APTIA
Industrial Arm of the Bus Industry Confederation
moving people

IMPLICATIONS OF THE DECISION IN ROSSATO'S CASE

Preamble:

On Wednesday 20 May 2020, the long-awaited decision in the Rossato case, relating to casual employment, was handed down by the Federal Court.

Workpac Pty Ltd v. Rossato, [2020], FCAFC 84 was a decision of three Federal Court Judges, Judge Bromberg, who gave the primary decision and Judges White and Wheelahan, who also supported the unanimous decision.

The Minister for Jobs and Employment, the CFMMEU and Matthew Peterson, representing parties to a class action, also intervened.

Any of the parties to the proceedings i.e. applicant and respondent, has the right to seek leave to appeal to the High Court. It is not known yet if any party will seek such leave.

The Attorney General, encouraged by employer organisations, has indicated that he may seek to legislate to make, at least the position of 'set off' against payment of casual loadings clear. What is certainly clear is that the decision has placed casual employment fairly and squarely on the IR agenda for the next few years. I have attached a copy of the Attorney General's doorstop meeting, courtesy of Hon Eric Abetz and Tasbus.

It is incumbent on all employers to understand the implications of this case.

Note:

Members of APTIA should seek their own legal advices as to the legal implications for their businesses, regarding the decision.

APTIA will also get legal advices as to the broader implications for the industry.

Set out below is a summary of the decision of Judge Bromberg, which was supported by the other two Judges, in a unanimous decision.

The Facts:

(i) Workpac Pty Ltd is a labour hire company, who employed Rossato, over six separate contract periods, in which Rossato worked at mines operated by Glencore Mining.

(ii) The contracts of employment between Rossato and Workpac stated that Rossato's was employed as a casual field team member (FTM). There were changes made to the six contracts, especially after Skene's case, to try to ensure that Rossato was considered to be a casual.

(iii) Rossato was paid a higher amount than a permanent FTM, which Workpac argued included a casual loading and which was paid in lieu of any leave entitlements. This was not expressed in the early contracts but later in the final contract.

(iv) The terms and conditions of Rossato's employment were also the subject of an Enterprise Agreement to which Rossato was a party.

(v) The EA did not stipulate the basis of the payment of any loading. Rossato was paid a flat rate of pay, which, supposedly, included any overtime payments or weekend penalties.

(vi) Rossato claimed that he had not received, over a 3 1/5 year period, any paid leave, personal leave, which was identified, or payments for Christmas day, Boxing day and New years day, when the mines shut down and no work was possible.

(vii) Workpac sought the following declarations from the Federal Court:

- That Rossato was a casual employment as expressly indicated by his contract of employment.
- That if Rossato, for any reason, was not deemed a casual then any extra payment could be offset against any leave entitlements to which Rossato was entitled, under national employment standards (NES).
- If an offset was not permitted, then Workpac was entitled to restitution of the extra monies due to the fact that the payments were made by mistake and Rossato was 'unjustly enriched'.

Matters considered:

(i) The character of Rossato's employment with Workpac, with specific reference to his contract of employment, the enterprise agreement, which applied to his terms of employment and the actual nature of his employment.

(ii) The concept of 'firm advance commitment' (FAC) which all parties agreed, following Skene's case, was a determinant of the type of employment of Rossato i.e. what constituted the absence of FAC and what indicated the existence of FAC.

(iii) In what circumstances could Rossato expect that any additional payments could be utilised to pay leave entitlements under the NES.

(iv) In any event was Workpac entitled to set off or have restitution of the monies paid on the basis that the nature of the contract, as expressed, enabled such set off or restitution?

The Decision

(i) The Court considered that the 'process of characterisation' of employment was more relevant than the contract terms, which only provided a cover for the actual nature of the employment.

(ii) That the absence of a 'firm advance commitment' of employment would be

- Irregular work patterns
- Uncertainty of work from day to day
- Discontinuity of work
- Intermittency of work and unpredictability of work

(iii) The Court did not accept the contractual terms to allow a set off and simply referenced the Enterprise Agreement and wage slip which were silent on the issue of set off.

(iv) Additionally, the issue of 'unjust enrichment' was not accepted nor was the argument about mistake and restitution.

(v) Some relevant comments:

Paragraph 72

"Another indication of an absence of a firm commitment is the existence of an employee, who stands and waits, or in other words, is only given the opportunity to provide his or her services in response to a specific demand that a specific period of working time be worked."

