A casual return to contractual orthodoxy?

Chris Parkin reports on *WorkPac Pty Ltd v Rossato* [2021] HCA 23

The High Court has unanimously reaffirmed the centrality of a contract of employment in determining whether an employee is or is not a casual employee. Following the High Court's decision, the assessment of whether an employee is a casual employee, because he or she has no firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work, is determined by reference to the terms of the contract.

Background

A discussion of *Rossato* must begin with a case that WorkPac lost in the Full Court of the Federal Court of Australia just months before the *Rossato* litigation began: *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536.

In that case, Mr Skene claimed that although he was a permanent employee, he had been classified as a casual employee by WorkPac and remunerated accordingly. This meant, among other things, that he was not afforded personal or annual leave, but received a casual loading.

In finding in favour of Mr Skene, the Full Court held that: (a) the absence of a firm advance commitment as to the duration of the employee's employment or the days or hours the employee would work was 'the essence of casualness'; and, (b) whether such a commitment existed or not required an assessment of, '[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship'. This approach explicitly called in aid what the Full Court described as the 'settled approach' to distinguishing employees from independent contractors: *Skene* at [168], [169], [180].

In light of *Skene*, Mr Rossato – a former employee of WorkPac – claimed that he too had been misclassified as a casual employee and sought compensation from WorkPac for untaken annual leave, public holidays and periods of personal leave and compassionate leave taken by him. WorkPac immediately commenced proceedings in the Federal Court seeking declarations that, among other things, Mr Rossato had been a casual employee.

The statutory context

The relevant entitlements claimed by Mr Rossato were provided for by the *Fair Work Act 2009* (Cth) (Act). Certain National Employment Standards in Part 2-2 of the Act are expressly not available to casual employees. These include annual leave (s 86), paid personal leave (s 95), paid compassionate leave (s 106) and notice of termination or redundancy pay (s 123).

At the time the *Rossato* litigation commenced, the Act did not define 'casual employee' (s 15A was inserted into the Act following the grant of special leave).

Nonetheless, the Act contemplated two circumstances relevant to the assessment of whether an employee was casual or not. First, a casual employee could be a person who had 'been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months': s 12 (i.e., a 'long term casual employee'). Secondly, a casual employee could be a person with 'a reasonable expectation of continuing employment … on a regular and systematic basis': ss 65(2)(b)(ii), 67(2) and 384(2)(a): see at [49]-[53].

The contractual context

Mr Rossato had been employed by WorkPac pursuant to six consecutive contracts of employment. Those contracts were constituted by a general terms and conditions document signed by him at the outset of his dealings with WorkPac, together with a 'Notice of Offer of Casual Employment' provided at or prior to the commencement of each new contract: at [12]-[13]. Each contract was wholly in writing.

The Full Federal Court decision

WorkPac successfully applied to have the matter heard by the Full Court in the Federal Court's original jurisdiction: *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179.

WorkPac's contention before the Full Court was that the presence or absence of a firm advance commitment was to be determined at the time of entry into the contract of employment and, where that contract was wholly written, without reference to post-contractual conduct. The Full Court in *Skene*, it said, invited consideration of matters outside the terms of the written contract and was plainly wrong: [38].

White J (with whom Wheelahan J agreed) accepted that the existence of the firm advance commitment should be assessed at the commencement of the employment relationship (subject to the possibility of variation): [41]. Their Honours, however, were not persuaded that *Skene* was plainly wrong. They accepted Mr Rossato's contention that, even taking WorkPac's case at its highest (disregarding post-contractual conduct), Mr Rossato was not a casual employee: [39]-[41].

The High Court's decision

WorkPac's appeal to the High Court was successful.

In a joint judgment, Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ concluded that 'A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship' and that the necessary commitment must be located in 'enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement': at [62].

Their Honours affirmed the centrality of the contract as follows (at [62]):

> To insist that nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee is also necessary in order to avoid the descent into the obscurantism that would accompany acceptance of an invitation to enforce 'something more than an expectation' but less than a contractual obligation. It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain.

Their Honours found that, although White J had expressed a preference for a contractual analysis that established the parties' enforceable rights and duties at the commencement of the employment, he had nonetheless reasoned to his conclusion by reference to notions of 'unspoken mutual undertakings', shared 'contemplations', 'indications' and 'expectations' that fell short of express contractual terms, and which would not have satisfied the test for implication of a term: at [64].

Their Honours rejected the approach taken in *Skene*, emphasising that where the parties had committed the terms of the employment relationship to a written contract and adhered to them, one must look to those terms to determine the character of the employment relationship: at [66]-[67].

In a short concurring judgment, Gageler J agreed that contractual terms contained nothing to oblige WorkPac to continue each contract of employment beyond completion of the assignment to which each contract related. That feature was enough in the circumstances to negative the existence of any firm advance commitment on the part of WorkPac to the indefinite continuation of Mr Rossato's employment: at [118].

The matters left outstanding

A key question left outstanding was whether the casual loading could be set-off against statutory entitlements which the employee should have received had they not been misclassified. In light of WorkPac's success on its primary argument, it was not necessary to determine this point: at [9]. The insertion of s 545A into the *Fair Work Act* appears to have resolved this point since s 545A requires the loading to be set-off. However, the proper approach to setting-off other amounts paid to employees against unpaid statutory entitlements in the context of misclassification of employment status remains to be considered by the High Court.

The second matter concerned the distinction between an employee and an independent contractor. WorkPac argued that the High Court's decision in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 had been wrongly understood as authorising recourse to post-contractual conduct in assessing whether a person was an employee or an independent contractor. While not addressing the submission directly, the joint judgment cautioned that a classification of a person as an employee or an independent contractor had consequences for third parties – unlike the question before the Court: [101]. This issue remains to be determined and may be resolved in the forthcoming decisions of two recently argued cases before the High Court: *Jamsek v ZG Operations Pty Ltd* (matter S 27/2021) and *CFMMEU v Personnel Contracting Pty Ltd* (matter P5/2021). BN