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Contract is Key!

The importance of employment contracts has been confirmed by High Court

On 4 August 2021 the High Court handed down its decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23, which overruled the decision of the Full Federal Court in May 2020. The May 2020 decision of *Rossato*, and an earlier decision about a similar scenario by the Full Federal Court in August 2018 (*WorkPac Pty Ltd v Skene* (2018) 264 FCR 536), both created doubt and uncertainty about casual employment. You can read more about the May 2020 *Rossato* decision [here](#).

Essentially, the High Court decision in *Rossato* has confirmed the importance of employment contracts. The High Court clearly stated that the binding promises created in the employment contract are relevant for the purposes of characterising the legal relationship between employer and employee. That is, we should look to the terms of the employment contract, made at the start of the employment relationship, to determine whether a ‘firm advance commitment’ to work has been offered and agreed to. If it has, the employee will be a permanent employee. If it has not, the employee will be a casual.

In the case of Mr *Rossato*, the High Court noted that work was offered to him on an assignment by assignment basis, and that he was free to refuse work offered to him. It was on that basis the High Court ultimately concluded that Mr *Rossato* was a casual employee of *WorkPac*. As he was properly characterised as a casual employee, Mr *Rossato* was not entitled to paid leave (over and above the 25% casual loading he had already been paid).

Need more information?

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Can the employment relationship change?

The short answer is yes. Business needs change over time and so can employment relationships. Where the change in the employment relationship is to be ongoing, then a new employment contract should be drafted to reflect the change in circumstances. The latest employment contract always forms the foundation of the employee's current status.

Fair Work Act changes

While the High Court has clarified the common law relating to casual employees, we have had a clear legislative definition of 'casual employee' in the *Fair Work Act 2009 (FWA)* since March 2021. We have written a number of posts regarding these amendments (which also relate to casual conversion) and how you can manage your business' obligations.

For more information, please see the following posts:

- [Is my employee a casual under the new legislative definition?](#)
- [The new casual conversion rules, what do I need to do?](#)
- [What happens to my existing casual employees during the transition period?](#)

Next steps for employers

An employment contract forms the foundation of the legal relationship between the employer and employee. Girardi HR can assist you with an audit of your current contracts and provide recommendation for changes where required.

To protect your business:

- *identify your casual employees* - determine who is casual; work with your accountant to work out what the financial implications of casual conversion are for your workforce.
- *review your contractual arrangements* – your employment contract should outline the terms of the engagement (the expectations, obligations and notice periods for termination). If the employee is casual, ensure the contract terms match the definition of casual employee under the FWA.
- *the casual conversion transition period ends on 27 September 2021* - the six month transition period for employers (other than small business employers) ends on 27 September 2021. By the end of the transition period, you must review your workforce and determine which employees were casual employees employed immediately before 27 March 2021. You then need to assess each casual employee against eligibility criteria at a date chosen by you between 27 March and 27 September 2021.

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