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**BIC/APTIA's RESPONSE TO ROSSATO's CASE**

(i) Following the decision in Workpac Pty Ltd v Rossato, BIC's Industrial Working Group sought legal advice from Piper Alderman, solicitors and KHQ Lawyers from Melbourne, who had previously provided an advice, following the decision in Skene v. Workpac Pty Ltd.

(ii) The decision in Rossato confirmed the decision in Skene being, an employee, who had a 'firm advance commitment' for work i.e. regular rosters and days of work, was not a casual employee and, as such, was entitled to leave entitlements guaranteed by National Employment Standards, referred to in the Fair Work Act 2009.

(iii) The decision also denied the employer the opportunity to set off the casual loading payable to the employee, in lieu of those entitlements, primarily because it was held that the application in Rossato was a claim for the entitlement itself. It also held at common law that the leave could not be paid in advance of it being taken.

(iv) The Federal Government had enacted a 'Set off' regulation, supposedly to protect such a circumstances but it was held in Rossato that such a regulation had no substance at law and in any event could not be used as a claim for the NES entitlements, only potentially to set off payments made.

(v) On 12 June 2020, Professor Andrew Stewart, hosted by Piper Alderman, provided a comprehensive power point presentation, titled *"What does the decision in Rossato's case mean for the bus industry?".*

(vi) Although the decision in Rossato's case has been appealed to the High Court and the Attorney General is conducting roundtable discussions with trade unions and employer groups to provide a definition for casuals, it is necessary to provide advice to the bus industry, which is a major employer of casual employment, on ways and means to address the decision.

(vii) There are around 90,000 buses and coaches in Australia with around 50,000 employed bus and coach drivers of which 40% are casual employees. At least 10% of those employees are part of the deregulated coach and charter industry whilst the remainder are route and school bus drivers whose employers are funded by various State Governments who contract them to run services. The average age of a driver is 55 years, whilst around 13% are female.

(viii) In rural and regional areas school bus services are operated almost exclusively by a casual workforce.

**Piper Alderman Advice: (Professor Andrew Stewart)**

(i) A summary of the presentation by Professor Andrew Stewart is attached.

(ii) In his slides Professor Stewart notes that the PVTA states *"a casual employee is an employee who is engaged as a casual employee and paid by the hour."*

*(iii)* Under general law, Professor Stewart notes "*casual employment is treated as temporary, irregular or uncertain."*

*(iv)* In Rossato, Professor Stewart confirmed that the Full Court of the Federal Court endorsed the view that *"the essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work."*

*(v)* Professor Stewart referred to the **Fair Work Amendment (Casual Loading Offset) Regulations 2018** and indicated it had little legal effect as it required a claim to set off payments paid in lieu of entitlement when the law only allows limited opportunities for an employer to pre-pay leave.

(vi) Specifically, Professor Stewart was asked to address the following,

- Will Rossato remain the law?
- What about the Bus Industry specifically?
- What can be done by Bus and Coach Operators?

(vii) **Will Rossato remain law?** – There are two options according to Professor Stewart as to whether Rossato remains as law.

Firstly, an appeal has been lodged in the High Court which could overturn the decision and hold that the designation as a casual is enough to support casual employment, and

Secondly legislation could be introduced to try to effectively change the law retrospectively.

Professor Stewart does not believe any legislation will be retrospective. An appeal upheld in favour of Workpac would act retrospectively.

(viii) **What about the bus industry specifically?** – According to Professor Stewart that depends upon how broadly the essence of a casualness test is applied by the Courts.

In a recent case of ***Birner v Aircraft Turnaround Engineering Pty Ltd*** **[2019] FCA 1085,** a long-term casual with an ongoing job had enough variable hours from week to week to make him a casual.

Professor Stewart took the view, however, that school bus drivers, with set days, set hours, set weeks would more likely fall with the definition of Rossato's case.

However, charter work, he took the view, with their variable unpredictability, employees might fall within definition in Birner's case.

**(ix)** **What can be done?** – Professor Stewart alluded to a number of scenarios.

- Sit tight as there does not appear to be a great appetite for the TWU to rush off to the Courts given that the problem has been around for a long time.

- For long term casuals one should convince them to convert to part time or full-time employment.
- School bus casuals could be at risk and perhaps another type of employment could be considered such as fixed term employees, or seasonal employees and or even flexible part time employees. (Note these three types of employment are considered later in this paper)
- Contracts could be amended to reflect the nature of the employment, including outlining the purpose of the loading, the role of an offset and an agreement to remain a casual.

  Professor Stewart is not a big fan of this approach as he does not believe such contractual arrangements overcome the issues in Rossato.

***Birner v Aircraft Turnaround Engineering Pty Ltd* [2019] FCA 1085,**

Professor Stewart referred to a decision ***Birner v Aircraft Turnaround Engineering Pty Ltd* [2019] FCA 1085,** in which Justice Collier found that the following findings relating to the employee's working arrangements were "not disturbed by the Full Court authority of *Skene*":

- The parties agreed the employee would be paid at the rate of $45.00 per hour
- Payroll and record keeping was done on the understanding the employee was a casual employee
- The hours available to the employee were set out in a roster available to him one month at a time, and seven or so days in advance
- The employee was at liberty to reject rostered shifts
- There was no requirement to complete a leave application form
- The employee on at least two occasions chose not to work rostered shifts
- The employee's roster changed, and became more variable, after he suffered a workplace injury
- The employee's shifts were sometimes seven hours, and other times nine hours in duration
- The employee was, on occasion, rostered to work for fewer than 40 hours in a given week, and never more than 40 hours per week
- The absence of specific reference to a casual loading is not, by itself, determinative that the employment relationship was not casual

**Piper Alderman's Advice (Tim Capelin)**

I put some specific questions to Tim Capelin, senior IR Partner, and his replies, which are attached, are summarised below.

