout his employment, however, after that employment ended he alleged he was in reality a permanent employee and therefore entitled to various NES benefits such as notice of termination and paid annual leave.

The Full Court of the Federal Court of Australia found that:

- Workpac had engaged Mr Rossato on a '**regular, systematic and predictable basis**', and demonstrated a 'firm advance commitment' to provide Mr Rossato with ongoing work throughout his employment
- notwithstanding the fact that his employment agreement characterised him as a casual employee and he had received wages inclusive of casual loading, Mr Rossato was in fact a permanent employee and therefore eligible to recover unpaid NES entitlements from Workpac such as notice and annual leave
- Workpac could **not** set-off the casual loading against the entitlements claimed by Mr Rossato since the amount of casual loading paid had been subsumed into his wages and was not separately identifiable or recoverable

The Rossato decision followed on from the 2018 decision of *Workpac Pty Ltd v Skene*, in which the employee in question was held to be 'other than a casual employee' and thus eligible to leave and other entitlements under the NES.

Both decisions have caused particular anxiety to employers who rely upon a substantial casualised workforce as they illustrate that such employers may be vulnerable to underpayment claims made by casual employees even where they are paid a substantially-higher casual rate of pay throughout their employment.

It is anticipated that the High Court will resolve the ongoing dispute by formulating a clear and comprehensive definition of casual employment or at least provide meaningful guidance about the conditions which give rise to a 'true' casual employment relationship.

Action Items

Until the High Court hands down its decision employers should:

- ensure (as far as possible) casual employees are not engaged on regular, systematic



and predicable shifts, and avoid giving such employees any guarantee of long-term employment

- ensure that all payslips issued to any casual employees show a separate and clearly-identifiable casual loading payment
- review and update their pro-forma casual employment agreements to ensure they contain strong and clearly-worded restitution and set-off provisions
- where appropriate, invite longer-term casual employees to convert to permanent employment in accordance with an applicable modern award or enterprise agreement