

HIGH COURT OVERTURNS ROSSATO FINDING EMPLOYEE WAS CASUAL

The High Court has set aside the orders made by the Full Court of the Federal Court in *WorkPac v Rossato* [2020] FAFC 83 (Rossato) and declared that Mr Rossato was a casual employee

Importantly, the High Court confirmed that a casual employee is one who does not have a firm advance commitment to ongoing work, and that the assessment of this is governed by the terms of the employment contract and not by the conduct of the parties.

Background and the earlier Federal Court Decision

Mr Rossato was employed by WorkPac between 28 July 2014 until 9 April 2018 under six consecutive contracts.

Following the decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (Skene), Mr Rossato claimed that he was not a casual employee and sought an order for payment of outstanding entitlements (annual leave, personal/carer's leave, compassionate leave and public holidays), under the Fair Work Act 2009 (FW Act) and the applicable enterprise agreement (EA).

In response, WorkPac commenced proceedings seeking declarations that:

- Mr Rossato was a casual employee and not entitled to paid entitlements under the FW Act or EA.
- Alternatively, Mr Rossato's pay included a casual loading which was in part paid in lieu of the entitlements and WorkPac was entitled to 'set-off' any amount owed to Mr Rossato in respect of those entitlements.
- Alternatively, WorkPac was entitled to restitution of the casual loading paid or the amount paid in excess of the permanent entitlements under the EA.

The Full Court of the Federal Court concluded that:

- Mr Rossato was not a casual employee and was entitled to the paid annual leave, personal/carer's leave, compassionate leave and public holidays claimed.



- WorkPac had not made payments to Mr Rossato in discharge of his outstanding entitlements to paid annual leave, personal/carer's leave, compassionate leave or public holidays and was not entitled to the "set-off" it claims.
- WorkPac was not entitled to restitution of the monies it claims, either on the basis of a failure of consideration or mistake.

The Full Court, influenced by the approach in *Skene*, determined that Mr Rossato was not a casual employee despite being employed and paid as such.

It reached this conclusion on the basis that his employment arrangements (including stable, regular, and predictable work) indicated a 'firm advance commitment'. Employer Assist invites you to refer to its earlier articles on the decisions in *Rossato* and *Skene* for more information.

High Court Decision

The High Court decision makes it clear that where the terms of the employment relationship are committed to a written contract by the parties, those terms must be considered to determine the character of the employment relationship.

The terms of the contract between Mr Rossato and WorkPac were considered by the High Court to identify if they established a firm advance commitment to continuing work beyond the completion of an assignment.

Some of the key considerations of the High Court in determining whether there was a firm commitment to continuing work included:

- contractual clauses providing that employment was on an assignment-by-assignment basis, including that Mr Rossato could accept or reject the offer of an assignment and that WorkPac was not obligated to provide an assignment, indicated there was no firm advance commitment to continuing work;
- contractual clauses providing that an assignment could be unilaterally varied by WorkPac on one hour's notice and could be unilaterally terminated by either party on one hour's notice, indicated there was no firm advance commitment to continuing work;
- the provision of a roster does not go to a firm advance commitment to continuing work beyond the completion of an assignment, and the contractual terms set out directly above are inconsistent with the making of a firm advance commitment to continuing work beyond the completion of an assignment;



- the parties agreed to a loading to be paid in lieu of entitlements, such as annual or personal leave, indicating casual employment; and
- the use of the word 'casual' may be a factor in interpreting the contractual rights and obligations of the parties to a contract for employment.

The High Court unanimously determined that Mr Rossato was a casual employee and not entitled to the benefits claimed. In light of this, the Court did not need to consider WorkPac's set off and restitution arguments.

Casual Employment Contract

The High Court *Rossato* decision highlights the importance of having a contract in place for casual employees which supports the position that the employment relationship is not a firm advance commitment to continuing work beyond the completion of an assignment.

While employees may be able to convert from casual employment to future permanent employment where specified factors are met under the FW Act and/or applicable Award, it is none-the-less prudent to enter into a casual employment contract in the event a retrospective employment status claim is made.

Fair Work Act

A statutory definition of 'casual employee' was inserted into the FW Act after the *Rossato* decision but before the High Court Decision. This definition should also be taken into consideration when drafting an employment contract of casual employees.

This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist for advice.

AAAA Member Benefits

If you require assistance, including the proper drafting of casual employment contracts, contact Employer Assist on 1300 735 306 or aaaa@employerassist.com.au