

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/11/2021 12:21:37 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: VID89/2019
File Title: MATTHEW PETERSEN v WORKPAC PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 17/11/2021 3:55:21 PM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Affidavit

No. VID89 of 2019

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Matthew Petersen

Applicant

WorkPac Pty Ltd

Respondent

Affidavit of: **Rory Michael Markham**
Address: c/o Adero Law, 3 Hobart Place, City ACT 2601
Occupation: Principal
Date: 16 November 2021

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I, **Rory Michael Markham** of 3 Hobart Place, City in the Australian Capital Territory, say on oath:

Introduction

1. I am a solicitor and the principal of Adero Law Pty Ltd, trading as Adero Law. I have practiced as a solicitor since 2008.

Filed on behalf of (name & role of party) Matthew Petersen, Applicant
 Prepared by (name of person/lawyer) Rory Michael Markham
 Law firm (if applicable) Adero Law
 Tel (02) 6189 1022 Fax _____
 Email Karla.Brenner@aderolaw.com.au
Address for service 3 Hobart Place, City ACT 2601
 (include state and postcode)

[Version 3 form approved 02/05/2019]

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2. I have had carriage of this proceeding on behalf of the Applicant, Mr Matthew Petersen (**Mr Petersen**), since its inception.
3. I make this affidavit in support of the Applicant's interlocutory application seeking leave to discontinue the proceedings (the **Discontinuance Application**).
4. My evidence is based on my personal knowledge, gained in the course of acting in this proceeding and related proceedings, unless otherwise stated. Where I depose to a fact on the basis of information provided by another, I believe that information to be true.

The Group Members' Employment

5. This proceeding concerns Mr Petersen and a number of Group Members who were employed by the Respondent, WorkPac Pty Ltd (**WorkPac**), and assigned to mine operators to work at black coal mines, and whose assignments ended between 5 February 2013 and 4 February 2019 (or who were still working at the latter date). Some Group Members' employment with WorkPac may have stretched back as far as December 2007.
6. I am instructed, and believe, that the Group Members were all employed as production workers, generally driving trucks and operating machinery on mine sites. In March 2019, Cameron Hockaday (a WorkPac representative) estimated that there were 11,301 Group Members in this proceeding. 1,100 of the Group Members have registered their interest in the proceeding with my firm.
7. At all material times, one of the Group Members has been Mr Robert Rossato, the respondent in the Rossato litigation, and a party to the High Court's decision in *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39 (**Rossato**).
8. I am instructed by Mr Petersen and by Group Members whom my firm has interviewed, and believe, that WorkPac applied the system of employment described in paragraphs 9 to 14 below to Mr Petersen and to all Group Members. So far as I can ascertain, the system I describe was the same system which applied to Mr Rossato and which is described in the *Rossato* decision. Accordingly rather than exhibit the suite of documents relating to the employment, where appropriate I have identified relevant findings of fact in *Rossato*.
9. Upon hiring, Mr Petersen and each Group Member signed a document entitled the "General Conditions", which applied to all assignments with WorkPac and provided for employment on an assignment-by-assignment basis. During an assignment, pursuant to the General Conditions, the employee was to work at least 35 ordinary working hours per week,

according to a roster. The length of any assignment could be varied by WorkPac, and assignments could be terminated upon one hour's notice. See *Rossato* [70]-[74].

10. Each individual assignment was agreed by a "Notice of Casual Employment" (**NOCE**) proffered by WorkPac and signed by the employee. The NOCEs offered assignments of a stated length (with 6 months a typical length). I have seen one NOCE which failed to specify an end date but it seems to me that this was almost certainly an accidental departure from the system, since it is the only one of several sighted by this firm.
11. The NOCEs expressly described the employment as casual, and provided for a wage which was stated to incorporate the casual loading provided for in the underpinning statutory workplace agreement: see *Rossato* [97].
12. The work on an assignment usually carried on after the end date in the NOCE. On occasion, a new NOCE might be given to the employee, setting up a new assignment. Some Group Members worked for WorkPac for several years under multiple NOCEs.
13. During each assignment, Mr Petersen and Group Members worked according to a regular roster.
14. When Mr Petersen and Group Members ended their employment on an assignment, WorkPac did not pay them any moneys on account of paid annual leave entitlements.
15. At all material times, WorkPac was bound by statutory workplace agreements which provided for annual leave entitlements, save for "Casual Field Team Members" (**Casual FTMs**). Between December 2007 and 3 July 2012, the relevant agreement was the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2007 (2007 Agreement)*, and thereafter it was the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012 (2012 Agreement)* (together, the **Agreements**). The relevant terms of the 2012 Agreement are set out in the *Rossato* decision, and so I do not exhibit the document here. The terms of the 2007 Agreement were materially identical to the 2012 Agreement in all relevant respects.
16. Further, at all material times, federal law entitled employees who were not "casual" to accrue annual leave. Between December 2007 and 31 December 2009, the relevant law was the *Workplace Relations Act 2006 (Cth) (WRA)*, and from 1 January 2010 it was the *Fair Work Act 2009 (Cth) (FWA)*. Further, s 90(2) of the FWA obliged employers to pay out accrued annual leave entitlements at the end of employment. This provision did not apply to "casual" employees. The WRA never defined the term "casual" nor did the FWA until 26 March 2021, as deposed to below.

