

FEDERAL COURT OF AUSTRALIA

Secretary, Attorney-General's Department v Warren [2022] FCAFC 118

Appeal from: *Warren v Secretary, Attorney-General's Department* [2021] FCA 89

File number: NSD 204 of 2021

Judgment of: **RARES, THAWLEY AND ANDERSON JJ**

Date of judgment: 12 July 2022

Catchwords: **INDUSTRIAL LAW** – construction of the phrase “attributable to” the entitlement in s 19(2)(a) of the *Fair Entitlements Guarantee Act 2012* (Cth) – whether the employer’s payment of a casual loading to the applicant during the employment was “attributable to” the applicant’s entitlements to annual leave and severance pay – held that it was: appeal allowed

Legislation: *Fair Entitlements Guarantee Act 2012* (Cth) ss 3(a), 4(2), 5, 6(2), 6(5), 14, 15, 16(1), 19, 20–24, 25–27
Fair Work Act 2009 (Cth) pts 2-2, 2-3, ss 61(1), 44(1), 45, 55(1)–(4), 90(2), 92
Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)
Fair Work Commission, *Black Coal Mining Industry Award 2010* (MA000001, 23 March 2010) cll 10.4, 13.1, 14.3, 14.4, 25.1, 25.2, 25.7, sch B

Cases cited: *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited [2015] HCA 37; 256 CLR 104
Warren and Secretary, Department of Jobs and Small Business [2019] AATA 95
WorkPac v Rossato [2020] FCAFC 84; 378 ALR 585
WorkPac Pty Ltd v Rossato [2021] HCA 23; 392 ALR 39

Division: Fair Work Division

Registry: New South Wales

National Practice Area: Employment and Industrial Relations

Number of paragraphs: 52
Date of hearing: 23 February 2022
Counsel for the Appellant: Ms T Wong SC
Solicitor for the Appellant: Clayton Utz
Counsel for the Respondent: Mr S Crawshaw SC
Solicitor for the Respondent: Slater & Gordon

ORDERS

NSD 204 of 2021

BETWEEN: SECRETARY, ATTORNEY-GENERAL'S DEPARTMENT
Appellant

AND: KYLE WARREN
Respondent

ORDER MADE BY: RARES, THAWLEY AND ANDERSON JJ

DATE OF ORDER: 12 JULY 2022

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 2 and 3 made on 12 February 2021 and order 1 made on 26 February 2021 be set aside and, in lieu thereof, it be ordered that the application be dismissed with costs.
3. The respondent pay the appellant's costs of the appeal on a lump sum basis to be agreed or otherwise fixed by the Registrar.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

BACKGROUND

1 Mr Kyle Warren worked in the coal mining industry. The terms of his employment were contained in a contract of employment (the “**letter agreement**”) dated 14 May 2013 as affected by the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Black Coal Mining Industry Award 2010* (**Award**). Mr Warren’s employment contract could not be legally effective to displace his ‘statutory’ entitlements. That is because:

- (1) the National Employment Standards in Pt 2-2 of the FW Act contain minimum standards that apply to the employment of all employees. Pt 2-2 is divided into thirteen divisions. Relevantly, Div 6 provides statutory “Annual leave” entitlements and Div 11 provides statutory “Notice of termination and redundancy pay” entitlements. These minimum standards cannot be displaced: s 61(1). An employer must not contravene a provision of the National Employment Standards: s 44(1).
- (2) the Award was governed by Pt 2-3 of the FW Act, which is entitled “Modern awards”. A modern award must not exclude the National Employment Standards, but it may include terms that are permitted by, or which are ancillary to, or which supplement, the National Employment Standards: ss 55(1) to (4). If a modern award applies to a person, then the person must not contravene the award: s 45. The Award supplemented the annual leave entitlements provided by the FW Act: cll 25.1, 25.2 and 25.7. The Award also provided for redundancy and severance pay: cll 13.1, 14.3 and 14.4.

2 The letter agreement purported to designate Mr Warren’s employment to be casual employment. However, it was common ground that Mr Warren was:

- (a) not within a classification in cl 10.4 and Sch B to the Award, with the result that casual employment was not permitted;
- (b) therefore entitled to be paid on the basis that he was a permanent employee; and
- (c) entitled under the National Employment Standards and Award to paid annual leave and redundancy pay.