1. *How do you transfer the status of an employee from casual to part time?* – By agreement or by increasing the number of part time employees and thereby reducing the casual pool of drivers.
2. *Can I make drivers redundant?* – If a restructure occurs where more part time employees are employed with less work for casuals it may be seen as a genuine redundancy.

3. *Can I simply change the status of a casual?* – No, not without a proper restructure as you cannot unilaterally change status from casual to permanent.
4. *Can I change their wages to reflect their new status?* – If they agree to change, yes, but not if they are made redundant because of the restructure. You run the risk of an unfair dismissal claim.
5. *Should I accumulate entitlements to them and make it retrospective if they change?* – Certainly, from the date they change status but not necessarily prior as you are not admitting their previous status, other than as a casual.
6. *What if they do not want to change their status. Am I protected?* – The offer and rejection cannot hurt but it will not make a huge difference if they are deemed not to be casuals.
7. *Am I required to guarantee wages for 52 weeks a year if they become part time employees?* – Yes, unless you have a fixed term contract.
8. *Can I annualise wages?* – This might be possible but may require an Award change to give effect to this as in other Awards.

**KHQ Lawyers Advice**

In November 2018, Chris Gianetti from KHQ Lawyers provided a comprehensive advice following Skene's case and address the issues as they related to school bus drivers, the deregulated coach and charter industry and route and school services. I have attached a copy of this advice.

In 2020 Chris further addressed similar issues and made the following observations.

- The decision in Rossato is flawed for a number of reasons more specifically because it does not recognise the legislated definition of a long term casual in the Fair Work Act as an employee employed on a regular and consistent basis for at least 12 months and its failure to give effect to the set off provisions due to the nature of the casual payment in lieu of entitlements.
- KHQ however indicated that industry should not wait for the outcome of the High Court Appeal as the appeal itself would take up to 12 months and of course its outcome was not guaranteed.
- School bus casuals who work 20 hours a week, 40 hours a year probably would fit into a Rossato situation and the industry should consider biting the bullet to address a remedy for the issues. (In this regard Chris agreed with Andrew's view of School bus casuals).

As a pre-cursor to making significant changes to the PVTA and agreements Chris goes on to consider an extension of advices given in Skene's case. He recommends:

(i) In pre-contractual discussions with potential casual employees there should be no reference to security or stability of the job.

(ii) Payslips should clearly separate the casual loading from other payments.

(iii) Employers need to reconsider how they employ their drivers and should transition to less reliance upon casual employees and look to a part time workforce.

(iv) Offers should regularly be made to casuals who work regular hour to convert to part time employees. Ultimately their rejection of an offer to convert provides excellent evidence of intention.

(v) In circumstances where leave payments are made to casual employees these payments should always be made when the employee takes the leave.

(vi) Employers should address requests for leave from casual employees with offers of conversion in lieu.

(vii) An increase in the pool of drivers and a shared workload which does not provide regular and consistently rostered work can be a benefit but would require a larger workforce which might present problems to achieve.

(viii) Rosters should be carefully considered as with types of work i.e. rotate route and school services, vary school to which drivers attend.

(ix) Casual should be turned over every 3 months if possible.

(x) Employers need to undertake quarterly assessments of their workplace and which drivers are becoming attached to specific shifts and job certainty.

Much was made of the contractual terms in Rossato to the extent that the Court even suggested it did not matter what was written, the test was, what was happening in practice. However, Chris still considered the contract terms of some value and made the following points:

(i) It is critical that the contract correctly describes the nature of the employment, such as a descriptor of what an engagement means.

(ii) The contract should contain warranties for instance that each engagement is a separate period of employment with no guarantee of further work, no firm advance commitment to work and that you understand that the arrangement is one of casual employment.

Chris provides a number of specific clauses that could go into a casual's contract of employment including:

- General language about a series of engagements
- Casuals acknowledgements and warranties
- Expression of the casual loading paid in lieu off
- Right to refuse shifts
- Specific set off clause for incorrectly paid loading
- Restitution clause
- Contingent variation provisions and indemnities
- Entire agreement clauses

Chris then makes the following strategic recommendations to address Rossato's case.

1. Seek an Award variation to create a sessional type of employment to cover the 40-week employment.
2. Seek agreement with the TWU regarding creation of a part time employee similar to the flexible part time employee in the Cleaning Services Award.
3. Consider use of IFAs to create a casual employment whilst commencing employment as a part time employee.
4. Start to build an industry case for change based around the circumstances of school bus drivers and the deregulated industry.

As a final recommendation Chris considers our industry should:

- Offer conversion
- If refused, then mix up work considerably to make them irregular
- Eventually be prepared for the battle.

Ian MacDonald, National IR Manager
20 July 2020