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The Proceeding

17. On 16 August 2018, the Full Court held in *WorkPac Ltd v Skene* (2018) 264 FCR 536 that a WorkPac employee, Paul Skene, who worked under the above-described arrangements, was neither a casual within the meaning of the FWA nor a Casual FTM under the Agreement. The Full Court held that Mr Skene should have been paid the value of his untaken entitlements when his employment ended.
18. Assuming the correctness of the *Skene* decision, on 7 February 2019, Mr Petersen issued this proceeding.
19. The litigation was funded by a commercial litigation funder, Augusta 005 Ltd (AVL), subject to the terms of a litigation funding agreement entered into by the Applicant and certain Group Members.
20. The Statement of Claim alleged that Mr Petersen and Group Members were not “casuals” within the meaning of the WRA/FWA and its predecessor, nor were they Casual FTMs within the meaning of the Agreements. Accordingly, and in reliance on *Skene’s* case, the claim alleged that when the Applicant’s and the Group Members’ contracts of employment ended in the claim period, WorkPac was bound by s 90(2) of the FWA to pay out the value of the annual leave they had accrued over their entire period of employment.
21. The Originating Application raised a number of common questions of fact and law directed to establishing that Mr Petersen and Group Members were entitled to compensation for WorkPac’s alleged contravention of s 90(2) of the FWA.
22. On 8 October 2018, WorkPac Ltd commenced the *Rossato* proceeding in this Court (QUD724/2018), seeking declarations that Mr Rossato was a casual for the purposes of the FWA and the Agreement, and that he was not owed any sums on account of annual leave.
23. On 21 December 2018, the Chief Justice directed the *Rossato* proceeding to be heard by a Full Court. On 26 March 2019, Mr Petersen was given leave to intervene in the *Rossato* proceeding.
24. On 20 August 2019, one of the Group Members in this proceeding, Mr Ben Renyard, commenced his own representative proceeding (VID897/2019, ***Renyard Proceeding***), seeking essentially the same relief as sought in this proceeding, but on behalf of a subset of the Group Members in this proceeding, being all those Group Members who were CFMMEU union members when their last assignment ended, or else when the *Renyard Proceeding* commenced. As at today’s date, the *Renyard Proceeding* remains on foot.

25. On 29 May 2020, the Full Court dismissed WorkPac's application in the *Rossato* proceeding. The Full Court declared, inter alia, that Mr Rossato was not a casual for the purposes of the FWA and Agreement and so was entitled to payment for untaken annual leave pursuant to s 90(2).
26. On 20 March 2019, WorkPac filed a defence in the present proceeding, denying liability. It also later filed a cross-claim against Mr Petersen, seeking restitution of casual loadings allegedly paid to him.
27. On 26 March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) came into operation. This Act inserted s 15A into the FWA, providing a definition of casual employment for the purposes of the FWA. The definition had retrospective effect: sch 1 item 46(3). The Act also introduced s 545A (also with retrospective effect) providing that, in the event an employee is found to be non-casual on the new definition, but received a casual loading, then the Court must reduce any entitlements recovered on account of the loading received.
28. On 4 August 2021, the High Court set aside the Full Court's orders and instead declared that Mr Rossato *was* a casual for the purposes of the FWA and the Agreement.

Discontinuance application

29. Following the *Rossato* decision, Mr Petersen instructed me to discontinue this proceeding. On 16 November 2021, Mr Petersen filed an interlocutory application for leave pursuant to s 33V of the FCA to discontinue the proceedings (**the Discontinuance Application**). The applicant seeks six orders by the Discontinuance Application.
30. I believe that the Respondent will consent to the orders sought being made. I also believe that the Respondent will discontinue its cross-claim against Mr Petersen once he discontinues his personal claim.
31. I have briefed senior and junior counsel in this proceeding, to give an opinion as to whether the proposed discontinuance would be unfair, unreasonable, or not in the interests of the GMs. **Annexure RMM-1** to this affidavit is a copy of the opinion.
32. I have instructions to disclose the opinion to the Court, subject to the Court making orders to preserve the confidentiality of the opinion, but not otherwise, and I am instructed to maintain legal professional privilege over the opinion for all other purposes.

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33. In my opinion even if any Group Member could establish they were non-casual, after the operation of s 545A, their net recovery would be reasonably small, perhaps only a few thousand dollars.


Notice to Group Members

34. Immediately upon the sealing of the Discontinuance Application, my office intends to send an email to the registered Group Members, notifying them of the proposed discontinuance, and attaching the application and a copy of this affidavit, save for counsel's opinion. My office also intends to place these documents on Adero Law's Facebook page and website, once again excepting counsel's opinion. I also intend to advise my usual media contacts of the proposed discontinuance, noting that the media has previously reported on this proceeding.

35. In those circumstances, I do not intend to directly notify every individual Group Member of the proposed discontinuance, unless ordered to do so by the Court.

Sworn by the deponent
at 3 Hobart Place
in the Australian Capital Territory
on 16 November 2021
Before me:

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Signature of deponent



Signature of witness

Ryan Thomas Fletcher
Solicitor