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Are casual employees entitled to paid leave?

Author: Margaret Kaukas
Email: enquiry@andersons.com.au
Phone: 08 8238 6636
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NOTE: WorkPac Pty Ltd has asked the High Court of Australia for "leave" (permission) to appeal this decision. Given the significance and potentially wide impact of this decision, we expect that the High Court will grant permission. If it does, the question of whether or not casual employees are entitled to paid leave will not be settled until the High Court has published its decision on the appeal. We will provide updates as the case progresses (18 June 2020).

In a decision published on Wednesday 20 May 2020, the Full Federal Court found that Robert Rossato – a "casual" worker engaged by a labour hire company, WorkPac Pty Ltd to work at various open cut black coal mines in Queensland, was entitled to paid leave (annual, sick, carers and compassionate leave) and payment for public holidays when he could not work.

Mr Rossato had worked for WorkPac for just under four years, pursuant to six separate contracts of employment. The contracts were for varying periods and at various mines all run by the same operator. His contracts specified that he was employed as a "causal" employee and he was paid a 25% loading upon his hourly rate, ostensibly in lieu of paid leave entitlements.

After he left employment with WorkPac, Mr Rossato made a claim asserting that he was entitled to payment for time lost from work during his employment due to illness, caring responsibilities and public holidays, and payment of annual leave accrued during his employment.

This claim was made on the basis of an earlier decision of the Full Federal Court called *WorkPac Pty Ltd* v *Skene* in which the Court found that another "casual" employee of WorkPac was entitled to paid leave because, despite being paid a casual loading,

he was not a “true” casual employee. In that case, the Court stated that the “essence” of “true” casual employment was that it did not involve a firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern.

To the surprise of many in the industrial relations industry, WorkPac did not seek to appeal the *Skene* decision to the High Court. However, in the Rossato case they, effectively, tried to reargue the issue but were ultimately unsuccessful.

When Mr Rossato made his claim, WorkPac sought a ruling from the Full Federal Court that, effectively, Mr Rossato was not entitled to paid leave and, alternatively, if he WAS entitled to paid leave, then the 25% casual loading that he had been paid should be “set off” against that entitlement.

The Full Federal Court rejected WorkPac’s arguments, finding that the *Skene* case had been correctly decided. Furthermore, it ruled that WorkPac could not set off the 25% casual loading paid to Mr Rossato against his paid leave entitlements – effectively, therefore, that Mr Rossato was entitled to paid leave despite having received a 25% casual loading.

In reaching this decision that WorkPac could not “set off” the casual loading against Mr Rossato’s paid leave entitlements, the Full Federal Court clarified an issue was left uncertain after the *Skene* decision.

Full Federal Court Findings for WorkPac Pty Ltd v Rossato [2020] FCAFC 84

In brief, the Full Federal Court found that:

- when the *National Employment Standards* contained in the *Fair Work Act (Cth) 2009* state that casual employees are not entitled to paid leave, it uses the term “casual employment” in the sense of a “true” casual and not just someone who is called a casual and paid a casual loading. (Note that the National Employment Standards provide minimum standards for the great majority of workers in Australia – only a very few employees are not covered by the National Employment Standards);
- “true” casual employment is employment where there is no firm advance commitment by the employer to provide work (and by the employee to perform work). (Note that this does not mean a guarantee of ongoing work, because even “permanent” employees can be dismissed. Nor does it exclude a fixed or maximum term contract because, arguably, such a contract includes a firm advance commitment for the maximum period of the contract.);
- the existence or absence of a firm advance commitment is determined, not just by the terms of the written contract of employment, but by the actual working arrangements. (So, for example, even if a contract stated that there was no firm advance commitment that work will be offered but the worker worked in accordance with a monthly roster, it would be difficult to argue that there was no “firm advance commitment”.);
- the usual indicators of the absence of a firm advance commitment include: irregular work patterns; uncertainty; discontinuity; intermittency of work and unpredictability of work. One judge referred to the example of an employee who “stands and waits” for work, who is only given the chance to work in response to a specific demand to work for a specific period of time, as a “true” casual. (For example, a nurse who is engaged in a “casual pool” at a public hospital and who has to call every morning to see if they are needed that day would be a “true” casual); and
- in the case before it, the payment of wages including the 25% “casual loading” was not for the purpose of discharging entitlements to paid leave contained in the National Employment Standards and, accordingly, the 25% loading could not be “set

off" against Mr Rossato's entitlements for paid leave which had not been paid to him. That is, WorkPac was not entitled to reduce the amount which Mr Rossato was claiming by the value of the 25% loading paid to him during his employment.

This decision – along with the earlier *Skene* decision – has the potential to impact a considerable number of "casual" workers. In particular, workers who have worked on a "casual" basis for an extended period of time, working regular shifts committed to in advance, may be entitled to claim and receive significant sums of money. (For example, the National Employment Standards provide for 4 weeks of paid leave each year, so a worker who has worked for six years in the circumstances outlined will be entitled to 24 weeks paid annual leave.)

Note, however, that to some degree at least, the decision relied upon the terms of the specific Enterprise Agreement applicable to Mr Rossato's employment. Accordingly, it is not possible to say that EVERY casual worker will be entitled to paid leave. However, in our view, the decision will have wide reaching impact.

It is possible that WorkPac may appeal this decision to the High Court. If they do, any claims based on this decision will, in all likelihood, be deferred until the High Court rules on the matter. We will provide an update if an appeal is filed.

If you believe that you may be entitled to paid leave for periods of employment as a "casual" employee, please contact Anderson's workplace law team.

Update 18 June 2020: If you are / were a casual employee and are interested in pursuing a claim for unpaid leave entitlements, we recommend that you defer pursing your claim until the High Court has delivered its decision on the appeal. We will report the outcome of the appeal in due course.
