

CASENOTE: WorkPac Pty Ltd v Rossato [2020] FCAFC 84**Background**

Mr Rossato (also '**Employee**') was employed by WorkPac Pty Ltd ('**WorkPac**' or '**Employer**') a labour hire company, on a series of six contracts of employment, over three and a half years. Mr Rossato was employed at mines in the Bowen basin, and described as a 'Casual FTM' or casual employee, and paid as such. Following the decision of Workpac v Skene,¹ in a letter of 2 October 2018 the Employee claimed an entitlement to be paid amounts for annual leave, personal/carer's leave and compassionate leave and public holiday pay entitlements due under the *Fair Work Act 2009* (Cth) ('**FW Act**') and an enterprise agreement made under the FW Act.

A. Procedural direction

Two days after the Employee's solicitors wrote to argue his claim, the Employer applied to the Federal Court for declarations, to the following effect:

- (a) first, Mr Rossato was a casual employee at common law and within the meaning of sections 86, 95 and 106 of the FW Act;
- (b) on this basis, Mr Rossato was not entitled to paid annual, personal/carer's, or compassionate leave under the FW Act or the 2012 enterprise agreement or payment for public holidays under that enterprise agreement;
- (c) next, if Mr Rossato was a casual employee, WorkPac is entitled to "set-off" any amount owed to Mr Rossato against a casual loading of 25% of the minimum rate paid to Mr Rossato; and
- (d) by reason of a total failure of consideration, or mistake, WorkPac is entitled to restitution of that part of the 25% loading which he received by virtue of being a 'casual' employee.

An application was brought by WorkPac in respect of the form of the WorkPac application. On hearing the application, Chief Justice Allsop considered a direction referring the application to a full court of the Federal Court. His Honour:²

- found that based upon Workpac v Skene and the public interest, there was a basis for the Court's jurisdiction to be exercised by a full court;
- found the Employer's application was of sufficient importance for a direction under section 20(1A) of the *Federal Court of Australia Act 1976* (Cth) to be made; and
- made the direction.

B. Full court

Justices Bromberg, White and Wheelahan heard the application, usually for a full court. Their Honours delivered separate judgments, each finding that the Employer failed in its application for declarations; and that the Employee was 'other than a casual', entitling Mr Rossato relief including annual leave and other types of paid leave sought.

¹ [2018] FCAFC 131; (2018) 264 FCR 536.

² [2018] FCA 2100.

Justice Bromberg

Justice Bromberg noted that leave was granted to intervene to the Minister for Jobs and Industrial Relations and to the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU') and Mr Petersen who was the applicant in a separate class action against the Employer.

His Honour's main findings concerned the allegation that the Employee was casual: his Honour found that the contents of the employment agreement (including powers to stand-down Mr Rossato) and the fact that work under the contract was not irregular or intermittent [118] meant that Mr Rossato was "other than a casual employee". In addition, his Honour rejected the set-off argument, adopting White J's reasons. In rejecting the 'restitution' argument, his Honour adopted both White and Wheelahan JJ's reasons.

Justice White

Justice White identified three sources of employment terms for Mr Rossato: the FW Act, the 2012 enterprise agreement, and Mr Rossato's contracts of employment [313]. His Honour:

- noted that the "firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work" is the criterion by which the existence of casual employment is to be ascertained. [398]; and
- reviewing other authorities such as Reed v Blue Line Cruises,³ Hamzy,⁴ and Doyle,⁵ White J noted some of the similarities in these decisions [444].

As to restitution, his Honour found against WorkPac's submission that it had paid the casual loading to Mr Rossato on the basis that he was a 'Casual FTM' under the enterprise agreement and not entitled to leave. WorkPac reasoned that a finding by this Court that Mr Rossato was not a casual employee, would involve a mistake from which restitution could be sought [688]. White J found that the flat rate paid to Mr Rossato prevented the Court from finding that a separate 'casual loading' could be identified [702], and that the amounts paid were not paid 'on the basis' that Mr Rossato was casual. Both on the basis of the mistake, and in identifying the loading which WorkPac claimed to pay separately, his Honour found against WorkPac [705].

In relation to 'set-off', White J found that in submitting that WorkPac had engaged Mr Rossato during six periods and paid him more than the rate required under the enterprise agreement *with the intention* that he would not have any entitlement to paid forms of leave, it was entitled to "set off" the amount of the overpayment against other forms of entitlement [821]. After considering authorities including Poletti,⁶ Givoni⁷ and Ray v Radano,⁸ his Honour dismissed the application for set-off on the basis that the required intention was not contained in any of the contractual sources [918]-[920].

Justice Wheelahan

His Honour Justice Wheelahan agreed substantially with Justice White, dispensing in short order with the argument regarding Mr Rossato's 'casualness'. His Honour found that the remaining

³ Reed v Blue Line Cruises Ltd (1996) 73 IR 420, see also 425 per Moore J.

⁴ Hamzy v Tricon International Restaurants [2001] FCA 1589; 115 FCR 78.

⁵ Doyle v Sydney Steel Ltd (1936) 56 CLR 545.

⁶ Poletti v Ecob [989] FCA 779; 91 ALR 381; 31 IR 321.

⁷ Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd [2002] FCA 1406.

⁸ Ray v Radano [1967] AR (NSW) 471.

questions were whether set-off, restitution or failure of consideration had a role to play in the Court's judgement: [952].

His Honour found that no restitutionary 'mistake' arose on the facts of the case, and that restitution could not oust the operation of statutory entitlements claimed by Mr Rossato. Further, his Honour cited authority, including Roxborough v Rothmans of Pall Mall,⁹ that the contractual nature of Mr Rossato's employment did not permit restitution, absent either an accidental overpayment (which had not occurred) or a total failure of consideration, which was not available on the facts.

Rationale of the decision

Aside from the question of set-off, the main reasons to examine this case are two: the *first* is the fact that it is the most recent and thorough examination of set-off, though intellectually the result is unsatisfying. *Second*, the losing applicant, WorkPac has indicated in mid-June 2020 that it will seek further consideration, by seeking special leave to appeal to the High Court.

Whilst the status of Mr Rossato as a 'non-casual' is hardly likely to be in dispute, the question as to whether one of the set-off arguments was properly decided may in fact attract the Court to a grant of special leave, on this narrow basis.

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⁹ Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68; (2001) 208 CLR 516.