3 Clause 3 of the letter agreement provided for Mr Warren’s “rate of pay”. It provided:

3. Rate of Pay

- 3.1 You will be paid an all-inclusive flat rate for all hours worked. Your hourly rate will be **\$39.01** per hour (gross). This includes a base rate plus 25% casual loading and further loading to compensate for other loadings, penalty rates and allowances. You will be paid weekly by electronic deposit to an account nominated by you.
- 3.2 Notwithstanding clause 3.1 of this letter, your hourly rate of pay for work on a recognised public holiday will be **\$80.29** per hour (gross). This public holiday rate includes a base rate plus 25% casual loading and a further loading to compensate for other loadings and allowances. Where you are required to work on a recognised public holiday, you will be paid at the rate of treble time the public holiday rate.
- 3.3 The payment of a casual loading of 25% is inclusive of, and compensates you for, any and all benefits with respect to paid annual leave, other forms of paid leave (including but not limited to paid personal/carer's leave, paid compassionate leave and paid community service leave) and severance pay (other than as set out in this letter) that arise under the Award or any other industrial agreement. The payment of the further over-award loading is inclusive of, and compensates you for, all allowances, penalty rates and loadings (other than as set out in this letter) that arise under the Award or any other industrial agreement, including all:
- (a) rest breaks;
 - (b) incentive based payments and bonuses;
 - (c) monetary allowances for expenses incurred in the course of employment;
 - (d) monetary allowances for disabilities associated with the performance of particular tasks or work in particular conditions or locations;
 - (e) loadings for working overtime;
 - (f) loadings for working shift work;
 - (g) penalty rates; and
 - (h) outworker conditions.
- 3.4 You agree that the payment of the casual and over-award loadings fully discharge the Company's obligations with respect to these benefits. In the event any of the above benefits become due and payable for any reason, the monetary value of such benefit may be set off against the amount paid as casual or over-award loading (as applicable), in which case the monetary value of the benefit will be calculated by reference to your base rate of pay.

4 Clauses 6.3 and 7.1 of the letter agreement expressly purported to (but could not) exclude Mr Warren's entitlements to redundancy pay and annual leave. Those clauses provided:

6. Termination

...

- 6.3 As you are a casual employee, you will not be entitled to redundancy pay.

7. **Leave**

7.1 As you are a casual employee, you will not be entitled to annual leave or any other forms of paid leave including but not limited to paid personal/carer's leave, paid compassionate leave and paid community service leave (with the exception of long service leave).

5 The rights and liabilities of parties under a contractual provision are determined objectively, by reference to the text of the provision and its context and purpose; the context is the text of the whole contract and any contract, document or statutory provision referred to in the contract: *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104 at [46] (French CJ, Nettle and Gordon JJ); see also: at [107]-[113] (Kiefel and Keane JJ) and at [119]-[121] (Bell and Gageler JJ). Construing the letter agreement in this way and noting its express reference to the Award in cl 3.3:

- (1) the reference in the letter agreement to “base rate” was a reference to the base hourly rate as provided in the Award;
- (2) the 25% “casual loading” and the “further loading” were together intended:
 - (a) to compensate Mr Warren for the various benefits referred to in cl 3.3 which arose under the FW Act or Award; and
 - (b) to discharge the employer's obligations with respect to the benefits in cl 3.3 – see: cl 3.4 (first sentence); and
 - (c) to be set off against any entitlement to payment of the various benefits referred to in cl 3.3 which might be found to arise (including in the event that Mr Warren was in fact a permanent employee rather than a casual employee) – see: cl 3.4 (second sentence).

6 Although the parties objectively intended the 25% loading to discharge any entitlement of Mr Warren to payment of the benefits in cl 3.3, the letter agreement was legally ineffective to achieve that result so far as concerned annual leave and redundancy pay by reason of the provisions of the FW Act.

7 Mr Warren's employment was terminated on 30 September 2016 by reason of his employer's insolvency. Mr Warren applied for financial assistance under s 14 of the *Fair Entitlements Guarantee Act 2012* (Cth) (**FEG Act**).

THE FEG ACT

8 The FEG Act establishes a scheme of providing limited financial assistance to an employee (referred to as an “advance” (see s 5)) in respect of five specified types of “employee entitlement” on insolvency of his or her employer. As is made clear by s 3(a) of the FEG Act, the scheme is only concerned with “unpaid” employee entitlements. The scheme is one of “last resort”, in the sense that no requirement to make an advance will arise unless there is no other source of funds. The scheme also contains provisions for potential recovery of advances made.

