This May edition includes:

- The recent Workpac v Rossato case on casual double dipping and what it means for employers; and
- Hero Sushi chain involved in 'fraud' and wage underpayment scandal.

Federal Court WorkPac v Rossato Ruling Sends Casual Shockwaves amongst Employers

The landmark decision of WorkPac Pty Ltd v Rossato has been handed down by the Full Federal Court. The Full Court held that a coal mining worker (**Mr Rossato**) was in fact a permanent employee with a right to paid leave entitlements, despite being classified and engaged as a casual employee under his employment contract for almost four years.

This became a major test case for the definition of casual work in Australia, with potentially widespread application and significance and provides some clarity in what has proven to be a confusing landscape.

Previously, the courts have questioned whether a particular class of 'casual' workers whose work patterns are more in line with permanent employment should receive paid leave entitlements. The question has fuelled debate because if you pay those employees 25% casual loading as well as paid leave entitlements, the employees may be 'double dipping'.

In 2018 the WorkPac v Skene decision sent shockwaves in the labour market when a casual employee was found to have been employed on a permanent basis. Whilst the Skene decision was about an employee engaged under an Enterprise Agreement, the Rossato decision dealt with the nature of casual employment under the *Fair Work Act 2009* (Cth) (**the FW Act**) meaning it may have a much broader impact for casual employment. In Rossato, the Court applied the definition of casual employment contemplated in the Skene decision, and subsequently held that Mr Rossato was not a casual employee either under the FW Act or under the relevant WorkPac enterprise agreement.

The Rossato decision reaffirmed Skene insofar as a employee classified by his employer as a casual was found to be entitled to paid leave entitlements on the basis that the employment did not meet the "*traditional*" definition of true casual employment, which is characterised by, amongst other things:

- "*absence of firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work;*

- *no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work (nor does a casual employee provide a reciprocal commitment to the employer); and*
- *discontinuous, intermittent and/or irregular work patterns*."

What are the implications?

This decision could have major implications for employers, many of whom are already under economic pressure due to Covid-19. It has been reported that the decision could affect regular casuals across the entire economy, far beyond the mining industry, and could expose businesses to back pay of up to $8 billion.

CFMEU national president Tony Maher declared that the decision "*passes the pub test on what it means to be a casual*" and subsequently "*puts an end to the 'permanent casual' rort that has become a scourge in the coal mining industry and across the workforce*".

"*Employers must now stop with the nonsense that calling a worker a casual makes them so*," Mr Maher said.

Will the Government step in?

In opposition to Mr Maher, employer groups have already exerted pressure on the Morrison government to intervene. Australian Chamber of Commerce and Industry chief executive James Pearson says the decision comes as a "*major blow*" at the "*worst possible time*".

"*The prospect of having to defend up to six years worth of back pay claims from former casual employees will be the end of many small businesses who are barely hanging on right now*", Mr Pearson stated.

Attorney General Christian Porter has already expressed that the Government would consider supporting an appeal to the High Court especially considering the economic impact of Covid-19. The Morrison Government has also flagged potential legislative change to statutorily override the decision but is yet to confirm governmental intervention.

The Opposition has conveyed its strong hesitation in pursuing legislative changes to the FW Act with Mr Tony Burke, Opposition industrial relations spokesman saying *"… if the Government thinks after all the insecurity that people are living with in Australia at the moment, that he wants to change the law to give people less job security — we're there for that fight*".

WorkPac have not yet confirmed whether they intend to bring a High Court appeal for this case. We will aim to keep you updated with any future developments.

What can and should employers do?

This decision has clearly caused employers (especially those who employ casual workers) a significant degree of concern.

The case potentially allows certain casual employees, who meet the requirements, to claim leave entitlements under the FW Act. The case is also authority for the proposition that employers were not able to offset any casual loading already paid to the employee against the amount owed. These two parts together potentially

creates new liabilities for employers with casual workforces.

Employers should review their casual contracts and hours to ensure that no employees have been misclassified. A pre-emptive review of employment contracts is advised as opposed to running the risk of employee claims for back pay alleging misclassification of their employment.

