HIGH COURT OF AUSTRALIA

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Details of Filing

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File Title:	WorkPac Pty Ltd v. Rossato & Ors
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Important Information

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IN THE HIGH COURT OF AUSTRALIA B73/2020
BRISBANE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE
THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

WorkPac Pty Ltd
ACN 111 046 012

Appellant

and

Robert Rossato
First Respondent

Minister for Jobs and Industrial Relations
Second Respondent

Construction, Forestry, Maritime, Mining and Energy Union
Third Respondent

Matthew Petersen
Fourth Respondent

THIRD RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The First Respondent was not a Casual Employee for the Purpose of the NES

2. The primary judgment correctly found that the first respondent was not a casual employee for the purpose of the NES provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) without looking at post-contractual matters: **CS [9] - [12]; PJ [207], [512] [529]**.

3. There were written documents other than the General Conditions and NOCEs that formed part of the contracts between the appellant and the first respondent at the time of engagement and demonstrated a firm advance commitment to continuing and indefinite work according to an agreed pattern of work (**firm advance commitment**): ***WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 (*Skene*) at [172], [175], [182]; CS [8]**. In particular, in relation to the first two engagements, the appellant gave the first respondent rosters that he was required to work at the same time as it gave him the NOCEs: **CS [21] to [23]; PJ [306], [566]**. In relation to later rosters and other engagements the rosters were provided by the host company as encompassed by the express terms between WorkPac and the first respondent: **CS [23] PJ [583] to [585], [605] to [606]**.

4. There were provisions of the General Conditions and NOCEs that were consistent with a firm advance commitment: **CS [13] to [16]; PJ [548], [588], [593], [606], [621]**.

5. The primary judgment was entitled to have regard to the factual matrix in which each contract between the appellant and the first respondent was made because there was uncertainty or ambiguity about the nature of the commitment to future employment in each contract: **CS [17]; PJ [524], [526], [529]**. This factual matrix included the rosters that the first respondent was required to work: **CS [18] to [23]. PJ [541] to [542], [593], [598], [607]**.

6. In relation to the firm advance commitment, the primary judgment was entitled to look at the nature of what was implied in the contract in relation to the promise to employ and be employed: **CS [24] to [26]; PJ [446], [447], [572], [576];**

Commonwealth Bank of Australia v Barker **(2013) 214 FCR 450 at [291] JBA TAB 45.**

7. Alternatively, the primary judgment was entitled to take the approach of characterising the true nature of the employment relationship in determining whether the first respondent was a casual employee for the purpose of the NES provisions of the FW Act. Under this approach it is the relationship that is being characterised, not the terms of the contract to ascertain whether there is a firm advance commitment. The totality of the relationship, including non-contractual work systems and practices, are relevant: ***Skene*** **at [180] JBA TAB 67**; **CS [48] to [49], [51]; PJ [44] to [45], [52] to [54], [622] to [631].**

8. It would be incongruous not to take the characterisation approach, which is the approach taken to the determination of whether a worker is an employee for the purposes of the NES provisions of the FW Act: **CS [50]; *Skene* at [180]**. The primary question is one of statutory construction, not of contractual interpretation: **PJ [54]**. This approach is consistent with the characterisation of work adopted by the United Kingdom Supreme Court: see **Uber *BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5 at [69], [76], [85] JBA TAB 65.**

9. If necessary, this approach encompasses taking into account post contractual conduct: **CS [49]; PJ [52] and [58]**; ***Hollis v Vabu Pty Ltd*** **(2001) 207 CLR 21 at [24] JBA TAB 33; *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151 JBA TAB 36.**

10. Further in the alternative, if the firm advance commitment was not ascertainable at the commencement of any of the engagement periods, there was a variation to the contracts of employment of the first respondent after each of those engagement periods commenced and he was a permanent employee at the time that the claimed entitlements accrued: **CS [52] to [54]; PJ [210]**.

The First Respondent was not a Casual Employee under the Enterprise Agreement

11. In ***Skene*** at **[205] to [222] JBA TAB 67** the appellant unsuccessfully argued that the equivalent of subclause 6.4.7 of the Enterprise Agreement entitled it to conclusively determine whether an employee was casual for the purposes of the Enterprise Agreement: **CS [28]**. In this case the appellant's different argument that subclause 6.4.1 of the Enterprise Agreement entitled it to conclusively determine

whether an employee was casual for the purposes of the Enterprise Agreement was rejected: **CS [29]; PJ [640] to [674].**

12. Subclause 6.4.1 of the Enterprise Agreement allowed the appellant to employ casual employees, but it did not allow it to conclusively determine that an employee who was not otherwise a casual employee was nevertheless a casual employee. This is by way of contrast to provisions in industrial instruments that actually do have a provision saying that a casual employee is one engaged and paid as such: **CS [31]; PJ [665]; *Telum Civil (Qld) Pty Ltd v CFMEU* (2013) 230 IR 30 at [41] to [43] JBA TAB 63; eg *Black Coal Mining Industry Award 2010* subclause 10.4 JBA TAB 72.**

The First Respondent was Entitled to Unpaid Payments for Leave

13. There was no error in the Primary Judgment in finding that there should be no set off: **CS [32] to [36], PJ [908] to [937], [1007] to [1021]**. The granting of the set off claim would in effect result in the regular payments made during the contract period and prior to termination which are said to be part of any identifiable casual loading being offset against payments made on termination. Further, such regular payments if made for leave were contrary to the prohibition on cashing out of annual leave and personal leave in ss 92 and 100 of the FW Act: **CS [33] [36]; PJ [319] to [321], [794]**.

14. There was no error in the Primary Judgment in finding that there should be no entitlement to restitution based on a failure of consideration of an identifiable severable provision: **CS [37] to [43], PJ [765] to [776], [967] to [981]**. Alternatively, if there was an identifiable severable provision, such a provision is unenforceable or inoperative on the basis that it was unlawful and/or against public policy: **CS [55]**.

15. Any casual loading provision is either impliedly prohibited by the FW Act or is unenforceable because it is associated with or in the furtherance of unlawful purposes: **CS [56] to [59]; PJ [795] to [803]; Explanatory Memorandum to the *Fair Work Bill 2008* at [207] JBA TAB 68; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 JBA TAB 30; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [23] JBA TAB 32.**

Steven Crawshaw SC
Dated: 13 May 2021

Robert Reed