9 The long title of the FEG Act is:

An Act to provide for financial assistance for workers who have not been fully paid for work done for insolvents or bankrupts, and for related purposes

10 The main objects of the FEG Act are set out in s 3:

3 Objects of this Act

The main objects of this Act are:

- (a) to provide for the Commonwealth to pay advances on account of unpaid employment entitlements of former employees of employers in cases where:
 - (i) the employers are insolvent or bankrupt; and
 - (ii) the end of the employment of the former employees was connected with that insolvency or bankruptcy; and
 - (iii) the former employees cannot get payment of the entitlements from other sources; and
- (b) to allow the Commonwealth to recover the advances through the winding up or bankruptcy of the employers and from other payments the former employees receive for the entitlements.

11 The simplified outline of the FEG Act in s 4 states that “a person is eligible for financial assistance under this Act (called an advance)” under Pt 2 if certain conditions prescribed in Pt 2 are met (s 4(2)). An advance is defined in s 5 as meaning “financial assistance under this Act on account of employee entitlements”. There are two unpaid “employee entitlements” (defined in s 5) relevant to the present case: “annual leave entitlement” (s 6(2)) and “redundancy pay entitlement” (s 6(5)). Section 6 of the FEG Act relevantly includes:

6 Kinds of employment entitlements

- (1) This section defines the various kinds of employment entitlements of a person whose employment by an employer has ended, by reference to the person’s entitlements under the governing instrument for the employment.

Note: Part 3 may affect the calculation of the person's employment entitlements for the purposes of working out the amount of an advance the person is eligible for.

Annual leave entitlement

- (2) The person's *annual leave entitlement* is the amount the person is entitled to under the governing instrument from the employer for paid annual leave that the person:
- (a) had accrued at the end of the employment; and
 - (b) had not taken by then.

...

Redundancy pay entitlement

- (5) The person's *redundancy pay entitlement* is the amount of redundancy pay the person is entitled to under the governing instrument from the employer for termination of the employment.

- 12 The amount of the unpaid entitlement is determined by reference to the amount of the person's entitlement "under the governing instrument for the employment": s 6(1), (2) and (5). The term "governing instrument" is defined in s 5 as follows:

governing instrument for employment means any of the following that governs the employment:

- (a) a written law of the Commonwealth, a State or a Territory;
- (b) an award, determination or order that is made or recorded in writing;
- (c) a written instrument;
- (d) an agreement (whether a contract or not).

- 13 It follows that the "governing instrument" for Mr Warren's employment was the letter agreement, the FW Act and the Award.

- 14 Mr Warren made an "effective claim" under s 14 of the FEG Act. The Secretary therefore had to decide whether Mr Warren was "eligible for the advance" and, if so, decide the "amount of the advance". Section 15 provides (notes excluded):

15 Secretary must decide effective claim

- (1) If an effective claim that a person is eligible for an advance is made to the Secretary, the Secretary must decide whether the person is eligible for the advance.
- (2) If it is decided that a person is eligible for an advance, the Secretary must decide the amount of the advance in accordance with Part 3.

- 15 There was no issue on appeal that Mr Warren was "eligible for an advance". It was the amount of the advance which divided the parties.

- 16 Section 16(1), in Division 1 of Part 3, provides that the amount of the advance be worked out under Division 2 of Part 3 for each of the person's employment entitlements. Division 2 contains three subdivisions. Subdivision A comprises s 19. Subdivision B contains "general rules for working out basic amounts for employment entitlements". Subdivision C contains "special rules for working out basic amounts for employment entitlements".
- 17 Section 19(1) provides that the amount of a person's employment entitlement is determined by "working out the basic amount for the entitlement under Subdivisions B and C" and reducing the basic amount by amounts described in ss 19(2) and (3), if any. It is only s 19(2) which is of present relevance, but s 19(3) is relevant to the correct construction of s 19(2). Section 19 provides:

19 Working out amounts for employment entitlements

- (1) Work out the amount for each of a person's employment entitlements to be taken into account under section 16 by:
- (a) working out the basic amount for the entitlement under Subdivisions B and C; and
 - (b) reducing the basic amount (but not below nil) by the sum of the amounts described in subsections (2) and (3) for the entitlement.
- (2) One amount of the reduction of the basic amount for a particular employment entitlement of a person for his or her employment by an employer is the total of amounts that:
- (a) are attributable to the entitlement; and
 - (b) have been paid by anyone:
 - (i) to the person; or
 - (ii) to someone else for the person's benefit or in accordance with the person's direction; and
 - (c) are not costs of the winding up or bankruptcy of the employer.
- (3) The other amount of the reduction of the basic amount for a particular employment entitlement of a person for his or her employment by an employer is the total of amounts that:
- (a) are attributable to the entitlement; and
 - (b) are payable (and have not been paid) by anyone:
 - (i) to the person; or
 - (ii) to someone else for the person's benefit or in accordance with the person's direction; and
 - (c) are not payable:
 - (i) under the *Corporations Act 2001* in the winding up of the

person's employer; or

- (ii) under the *Bankruptcy Act 1966* from the proceeds of the property of the bankrupt employer of the person; or
- (iii) under this Act.

18 The principal issue dividing the parties was whether, in working out the advance to which Mr Warren was entitled, any part of the loadings paid to him were to be taken into account in reducing the advance on the basis that the amount paid was “attributable” to Mr Warren’s “annual leave entitlement” or “redundancy pay entitlement”, within the meaning of s 19(2) of the FEG Act.

PROCEDURAL BACKGROUND

19 The appellant, by a delegate, rejected Mr Warren’s application. Mr Warren applied for review of the delegate’s decision in the Administrative Appeals Tribunal. The Tribunal concluded that the appellant had erred in the computation of Mr Warren’s entitlement to severance pay, but accepted that the loadings paid to Mr Warren were “attributable” to his “employee entitlements”: *Warren and Secretary, Department of Jobs and Small Business* [2019] AATA 95. Mr Warren appealed to this Court, contending that the loadings were not “attributable” to his “employee entitlements”. The primary judge accepted this contention: *Warren v Secretary, Attorney-General’s Department* [2021] FCA 89; 303 IR 72; 172 ALD 325 at [110]-[117], [124]. His Honour considered that a finding that any part of the loading component of the total wages paid to Mr Warren was attributable to his employee entitlements was outside the “zone” of permissible factual decision-making, referring at [117] to *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [201] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

20 The appellant contends that the primary judge erred in so concluding.

THE PRIMARY JUDGE’S REASONS

Annual leave entitlement

21 The primary judge’s reasons in relation to Mr Warren’s annual leave entitlement may be summarised in the following way.

22 *First*, during the term of his employment, Mr Warren accrued an entitlement to take a period of annual leave: [110]. Upon termination of Mr Warren’s employment, he had an accrued period of untaken paid annual leave of 783.469 hours: [110]. Section 90(2) of the FW Act,

required the employer to pay to Mr Warren “the amount that would have been payable to [him] had [he] taken that period of leave”, this amount being in addition to whatever amounts had been paid to Mr Warren as wages: [110].

23 *Secondly*, no part of the wages and loadings that the employer paid to Mr Warren was capable of discharging Mr Warren’s statutory entitlement to untaken paid annual leave, payable when his employment ended: [95], [110], [115]. The employer’s statutory obligation to make the payment to Mr Warren under s 90(2) of the FW Act upon termination “could not be avoided or discharged by relying on the terms of the letter agreement, including the attempt at clause 3.4 of the letter agreement to apply the loading of his wages against the amount payable under s 90(2)”: [111].

24 This was so for two reasons, provided at [111]:

... The first reason is that it would be contrary to the terms of s 90(2) itself, which requires payment of the amount that would have been payable had the applicant taken the leave: see, *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100; 231 FCR 298 at [42] (Tracey, Flick and Katzmann JJ). That entitlement was in addition to the wages that had been paid, including the loadings which I find were not capable of being applied to paid annual leave. The second reason relates to the prohibition on cashing out in s 92 of the *Fair Work Act*. To permit the employer to set-off the loadings that were said to be included in the wages against the amount due to the applicant under s 90(2) would be to give effect to an agreement to cash out the annual leave, and would give rise to a legally incoherent result.

25 *Thirdly*, the primary judge reasoned that, because the employer’s statutory obligation to pay untaken paid annual leave could not be discharged by the earlier payment of loadings directed in part to compensating for the absence of a right to annual leave, it followed that the loading paid to Mr Warren “was not capable of being properly attributable to the statutory entitlement to paid leave”: at [115]. His Honour concluded:

In the case of the applicant’s annual leave entitlement, for all the reasons that I have given above, the regular payment by the employer of wages was not capable of being properly attributable to the statutory entitlement to paid leave, or as having any correlation such that any part of the wages discharged the employer’s statutory obligation to afford the applicant paid leave, and in consequence the annual leave entitlement that was payable under s 90(2) of the *Fair Work Act*.

