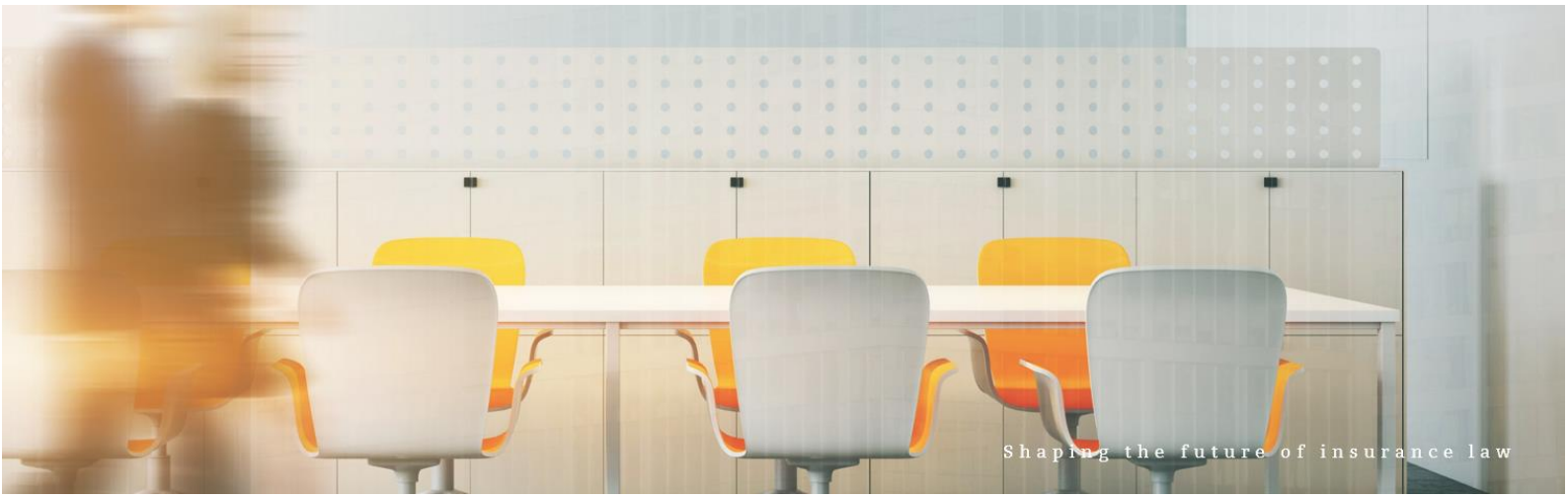

It's all about the employment contract – High Court decision in *WorkPac v Rossato*

5 AUGUST 2021

***Workpac Pty Ltd v Rossato* [2021] HCA 23**

AT A GLANCE

- On 4 August 2021, the High Court delivered its eagerly anticipated judgment about casual employees in *Workpac Pty Ltd v Rossato* (***WorkPac***).
- In combination with recent changes to the *Fair Work Act 2009* (Cth), the High Court's decision in *WorkPac* provides important guidance for employers and their EPL insurers on managing causal employees.
- In short, it's all about the employment contract.

BACKGROUND

WorkPac Pty Ltd is a labour hire company that provides workers for the mining industry. Mr Rossato was employed by WorkPac for four years and he worked on two mine sites in Queensland.

Key features of Mr Rossato's employment included:

- He signed six consecutive employment contracts with WorkPac over a four-year period. Each contract described him as a casual employee, provided for a 25 percent loading, and explained that he was not guaranteed work and that either party could terminate an assignment on one hour's notice.
- He was allocated shifts via a roster that was typically set well in advance by the mining company.
- He worked on a 'drive in, drive out basis', often on a seven days on, seven days off arrangement.

Mr Rossato made a claim against WorkPac and alleged that he was not a casual employee. It follows that Mr Rossato claimed he was entitled to annual leave, public holiday pay, personal leave and compassionate leave under the *Fair Work Act* and the relevant enterprise agreement.

Mr Rossato sought to rely on the Full Federal Court decision of *WorkPac Pty Ltd v Skene*[1] by arguing that his employment did not have the 'essence of casualness', such as unpredictability and irregular work patterns.[2]

FULL FEDERAL COURT DECISION

Mr Rossato was initially successful in his claim against WorkPac.[3] In a unanimous decision in May 2020, the Full Federal Court found that Mr Rossato was not a casual employee and therefore he was entitled to paid leave under the *Fair Work Act* and the relevant enterprise agreement.

