HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 May 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B73/2020
File Title:	WorkPac Pty Ltd v. Rossato & Ors
Registry:	Brisbane
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondents
Date filed:	13 May 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B73 of 2020

BETWEEN:

WorkPac Pty Ltd
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

FOURTH RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the fourth respondent by:
Adero Law
5 Torrens Street
Braddon, ACT, 2612

Date of filing: 12 May 2021
Telephone: (02) 6152 9173
Email: Rory.Markham@aderolaw.com.au
Ref: RM

Part I:

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

Part II: Outline of propositions: employment is a relationship distinct from contract

2. At [13] of its submissions (**AS**), the Appellant asserts that "whether an employee is classified as a casual depends entirely on the … terms of the employment contract" and that "the contract [here] is wholly in writing".

3. The case is not about the construction of a contract; it is about identifying the nature or type of employment. The relevant Divisions of the *Fair Work Act* (***FWA***) refer to the "other than casual" type of employment, not to any particular type of contract. Employment is not a contract: it is a relationship which arises out of a contract.

4. There is also no basis for the claim that the contract was wholly in writing. No document relied on by the Appellant contains an "entire contract" clause or other such indication.

5. The industrial meaning of casual employment is employment based on a shared expectation of work being done "ad hoc": *Doyle v Sydney Steel* (1936) 56 CLR 545 at 557, or "on demand": *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38] (***Hamzy***) (**4RS [13]-[16], [28]-[29]**). In *Hamzy*, "firm advance commitment" was an explanation of "on demand" work, not a formula for casualness. Nor did "commitment" refer to a contractual promise. Mr Hamzy's contract is not referred to in the judgment

6. Whether the employment is for a fixed term is also not definitive of casualness. There are many employments for fixed terms which are casual (eg a babysitter engaged for four hours) and many which are not (eg a five year engagement on a scientific project).

7. The UK Supreme Court recently held that where a worker and employer have unequal bargaining strength, adopting the terms of a written contract as a starting point to characterise their relationship is inconsistent with a beneficial legislative intent: *Uber BV &v Aslam* [2021] UKSC 5 at [76]. The *FWA* has beneficial purposes, and the parties here were of unequal bargaining strength.

This relationship was not one of casual employment

8. The First Respondent was not expected to work on demand but expressly required to work as rostered for months at a time (**4RS [24]-[27]**). The General Conditions (**GC**) required completion of an Assignment (cl 5.4) and prohibited other work during one (cl 6.15).

9. The conduct of the parties shows clearly that this work was neither required nor performed on demand. Some indicators are that:

   (a) induction took several days, online and on site (AFM, 126);

   (b) clause 14 of the Enterprise Agreement (**EA**) provided for standard hours of work for Flat Rate FTMs (AFM, 71);

10 (c) work was done on long term rosters (see eg AFM, 18 [6.26]-[6.27]; GC cl 7.4);

   (d) during weeks when work was to be performed, accommodation and food were provided by the mine (see AFM, 18 [6.23]); and

   (e) the employee was not at liberty to take on any other employment during an Assignment, each of which stretched over months (GC cl 6.15).

10. To suggest that this pattern of work was subject to change at short notice by either party has such an air of commercial unreality as to be ruled out (**4RS [24]-[27]**). It is not apparent how the mine operator could conduct its business if its operations were subject to workers giving very short notice, noting that induction took days. The Appellant's right under cl 5.4 of the GCs to sue for costs incurred in those situations shows active
20 discouragement of such conduct.

11. It is equally unrealistic to suggest that the Appellant could find a workforce who would accept being put out of work on one hour's notice. Presumably that is why no attempt was made to put evidence before the Full Court that this had ever happened.

12. It follows from the above that the Full Court was right in characterising the First Respondent's employment as other than casual within the meaning of the *FWA*. Thus **Ground 1** should fail.

13. Likewise **Ground 2** should fail, since there is no sensible basis on which the EA (made in contemplation of the *FWA*) should be understood to use the word "casual" with any

meaning other than the same meaning as in the *FWA*. Any other construction would be productive of serious and useless confusion (**4RS [30]-[32]**).

There should be no set-off or other recovery from the first respondent

14. As to **Ground 3**, the Court should reject the assertion of "double-dipping", especially since casuals were paid much less than permanents at the same mine (**4RS [44]-[45]**).

15. No identifiable casual loading was paid under any NOCE (**4RS [41]-[44]**), all of which stated a flat rate of pay. No casual loadings were payable to "Flat Rate" casuals, as the First Respondent was under the EA (cl 6.4.5(b) at AFM, 51).

16. Alternatively, if the Court holds that a loading was paid, it was not a severable item of consideration. The flat rate was paid as wages for the work performed, and the contracts are completed. There was no failure of consideration, nor has any relief in relation to the contracts ever been sought (**4RS [46]-[47]**).

17. It is not now available to the Appellant to recharacterize the wages paid as pre-payment of moneys under s 90(2) of the *FWA*: *Poletti v Ecob (No 2)* (1989) 31 IR 321 (**4RS [37]**).

18. There was also no agreement not to pay accrued entitlements (**4RS [35]**). Any attempt to do so now would be contrary to s 92 of the *FWA* (**4RS [36]-[37]**). Hence no question arises of set-off or any other form of payment from the first respondent to the Appellant.

19. If those submissions are wrong, at least the fourth, fifth and sixth NOCEs did not contain anything which could be characterized as a loading, since none of them incorporated cll 6.4.5 and 6.4.6 of the EA.

20. And as the Full Court correctly held, reg 2.03A does not apply (**4RS [48]**), including because no claim is made "in lieu" of accrued entitlements. The suggestion at AS [40] of ordering an asserted set off by analogy with s 545 should also be rejected. So on any approach, **Ground 3** should fail.

21. The Fourth Respondent supports the two Notices of Contention (**4RS [49]-[53]**).

Dated: 13 May 2021

K P Hanscombe