26 The primary judge further explained at [116]:

... Once it is recognised that the payments of wages by the employer do not have a sufficient connection with the statutory entitlement to a payment under s 90(2) to affect the employer’s liability to make that payment upon termination, it is difficult to see how, for the purposes of s 19(2) the FEG Act, the wages paid by the employer are capable of being attributable to the entitlement. The respondent’s submission that

s 19(2) should be construed broadly and in a practical way does not overcome the difficulty for the respondent that the relevant object of the FEG Act is to provide for advances on account of unpaid employment entitlements in the event of the employer's insolvency. In relation to the annual leave entitlement, the effect of the respondent's submissions is to undermine that object of the FEG Act by reducing the applicant's entitlement to an advance by a process of dissection and attribution which the employer would not have been permitted to undertake to reduce its liability to pay that entitlement ... The effect of the respondent's submissions is to reduce the applicant's claim by treating the applicant's unpaid annual leave entitlement as having been paid by the employer, when this did not occur.

The primary judge's conclusions in respect of redundancy pay entitlement

27 The primary judge's reasons in relation to redundancy pay entitlement can be summarised as follows.

28 *First*, Mr Warren was entitled to a severance payment under cll 14.3 and 14.4 of the Award, both of which comprise a redundancy pay entitlement within the meaning of s 6(5) of the FEG Act. More specifically, Mr Warren was entitled under the Award to a total of nine ordinary weeks' pay, comprising:

- (1) a severance payment, in the event of redundancy, equal to one ordinary week's pay for each completed year of employment, amounting to three ordinary weeks' pay in Mr Warren's case: Award, cl 14.3; and
- (2) a retrenchment payment, in the event of redundancy due to technological change, market forces or diminution of reserves equal to two ordinary weeks' pay for each completed year of service, amounting to six ordinary weeks' pay in Mr Warren's case: Award, cl 14.4.

29 *Secondly*, the primary judge concluded that the employer's payment of wages could not be effective to discharge the employer's statutory liability to pay a severance payment under the Award: [122]. His Honour explained at [122] (emphasis in original):

... That is because the terms of clause 14.3 of the Award had a temporal dimension in relation to the employer's obligation to pay a severance payment". It was *when the termination occurred* that the applicant, then being a *terminated employee*, became *entitled to severance pay*, and correspondingly the employer became obliged to make the severance payment.

30 The primary judge further explained at [123]:

... In this case, the employer could not, at the time of the applicant's termination, rely on what was in effect an earlier attempt to pre-pay by way of loaded wages any future conditional liability for severance pay, when at the time those wages were paid, the applicant's employment had not been terminated due to redundancy and therefore the employer's statutory liability had not arisen. The intent of the *Fair*

Work Act is that an employee will enjoy entitlements in accordance with, *inter alia*, any modern award that applies to the employee's employment. While the employer and the applicant by the letter agreement agreed that the employer would pre-pay any severance pay that may become payable to the applicant upon termination due to redundancy, the consequence of giving effect to that agreement would be to exclude the Award entitlement to severance pay that arises *when the termination occurs* due to redundancy ...

31 *Thirdly*, his Honour concluded at [124] that it was not open to the Tribunal to treat the loading on the wages as being attributable to Mr Warren's entitlement to a severance payment for the purposes of s 19(2) of the FEG Act, because "[o]nce it is recognised that the employer's payments of wages do not have a sufficient connection with the statutory entitlement to a severance payment under the Award, for the purposes of s 19(2) of the FEG Act it follows in the circumstances of this case that the payments of wages are not capable of being attributable to the entitlement". His Honour added:

... As with annual leave, the effect of the respondent's submissions is to reduce the applicant's claim by treating the applicant's unpaid severance pay entitlement as having been paid by the employer, when that did not occur ...

CONSIDERATION

32 As noted earlier, there was no dispute that Mr Warren had made an effective claim under s 14 of the FEG Act and that the Secretary (by a delegate) was satisfied that Mr Warren was "eligible for the advance" within the meaning of s 15(1). Section 15(2) therefore required the decision-maker to determine the "amount of the advance" to Mr Warren under Part 3. This required the decision-maker to:

- (1) identify whether Mr Warren had an unpaid (s 3(a)) "employee entitlement" (defined in ss 5 and 6), which involved identification of that to which Mr Warren was entitled under the "governing instrument" (namely the contract of employment in the letter agreement, as affected by the FW Act and the Award);
- (2) determine the amount of the advance in accordance with s 16 of the FEG Act, which in turn required determination of:
 - (a) the basic amount under Subdivs C and D of Pt 3; and
 - (b) whether there were any amounts paid by any person to Mr Warren which were "attributable to the entitlement" within the meaning of s 19(2) which would reduce the basic amount in accordance with s 19(1).

