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CASENOTE: WorkPac Pty Ltd v Skene [2018] FCAFC 131

Background

Mr Skene (also **'Employee'**) was employed by WorkPac Pty Ltd ('**WorkPac**' or '**Employer**') initially as a dump-truck operator during 2010, and then during a separate period from July 2010 to April 2012.[1] Mr Skene was a labour-hire employee, assigned first to Anglo Coal's Dawson mine in Queensland and working under a transitional agreement, the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* ('**Agreement**'). Mr Skene later worked (again whilst employed by WorkPac) for Rio Tinto at its Clermont mine from July 2010. Prior to commencing any work, he signed a contract which provided for an ongoing duration with a one-hour termination period; the contract also provided that employment was on an 'assignment by assignment' basis, which provided for each "*discrete period of employment* [being for] *. . . a Casual or Fixed Term hourly basis*". On about 23 April 2012, Mr Skene's employment was terminated. Mr Skene sued in the Federal Circuit Court of Australia.

<u>First instance</u>

At first instance, the Employee made two claims:

(a) firstly, he claimed an entitlement to accrued annual leave pursuant to WorkPac's enterprise agreement: the Employee claimed the exclusion of 'casual employees' in section 86 of the *Fair Work Act* 2009 (Cth) ('**FW Act**') did not apply to him; and
(b) secondly, he claimed annual leave loading and penalties for breach of section 44 of the FW Act (amongst other entitlements) on the basis that he was 'other than a casual employee' and that there had been a breach of the Agreement.

Judge Jarrett of the Federal Circuit Court found:

- both Mr Skene and Ms Gray (a witness called by the respondent) gave evidence that they considered the Employee's employment to be casual. The written terms of employment included five separate options for status of employment – including full-time, part-time, casual and 'limited term or assignment' engagement. These options were not exclusive of each other;
- Mr Skene did not take any paid annual leave during the period of his employment with WorkPac between 11 and 17 October 2011, though he took unpaid leave;
- a casual employee would be 'engaged by the hour'. This did not appear to Judge Jarrett to be Mr Skene's position; and
- that the Employee's engagement was regular, on the basis of a roster put forward by Clermont, however, the description was not decisive. Rather the mutual intention must be objectively ascertained.

[1] At least one online version of the Full Court case records Mr Skene as working until April 2014: see https://jade.io/article/599072 (accessed on 3 September 2018) at [8]. This appears to be incorrect based upon the findings at first instance (see [2016] FCCA 3035, at [1].) Despite other corrections, this remains in the appeal judgment.

Referring to White J in FWO v Devine Marine Group Pty Ltd[2] the trial judge found that Mr Skene was not a 'permanent' employee, but was entitled to compensation for non-payment of accrued annual leave under section 87 of the FW Act. The trial judge ordered $21,054.69 by way of compensation and $6,736.03 in interest, dismissing all other claims. WorkPac appealed.

A. Ground of the Appeal

The Employer advanced a single ground of appeal, to the effect that the trial judge had erred 'in failing to find that Mr Skene was a causal employee' for the purpose of section 86 of the FW Act. Consequential orders sought were:

- the appeal court should set aside the primary judge's order as to compensation; and
- the Employee's application be dismissed.

The Employee cross-appealed, seeking the appeal court find that the Employee was a casual employee for the purpose of the Agreement; also challenging the amount of compensation; and finally seeking than a penalty be imposed upon WorkPac.

Justices Tracey, Bromberg and Rangiah heard the Full Court appeal. They delivered a judgment:

- examining authorities such as Melrose Farm,[3] and Williams[4] which were relied upon by the primary judge;
- reviewing other authorities such as Reed v Blue Line Cruises,[5] Hamzy,[6] and similar decisions.

B. Legal issues

First issue – what is the meaning of 'casual employment'?

WorkPac asserted that Mr Skene was a casual employee within the 'common industrial meaning' of the phrase, as the notion of what is understood to be a casual employee by federal industrial tribunals for the past 70 years is the intended meaning of "casual employee" in section 86 of the FW Act. In so doing, WorkPac asserted (in contrast to the primary judge) that 'casual employment' meant not the legal meaning of the term, but its common or ordinary meaning.

The Full Court found against WorkPac - that for reasons of statutory construction (absent clear contrary indication), the legal meaning of the expression 'casual employee' was the correct one, and consistent with prior authority.

Second issue – entitlement to annual leave under the Agreement

The Agreement provided at cl 5.5.6:

> *At the time of their engagement, the Company will inform each* [employee] *of the status and terms of their engagement.*

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[2] [2014] FCA 1365, in particular [137].
[3] Melrose Farm Pty Ltd (t/as Milesaway Tours) v Milward (2008) 175 IR 455.
[4] Williams v McMahon Mining Services Pty Ltd [2009] FMCA 511 per then Lucev FM.
[5] Reed v Blue Line Cruises Ltd (1996) 73 IR 420, see also 425 per Moore J.
[6] Hamzy v Tricon International Restaurants [2001] FCA 1589; 115 FCR 78.

WorkPac argued that this term of the Agreement provided for Mr Skene's status; and that essentially the Employer could determine that status. In response, Mr Skene argued that the obligation in cl 5.5.6 obliged WorkPac to inform Mr Skene of his status, as objectively determined and not as set by Workpac.

The Full Court found that cl 5.5.6 does not say that the 'status' of Mr Skene is determined or specified by WorkPac or that the status is at WorkPac's election. This second issue was resolved against WorkPac, and its ground appeal dismissed.

Third issue - penalty

In relation to Mr Skene's appeal on penalty, Mr Skene argued that in declining to impose a penalty for contravention of section 86 of the FW Act, the primary judge erred in the exercise of his discretion.

The Full Court found:

- the primary judge took the view that WorkPac's conduct was sufficiently excusable as to not warrant a penalty, was because his Honour mistakenly held that WorkPac had taken appropriate advice and had closely considered the legal implications of its conduct;
- this was a mistake of fact, and one which should be corrected on appeal: Comcare v Post Logistics.[7]

Mr Skene's appeal as to the penalty was allowed and remitted to the Federal Circuit Court for reconsideration.

Rationale of the decision

There is an inherent tension between engaging an employee for irregular hours and an uncertain period – and one in which the engagement is ambiguous, but the hours turn out to regular and systematic. In this case, the tension becomes definitional, as the Full Court found that the intention of 'casual' in section 86 was one in which the legal conclusion had a role to play. This is a strained interpretation.

There are other unsettling parts of this decision. For example, it is not clear how the Rio Tinto roster – given or apparently given to Mr Skene for work a year in advance – could have any work to do in determining his status with WorkPac. There was no finding that this was authorised or approved by WorkPac – and any factum or thing done by a non-employer could (without more) not be an indicium of the *basis or status* of the Employee's work. This seems at some odds to the nature of reasoning involved in determining the 'objective status' of Mr Skene.

Whilst the engagement of Mr Skene is not likely to be a vehicle for a grant of special leave, I consider it quite likely that a special leave application (considering the meaning of section 86, and other provisions of the FW Act) may have some force, in seeking to overturn the Full Court decision.

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4 September 2018

[7] Comcare v Post Logistics Australasia Pty Ltd (2012) 207 FCR 178 (per Rares, Cowdroy and Griffiths JJ). See in particular [39].