What Does the Decision in the *Rossato* Case Mean for the Bus Industry?

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- Pay loading of 25% compensates for lack of entitlements to annual leave, paid personal leave, notice of termination, redundancy pay

  > but casuals do get various forms of leave

  > plus unfair dismissal protection (if they work for long enough on a regular and systematic basis)

  > and superannuation (if they earn more than $450 per month)

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So who <u>is</u> a casual?

- Most awards and enterprise agreements seem to leave it to the employer to decide

  - > eg Passenger Vehicle Transportation Award 2020 clause 11.1:

    A casual employee is an employee who is engaged as a casual employee and paid by the hour.

  - > clause 11.5 allows 'regular' casuals with 12 months' service to request conversion to permanent hire, which employers can refuse on reasonable grounds

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But wait …

- Under the 'general law', casual employment is treated as temporary, irregular or uncertain

- And the Fair Work Act 2009 has no definition

- So an employee might be paid as a casual, yet not be a casual for general law purposes

- As found to be the case in two major decisions, both involving labour hire workers in the coal mining industry

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- Paul Skene engaged as a dump truck operator for two periods, totalling two years

- Arrangements involved driving/flying in and out, then working set rosters

- Each time given a 'notice of offer of casual employment', paid an all-in rate, though with no specific designation of casual loading

- Held to be entitled to annual leave on termination of his employment

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- Full Court of the Federal Court interpreted section 86 of the Fair Work Act as using 'casual' in its general legal sense

- Endorsed the view that

  the essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work

- Engineered by Workpac to test out arguments not run in *Skene*

- Robert Rossato worked as a production employee for over three and a half years, on six separate contracts

- Engaged and paid as a casual

- Successfully claimed unpaid annual leave, personal leave and public holiday pay

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- Workpac unsuccessfully argued that

  - > Rossato had clearly agreed to be a casual

  - > if he was owed annual leave entitlements, Workpac could 'set off' the loading it had paid

    - – either under the common law or the Fair Work Amendment (Casual Loading Offset) Regulations 2018

  - > alternatively, it could seek restitution of some or all of the loading, for mistake or 'failure of basis'

- Main problem with set-off (and perhaps also restitution) – employers can't pre-pay leave

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Could things change?

- Likely to be a High Court appeal in *Rossato*
  - > prospects?
  - > timing?

- Employer groups are pushing for a legislative fix, to preclude 'double dipping'
  - > could this be an outcome from the current roundtable discussions with ACTU?
  - > could any change have retrospective effect?

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- How many 'disguised casuals' there might be depends on how broadly or narrowly the 'essence of casualness' test is applied

  > compare *Birner v Aircraft Turnaround Engineering* [2019] FCA 1085

- But clearly a greater risk for casuals with stable and predictable work

  > eg school bus drivers with no extra work as needed

- Does it matter if a casual has previously refused conversion?

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- Sit tight and hope the problem goes away, courtesy of the High Court or new legislation

    > note absence of known follow-up cases outside mining industry – though that could easily change

- Persuade long-term casuals to convert

    > but they have an obvious incentive to refuse

- Restructure some contracts to fixed term

- Amend contracts to more clearly stipulate loadings, and/or allow set-off or restitution

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Questions?

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