JobWatch
Employment Rights Legal Centre

MEDIA STATEMENT

Thursday 5 August 2021

Millions of casuals denied entitlements by High Court decision

JobWatch is very concerned by the High Court decision of *Workpac v Rossato & Ors [2021] HCA 23 (4 August 2020)* released yesterday and its implications for the 2.5 million people in Australia who work casually.

Having already been significantly impacted by the economic downturn of the COVID-19 pandemic and related lockdowns, long-term casual workers are now subject to this High Court decision which makes it significantly harder for them to argue that their employment has been misclassified as a casual engagement when in fact it should have been considered a permanent role.

This decision effectively allows employers to render any employment casual through a contract at the start of employment. This ignores the reality that contracts may be varied over time by performance or inference from the conduct of the parties, or that a written contract can be found not to reflect the real agreement between the parties.

In very real terms, what this means is that someone who has been working casually in the same role for the past ten years, doing the same shifts every week and being scheduled onto the roster months in advance, would have significant difficulty in succeeding in a claim for underpayments based on role misclassification in either of the federal courts or an eligible state court. They effectively lose out on years of annual and personal leave, public holiday pay, long service leave, and other permanent worker entitlements that they should have been accruing had their employment been correctly classified.

This decision has significant implications for those working for labour hire companies, like Robert Rossato in this case who worked six consecutive contracts for almost four years, doing exactly the same job on an established shift schedule for the same company, though at different sites.

It has implications for the tertiary and education sector, where casualisation of academic and support staff is increasing. John* has been a full-time casual lecturer for the last four years, teaching the same subjects with his contract renewed every three to four months with no access to paid leave and other entitlements.

It has implications for hospitality and retail workers, many of whom are long-term casuals. Amira* was one of these people, who lost her regular 20 hours a week when the restaurant she was working at closed down permanently during the pandemic. She was left to line up at Centrelink for the JobSeeker payment as she didn't have leave entitlements and redundancy payouts to rely on.

The examples provided above are not fictional case studies. They are real, and representative of the **2,301 casual workers who have called JobWatch** since 2016 seeking legal information about how to pursue underpayments from employers.

Thousands of misclassified casual workers are going to be left worse off by this High Court decision, which is likely to also have far reaching effects on the wider relationship between employers and employees. It appears to disregard the imbalance of bargaining power between employers and employees and the reality of the employment relationship, providing employers with the means to limit an employee's ability to exercise their workplace rights as they fear losing their job without reasonable means of recourse.

JobWatch notes that while the new casual conversion laws mean that employers have to offer casuals permanency if they've been regular casuals for a year, this hasn't yet been tested in court. This High Court decision may negatively impact future court decisions on the casual conversion laws.

JobWatch encourages all workers with concerns about their rights at work, including underpayments, to contact our free and confidential Telephone Information Service on 1800 331 617 (Regional VIC, QLD, TAS) or (03) 9662 1933 (Melbourne Metro).

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Quotes attributable to Zana Bytheway, Executive Director of JobWatch:

"Today's High Court decision is a bold strike against all casual workers, essentially denying them legal recourse to claim underpayments based on role misclassification. It entirely fails to understand that work conditions may change after the initial contract and roles subsequently misclassified."

"Casual work should be characterised by its flexibility – however we know that for many casual workers, they are subject to pre-determined shifts and rosters with no genuine opportunity to turn down shifts without facing significant repercussions for this decision. As such, they should really be considered permanent workers, and receive the same entitlements as permanent workers."

"If the intention of the High Court was to avoid double dipping, then an alternative outcome consistent with new Fair Work Act provisions would have been to find that Rossato was indeed a permanent employee, and to offset any entitlements owed with the casual loading paid."

"From now on, millions of casuals will effectively lose their opportunity to make a claim for underpayments based on role misclassification. This could mean the loss of millions of dollars every year, straight out of the pockets of vulnerable casual workers."

Contact

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About JobWatch

JobWatch is an independent, not-for-profit employment rights community legal centre. We operate out of Victoria and assist Victorian, Queensland and Tasmanian workers with their rights at work. Some of our functions include:

- A free and confidential telephone information and referral service for Victorian, Queensland and Tasmanian workers.
- Community legal education, including training, seminars and the production of a variety of publications on employment law and workers' rights.
- Representation and assistance for disadvantaged workers through a legal casework practice.
- Campaign and law reform activity with a view to promoting workplace justice and equity for all workers.

For more information: **www.jobwatch.org.au**