HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	B73/2020
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN:

WorkPac Pty Ltd
ACN 111 076 012
Appellant

and

Robert Rossato
First Respondent

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Minister for Jobs and Industrial Relations
Second Respondent

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

Matthew Petersen
Fourth Respondent

20 **APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

Part I: CERTIFICATION

These submissions are in a form suitable for publication on the internet.

Part II: ARGUMENT

Casual employment for the purposes of the *Fair Work Act*

[1] The correct focus is on the terms of the contracts, without reference to post-contractual conduct: WorkPac's Submissions (***WS***) §13; WorkPac's Reply (***WR***) §2.

[2] Casual employment under the Act: **(a)** can be 'long term', 'regular and systematic' and 'continuing' (ss.12, 65(2)(b)(i), 67(2)(a), 384(2)(a); WS §14; WR §8); and **(b)** is a contractual relationship in which the employer makes no enforceable promise (that is, 'firm advance commitment' (*Hamzy* (2001) 115 FCR 78, [38]), that future work will be made available to the employee; the employee makes no enforceable promise to perform such work as may be made available; and the parties agree that they can terminate the employment readily and quickly: WS §16.

[3] Mr Rossato's employment met this description: WS §17-21; WR §4-7.

[4] The absence of a firm advance commitment in Mr Rossato's contracts cannot be filled by reference to innominate unspoken mutual undertakings: WS §22.

Casual employment under the Enterprise Agreement

[5] An enterprise agreement allocates the rights and liabilities of those who are covered by the agreement (s.53) according to its terms. Any inconsistency between an enterprise agreement and the Act is resolved by ss.55 and 56.

[6] This Agreement created a category, or classification, that it called 'Casual FTM', and attached to that classification the right to receive a higher rate of pay, but no right to take, or be paid on account of, the annual and other leave prescribed by the Agreement.

[7] The name of the category is only a label used to differentiate the category from other categories of employees under the Agreement: cf *Skene's Case* at FC [222].

[8] Under the Agreement, an employee's allocation to the category of Casual FTM is achieved by the agreement of the parties: see clauses 6.4.1 and 6.4.7.

Double-dipping

[9] Mr Rossato was paid an amount over and above that to which a permanent employee would have been entitled on account of his classification as a Casual FTM (the 'contractual overpayment'), that included an identifiable 'casual loading': WS §31, 32; WR §12-14.

'Set off' in the context of employment

[10] Payments made by an employer under a contract may be appropriated to discharge its statutory obligations where the former was 'properly attributable' to the latter, using 'common sense' to find the 'true balance' between the parties: *Ray v Radano* [1967] AR (NSW) 471, 477-479; *Poletti v Ecob (No 2)* (1989) 31 IR 321, 332-333. See WS §34;
10 Minister's Submissions §25-28. By this principle, both that portion of the casual loading expressly allocated to annual and personal/carer's leave (*Poletti*, 335) and the unallocated amount of the contractual overpayment, should have been 'set off' against Mr Rossato's claims.

[11] The Full Court held otherwise by reference to a line of authority that insists on an unduly 'close correlation' – so close as to be the 'same' FC [844]; [865](a); [1008] – between the contractual payment and the statutory entitlement, giving rise to a false distinction between making a payment for the purpose of discharging a statutory obligation or as compensation for the absence of such an entitlement: WS §39.

[12] The requirement of a close correlation should be abandoned where, as here, the parties
20 **(a)** did not succeed in creating a relationship of casual employment that they had manifestly intended (*cf* FC [881], [883]), and **(b)** explicitly disavowed the application of the relevant statutory entitlements: [1020]. See *James Turner* (2003) 132 IR 122, [29]; *Linkhill* (2015) 240 FCR 578, [99]; *Transpetrol* [2019] FCA 400, [113]; WS §36; WR §16.

[13] In the alternative, there was a sufficiently close correlation between the casual loading and the statutory liabilities 'in lieu of' which it was paid: FC [272](d); [287](h); [340]-[342]; [477]; [902](e); [951]-[952]; [1020]. See WS §37-39.

[14] Statutory entitlements of the kind claimed by Mr Rossato are recoverable in proceedings under s.545(2)(b) for 'compensation', assessed having regard to what is reasonable, just and appropriate: *Dafallah* (2014) 225 FCR 559, [157]-[158]. The contractual
30 overpayment or, in the alternative, the casual loading, is so inextricably connected to Mr

Rossato's 'loss' that it should be taken into account to reduce his compensation: *Hutchison Ports Appeal* [2019] FCAFC 69, [143]. See WS §40; WR §15 (3rd point).

Failure of consideration

[15] The casual loading paid to Mr Rossato was paid to enable WorkPac to procure Mr Rossato's services as a Casual FTM, and to compensate him for the absence of entitlements that he would have had as a Permanent FTM. The casual loading was not paid for the mere performance of work: WS §41, 45, 46.

[16] The Full Court's decision obliterated the basis for the casual loading, with the unjust effect that Mr Rossato was entitled to be paid for the entitlements that he did not receive, while also keeping the money already paid in lieu of those entitlements: WS §47.

[17] The casual loading was payable pursuant to an underlying statutory obligation imposed by the Agreement and s.50. The fact that he was paid a contractual rate that exceeded the amount due under the Agreement did not render his remuneration an 'indivisible sum'. The casual loading remained 'distinct and severable': WS §42-44.

[18] The parties did not contemplate, or allocate the contractual risk of, a judicial finding that falsified a fundamental premise of the contract (that Mr Rossato was a Casual FTM). Ordering restitution would do no violence to the parties' bargain: WS §48, 49.

Regulation 2.03A of the Fair Work Regulations 2009 *(Cth)*

[19] The Regulation operated to allow a 'set off' in this case: WS §51, 52.

12 May 2021

Bret Walker | Ian Neil | David Chin | Christopher Parkin