HIGH COURT OF AUSTRALIA

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Details of Filing

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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

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS

Second Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION

Third Respondent

10 **MATTHEW PETERSEN**

Fourth Respondent

Form 27F

THE FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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Part I: Certification

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

Part II: Outline of propositions to be advanced in oral argument

[2] This outline adopts defined terms in Mr Rossato's outline filed 18 February 2021.

[3] **Mr Rossato's entitlements and whether his employment was casual**: For employees that are "other than casual", paid personal, compassionate and annual leave comprise legislated minimum standards which cannot be displaced (ss.61, 86 and 95 of the FW Act).

[4] It is inconsistent with the NES, being minimum standards, which cannot be displaced, to conclude employment is "casual" by a label placed on the employment or under a contract. Similarly, who is a "casual FTM" for the purposes of the EA is to be determined on the same basis given the EA was made under the FW Act and cannot displace the NES.

[5] Mr Rossato was not a casual employee for the purposes of the FW Act or the EA. *First*, if the existence of a firm advance commitment was to be assessed at the time of the commencement of each of the six contracts, the terms provided for such a commitment:

(a) the General Conditions provided that the employee agrees to complete an assignment once the employee has accepted it, and the first three NOCEs was for an assignment "guide only" length of 6 months, 154 days, and 6 months respectively, on alternating shifts[1];

(b) each assignment was for a "discrete period of employment", and Mr Rossato was being required to complete an assignment once accepted, work shifts or rosters prescribed or any agreed replacement shifts or rosters, and work exclusively for the Appellant as long as the assignments subsisted.[2]

[6] White J held that these matters suggested a well organised and stable structure of work according to a known pattern conveying a firm advance commitment and negatived any inference that the Appellant could choose on any particular day not to offer work (CAB 173 [588]). Mr Rossato was assigned to particular crews under each contract and was provided with long term rosters in advance. A range of objective background facts also pointed to a firm advance commitment.[3]

[7] The fourth, fifth and sixth contracts contained no statement concerning the length of the assignment and stated that the hours which Mr Rossato may require to work may vary

[1] AFM 133 (General Conditions cl 5.4), 232-233 (NOCE 1), 276-277 (NOCE 2) and 294-295 (NOCE 3).

[2] AFM 133, 134 and 136 (General Conditions – cll 5.1, 5.4, 6.15 and 7.4 respectively).

[3] Including as set out by White J at CAB 163 [541]-[543], 168-169 [564]-[566] and 170 [573].

from day to day and week to week. However, the General Conditions remained the same and both parties knew the system of work including a shift structure provided continuity, regularity and predictability of work. Again, Mr Rossato was assigned to particular crews under each contract and provided with long term rosters in advance.

[8] *Secondly*, if the requisite firm advance commitment is not evident in the contracts it is identifiable based upon the overall characterisation of Mr Rossato's employment, by reference to the conduct of the parties and the real substance, practical reality and true nature of the relationship. Using post-contractual conduct is permissible where the nature of the relationship between the parties is to be identified based upon the system that was operated under the contractual terms and the work practices imposed by the employer, as opposed to the terms of the contract alone. See *Hollis v Vabu* (2001) 207 CLR 21, 33 [24] (**JBA-3, 653**); *R v Foster* (1952) 85 CLR 138, 150-151 (**JBA-3, 782-783**) and *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 173 [102]) (**JBA-4, 920**).

[9] When determining whether statutory rights exist, it is not appropriate to use contractual descriptions or terms to determine the nature of the relationship or what type of employment exists. See *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, 565 [126], 576 [180] (**JBA-6, 2016, 2027**), *Autoclenz Limited v Belcher and Ors* [2011] 4 All ER 745, 757 [34]-[35] (**JBA-4, 1031-1032**), *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 [68]-[70], [76] (**JBA-6, 1944, 1946**).

[10] *Thirdly*, if none of the contracts expressly provided for the hours Mr Rossato would work, they were not wholly in writing and extrinsic evidence, including the long-term rosters that applied, ascertain further terms of the contracts demonstrating a firm advance commitment in this case. See *Masterton Homes Pty Ltd v Palm Assets Pty Ltd & Ors* (2009) 261 ALR 382, [90(1)], 407 [114] (**JBA-6, 1854, 1860**).

[11] **No Double-dipping:** There is no evidence that Mr Rossato was paid any more than a permanent employee who received paid leave entitlements would have been paid for doing the same work.

[12] There was no identifiable casual loading. Only White J found, in respect of only the first three contracts, that a casual loading of 25% could be identified. This finding was wrong. If, as White J found, the casual loading is paid on every hour worked, the difference between the flat rates for particular rosters (in Schedules 3 – 7 of the EA) should be at least the dollar difference of the casual loading calculated on the Ordinary Hourly Rates (EA Schedule 2) – being the applicable Ordinary Hourly Rates before the Flat Rates are worked up (using shift, weekend and overtime penalties). The Flat Rates though are less than this difference and so cannot have been applied to each hour worked and there is

no evidence as to how (or if) the casual loading has been incorporated. In any event, any "casual loading" was correctly found to be subsumed into a "prevailing" or "market" rate offered to and accepted by Mr Rossato.[4]

[13] No set-off: A payment made for one purpose cannot be relied upon to satisfy another (*Poletti v Ecob (No 2)* (1989) 31 IR 321, 332-333 at **JBA-6, 1872-73**). Here, any casual loading was not an entitlement to take paid leave, or a payment in respect of untaken annual leave or for public holidays. It was paid on the basis, *inter alia*, that there were no such entitlements (*TransAdelaide v Leddy (No 2)* (1998) 71 SASR 413, 419-421, 432 at **JBA-6 1917-19, 1930**). Even if a casual loading was paid to compensate for a lack of entitlements, this is different from a payment to satisfy an entitlement, and there is no sufficiently close correlation to the entitlement of a right to take time off.

[14] Failure of consideration: There was no total failure of a distinct and severable part of the consideration. The hourly rate was paid to procure Mr Rossato's services. WorkPac received the benefit of those services during times where, had Mr Rossato been entitled to absent himself or take paid leave, he would have done so, and this both benefited WorkPac (because it could meet its obligations to its client without having to find a replacement) and was to Mr Rossato's detriment (because he was deprived of the opportunity of rest and recreation and caring for his partner when she was ill). The consideration has not wholly failed, and the position of the parties cannot be restored.[5]

[15] Unlawful and unenforceable: It is unlawful to cash out annual leave (s.92 FW Act) or personal leave (s.100 FW Act). An agreement having that effect was at least impliedly prohibited by statute: *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23], 522-23 [45], 543 [111] (**JBA-3, 593, 602, 623**). These provisions are mandatory and no provision in the FW Act provides for them to be enforced other than treating the agreement as void.

[16] The argument that relies on s.545(2)(b) ought to be rejected as section 545 is not live in this proceeding. The Appellant cannot invoke a discretionary provision which calls for an assessment of "loss" for the first time on appeal. Further, to do so would also have the effect of stultifying an existing prohibition in the law.

[17] Regulation 2.03A: It does not affect the substantive law. If the set-off and failure of consideration arguments fail, it does not provide an alternative basis to claim an offset.

Dated 12 May 2021

Christopher Murdoch QC **Chris Curtis**

[4] Decision at CAB 211-212 [758]-[762], 214-215 [772]-[774] (White J).

[5] Decision at CAB 213-215 [765]-[776] (White J), 268-269 [978]-[981] (Wheelahan J).