The Full Federal Court held that Mr Rossato had a 'firm advance commitment' to ongoing work because:

- he worked regular shifts that were scheduled up to 12 months in advance, and
- while his employment contracts allowed him to reject shifts, this was inoperative because of the long-standing behaviour of the parties and the remote nature of the work.

The Full Federal Court explained that a written contract does not necessarily determine whether a person is a casual employee. This is because the conduct of the parties in the employment relationship must be considered, including the number and predictability of hours worked.

The effect of the Full Federal Court's decision was that the nature of an employment relationship could change, even if a contract clearly defined a person as a casual employee. This position has now been rejected by the High Court and new legislation.

HIGH COURT DECISION

On 4 August 2021, the High Court unanimously and emphatically overturned the decision of the Full Federal Court and found that Mr Rossato was a casual employee of WorkPac.[4]

The High Court focussed on the key features of Mr Rossato's contracts of employment with WorkPac, specifically that:

- his employment was on an assignment-by-assignment basis
- he was entitled to reject any offer of work
- WorkPac was under no obligation to offer any further work, and
- his higher level of remuneration reflected these factors.

This analysis led the High Court to find:

> *'the whole point of the arrangements under which the parties undertook one assignment at a time was that there should be no basis for any suggestion that either of them was providing a firm advance commitment to continuing work'.*[5]

This means that Mr Rossato was not entitled to assume he had an ongoing working relationship, despite his regular hours over a long period of time.

The key message in the High Court's judgment is to focus on the written employment contract and what it says about the nature of the employment relationship at the outset. The High Court found that straying beyond this approach:

> *'…would mean that the parties could not know what their respective obligations were at the outset of their relationship and would not know until a court pronounced upon the question. That outcome does not accord with elementary notions of freedom of contract'.*[6]

This decision highlights the critical importance of employment contracts and it limits the number of other factors that determine whether a person is a casual or permanent employee.

> **A clearly defined employment contract will provide certainty, but a wholly verbal or poorly drafted agreement will create confusion, ambiguity and litigation risk.**

[1] [2018] FCAFC 131.
[2] See also *Hamzy v Tricon International Restaurants* [2001] FCA 1589.
[3] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.
[4] *WorkPac Pty Ltd v Rossato* [2021] HCA 23.
[5] Ibid, paragraph 89.
[6] Ibid, paragraph 99.

GOVERNMENT INTERVENTION

The unanimous decision of the Full Federal Court was controversial and described as a "question…of national importance" at the time the appeal was lodged in the High Court.[7]

The Commonwealth Government argued the decision "heightened concerns for over two million casual employees and over 800,000 employing businesses" with "potential back pay liabilities…(of) between $18 and $39 billion" in unpaid entitlements.[8]

These concerns were the catalyst for a significant change to the *Fair Work Act* in March 2021. For the first time, the Government introduced a definition of 'casual employee' that considers whether:

- the offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work
- the employer can offer work, and whether the employee can accept or reject work
- the employment is described as casual, and
- the person is entitled to a casual loading.[9]

Importantly, the new definition mandates a focus on the "offer of employment and the acceptance of that offer" and "not on the…subsequent conduct of either party".[10] This means that a person may still be a casual employee even if they've had a regular pattern of work hours over a long period of time.

This change to the *Fair Work Act* makes it clear that the terms of the employment contract are paramount, rather than any unwritten expectations that may evolve over the course of an employment relationship.

GUIDANCE FOR EMPLOYERS AND THEIR INSURERS

The unanimous decision of the High Court is consistent with the new definition of 'casual employee' in the *Fair Work Act*. This means that after many years of uncertainty, we now have some guidance for employers about casual work, including that:

- it is crucial to have a well-defined contract of employment, as this will define the scope of the employment relationship
- it is important to understand the new definition of 'casual employee' in the *Fair Work Act*, as it is likely to apply retrospectively[11], and
- written terms will take precedence over unwritten expectations in an employment relationship.

The overall message for employers and their EPL insurers is simple – a clearly defined employment contract will provide certainty, but a wholly verbal or poorly drafted agreement will create confusion, ambiguity and litigation risk.

W+K's Workplace & EPL team can advise on managing casual employees in your workplace, including preparing well-defined employment contracts to provide certainty in this complex area.

[7] *WorkPac Pty Ltd v Rossato* [2021] HCA 23, at paragraph 109.
[8] Explanatory Memorandum to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth).
[9] See section 15A of the *Fair Work Act 2009* (Cth).
[10] See section 15A(4) of the *Fair Work Act 2009* (Cth).
[11] *Jess v Cooloola Milk Pty Ltd* [2021] FCCA 1526, at paragraph 89

Need to know more?

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