Paragraph 211

"The assessment of whether a person is a 'casual employee' is to be conducted by a characterisation of all of the relevant facts which speaks to the type of employment that existed at the time the entitlements in question accrued."

Paragraph 217

"Payslips do not show that any payment made in relation to an entitlement to leave shows a nil balance of leave."

Paragraph 226

"However, a starting point is the recognition that any form of paid leave involves both a payment and an authorised absence from work. In substance, the entitlement to paid leave is an entitlement of an employee to be absent from work for a period without loss of the remuneration that would ordinarily be earned in that period."

Paragraph 253

"As the Enterprise Agreement does not provide that any component of the EA hourly rate payable to Mr Rossato be paid as a casual loading in lieu of, or partly in lieu of annual leave entitlements and personal leave entitlements, the better view is that the premise upon which WorkPac's contention is based – that the hourly rate payable under the contracts included a casual loading – is not established."

Questions for the Public Transport Industry

1. Does the decision in Rossato, which confirmed the decision in Skene's case, that the absence of a 'firm advance commitment' will be the determinant as to whether an employee is a casual employee, and following that position?

    - Does a school bus casual, who works 20 hours a week and 40 weeks only a year, have a firm advance commitment and therefore is not a casual employee?
    - Does a coach or charter driver who is provided a roster 24 hours, prior to their workday, but who works regularly and consistently but for economic circumstances have a firm advance commitment?
    - Does this spell the end of permanent casuals who either operate route and school services with a bit of charter to take them close or over 38 hours a week on a regular basis.

2. Is it possible to have terms of employment either in an Award, an Enterprise agreement or contract of employment which creates an employment type in which an additional loading is accepted in lieu of NES entitlements? Is it possible therefore to give effect to the wishes of the aged public transport workforce which has a preference for less permanent work.

3. Does the **Fair Work Amendment (Casual Loading Offset) Regulations 2018** afford any relief to an employer in the circumstances where an employee is employed as a casual and it is found that they are not really a casual because they are identified with a FAC?

4. If, as in Rossato's case, the employee is not a casual employee, then what is the status of that employee?

    - Is the employee a permanent or part time employee?
    - Is the employee some other form of employee given that all Awards and most Enterprise Agreements only have three types of employment i.e. casual, part time and permanent?
    - In this case, all Awards and Enterprise Agreements have different rates of pay for casuals, sometimes related to a casual loading, but also, sometimes, referenced by a higher rate of pay. What rate of pay applies to these other employees?

- If an employee is employed to work less than 38 hours a week as a casual, on a higher wage and receives a higher rate of pay, is that employee's terms and conditions of employment changed to the extent that their position has been made redundant within the terms of the Fair Work Act?

- Would redundancy payments, subject to section 121 of the Fair Work Act, apply, given that the employee would have been offered the same position but on a different wage rate.

What should you do in the meantime?

When Skene's case was released APTIA and most State Executive Directors provided a summary of actions that Operators could undertake whilst the impact of the decision on Skene and now Rossato were played out.

No doubt there will be a lot of public debate, the need for legal advice and perhaps legislative reform following this decision.

It is irrefutable that if the decision stands Operators will be required to make dramatic changes to their work forces and perhaps further changes made to the Awards and Enterprise Agreements that have served us well, so far.

Beware:

It is probably safe to assume that if an employee has a 'firm advance commitment' within the meaning of Skene and Rossato then these employees are not casual employees.

However, it is likely that there will be relief, by way of set off, as it is clear that the decision creates inequities.

For instance, in public transport, that a casual, no longer deemed a casual, would be paid 25% more for working 20 hours a week than a part time employee, working the same 20 hours a week.

I have set out below our previous advice which should be considered as APTIA explores all options.

(i) You should consider if it is possible to convert casual employees to part time or full-time employment. Note school bus driver working 40 hours a year may not fit into this category.

(ii) You should write to each casual employee and advise them that they are employed as casual employees and that they receive an additional hourly payment which covers them for the paid leave entitlements, which part time or permanent employees receive and that the additional payment is set off against any paid NES entitlement.

(iii) Where possible your pay slips should record the additional payment along with the base rate of pay so that the additional payment (loading) is clearly designated.

(iv) Employers should seek to add to their enterprise agreement negotiations a clause which seeks to protect an employer from double dipping by an employee who is deemed not to be a casual whilst they are receiving the casual loading.

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