Industrial Relations overhaul in the wake of COVID-19

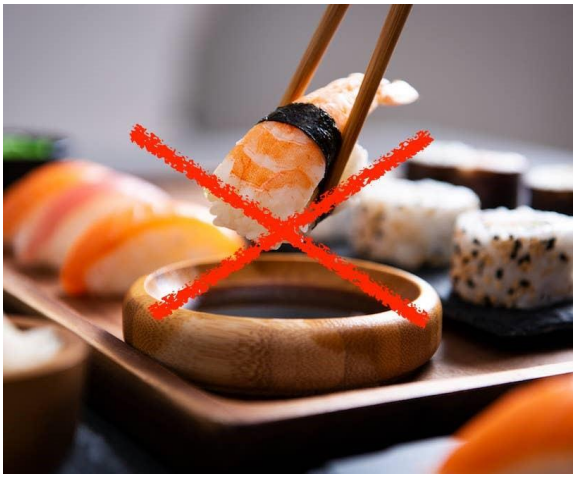
In the meantime, it seems the review of classification of casuals will form part of more general re-evaluation of workplace pay and conditions by the Morrison government, overseen by a consultation process between unions and employer groups and headed by Christian Porter.

On Tuesday 26 May 2020, the Prime Minister announced five priority areas for reform, including changes to casual and fixed-term employment, changes to Modern awards, collective bargaining for workplace pay deals, and compliance and enforcement to ensure workers are "*paid properly*".

While it appears that there is an Intention for collaboration, the Morrison government has stated it will push on with IR reform even if unions and employers can't come to an agreement.

If you have any questions about the classification of employees and whether your casual employees are 'true casuals' please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

We would be more than happy to assist with a comprehensive review of your casual workforce to ensure that all employees are correctly classified.



Hero Sushi the Villain in 'Fraud' and Wage Underpayment Scandal

Restaurant chain, Hero Sushi has been fined a record total of $891,000 for deliberate underpayment of staff and attempting to cover up the underpayments by creating fraudulent documents.

"The Most Significant Decision"

Hero Sushi's actions were compared to "fraud" by Federal Court judge Geoffrey Flick for its repeated attempts to conceal underpayments totalling $700,000 at three different stores. The Fair Work Ombudsman (FWO) called the case the "most significant to be placed

before the courts" in terms of the fraudulent documentation.

Hero Sushi provided hundreds of falsified payroll documents to the FWO on nine separate occasions during their investigation, in an attempt to claim that staff had been paid correctly. Justice Flick noted "The time and effort consumed in creating such false documents must have been considerable".

Eventually, a payroll manager admitted the payroll documents were "reverse-engineered".

Record Fines

The three sushi outlets were fined $600,000 in penalties, their two owners/directors $85,000 each, the company's accounts manager $75,000, and two other payroll officers a total of $46,000. Particularly significant in this decision is that personal fines and penalties were handed down on both owners and officers of Hero Sushi.

Justice Flick stated that he "may well have imposed considerably higher penalties", and had "considerable misgivings" that the penalties were not even greater, but he ultimately deferred the financial penalty to the FWO's expertise in these matters. The maximum fine for such contraventions is almost $2 million.

Further Penalties

In addition to the fines, Justice Flick ordered that notices be prominently displayed at the three stores showing details about the court case, award entitlements and the FWO's 'Record My Hours' app. The owners were also ordered to conduct a six-month independent audit and provide the results to the FWO.

The Underpayments

Hero Sushi was eventually found to have been paying staff as little as $12 per hour, well below the minimum wage of $19.49 per hour. A total of 94 employees had not been paid minimum hourly rates, casual loadings, weekend or public holiday penalty rates, annual leave or superannuation. Many of the employees were young overseas workers on international student and working holiday visas.

Fair Work Ombudsman v HSCC Pty Ltd [2020] FCA 655

Takeaway for Employers – Record-Keeping Obligations

This case clearly demonstrates that attempting to falsify pay records to rectify an FWO investigation into staff underpayments is most likely futile and incredibly ill advised. However, while most employers may not resort to fraud, many businesses may still fail their record-keeping obligations unintentionally.

Annualised Salary Obligations

A prime example could be unintentionally failing to comply with the new and onerous record-keeping requirements for annualised salary arrangements. These

obligations were introduced to combat the wave of underpayment cases in recent years. Many of those underpayments were often as a result of annualised salaries.

Just some of the new requirements include keeping track of an employee's specific start and finish times including unpaid breaks. The records must be signed by each employee to confirm their accuracy. Annual reconciliations must also be made between the employer and employee to ensure the annualised salary arrangement is paying the employee at the correct award rate. However, the above examples are not even the bare minimum under the new requirements, which include further payment obligations and notice obligations.

The new annualised salary provisions have been in force since 1 March 2020. Employers must comply with these record-keeping provisions or face investigation by the FWO and potentially severe penalties.

If you have any question about record-keeping obligations, the new annualised salary requirements and/or potential wage underpayments, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.