33 It is convenient to approach the appeal by reference to these issues.

Did Mr Warren have an “employee entitlement”?

34 The primary judge correctly concluded that the employment contract did not discharge the employer’s liability to pay untaken paid annual leave with the result that Mr Warren had an unpaid “employee entitlement” being an “annual leave entitlement”. The primary judge also correctly concluded that the loadings paid to Mr Warren did not discharge the employer’s obligation to make the redundancy payments required by cll 14.3 and 14.4 of the Award.

35 None of cll 3.4, 6.3, 7.1 of the letter agreement or the employer’s agreement to pay wages at the loaded base rate was legally effective to discharge the employer’s statutory liability to give paid annual leave or to pay for untaken paid annual leave on termination or to make the redundancy payments referred to in the Award. The reason the letter agreement did not discharge the employer’s obligations in this respect is the contract’s inconsistency with the FW Act and the Award – see above: at [2] of these reasons.

36 It follows that Mr Warren had two unpaid “employee entitlements” within the meaning of s 6 of the FEG Act: the “annual leave entitlement” and the “redundancy pay entitlement”.

Determination of the basic amount

37 No issue was raised on appeal about question (2)(a) at [32] above, namely the determination of the “basic amount” payable for Mr Warren’s annual leave entitlement. In this regard, s 20 provides (notes excluded):

20 Basic amount for annual leave entitlement

The basic amount for a person’s annual leave entitlement for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer.

38 No issue was raised on appeal about determination of the “basic amount” payable for Mr Warren’s redundancy pay entitlement. In this regard, s 23 of the FEG Act provides (notes excluded):

23 Basic amount for redundancy pay entitlement

The basic amount for a person’s redundancy pay entitlement for his or her employment by an employer is so much of the entitlement as:

- (a) is not a cost of the winding up or bankruptcy of the employer; and
- (b) does not exceed the total of:
 - (i) 4 weeks’ pay (at the rate relevant to working out that entitlement) for each full year of the person’s service with the employer for which the

employer was required to pay redundancy pay by the governing instrument for that employment; and

- (ii) if that instrument requires payment of redundancy pay for a proportion of a year (less than a full year) of the person's service with the employer—that proportion of 4 weeks' pay (at the rate relevant to working out that entitlement).

Were amounts paid to Mr Warren which were “attributable to the entitlement”

39 The central issue on the appeal is that in question (2)(b) at [32] above, namely whether there were any amounts paid to Mr Warren which were “attributable to the [annual leave or redundancy pay] entitlement” within the meaning of s 19(2) of the FEG Act. If there were, those amounts reduce the basic amount payable for each of those entitlements as calculated in accordance with s 16(1). Section 19(2) is not concerned with whether the entitlement has been discharged or satisfied; its concern is with a payment which can be described as “attributable” to an employee entitlement.

40 For the reasons which follow, and acknowledging that the issue is a constructional one about which reasonable minds may differ, we disagree with the primary judge that, in deciding the “amount of the advance” under s 15(2) of the FEG Act, it was not possible to conclude that no part of the loading paid to Mr Warren was “attributable to the [annual leave or redundancy pay] entitlement[s]” within the meaning of s 19(2) of the FEG Act.

41 *First*, the question of whether the employer's obligations with respect to annual leave and redundancy pay were *discharged* by payment at the loaded base rate is distinct from, and should not be conflated with, the question whether, for the purposes of, and within the meaning of s 19(2) of the FEG Act, the payments made to Mr Warren during his employment were “attributable to the [annual leave or redundancy pay] entitlement”. A focus on the question of whether an employer's legal obligation to make the relevant payment has been “discharged” distracts attention from the language and purpose of the FEG Act, to a consideration of the employer's compliance with the FW Act. The objects of the FEG Act do not include securing compliance with the FW Act or to providing full compensation to employees for an employer's breaches of the FW Act or an Award. Rather, the main objects of the FEG Act include the payment by the Commonwealth of advances, that is financial assistance under the Act “on account of employment entitlements” (s 5 definition of “advance”; see also s 3(a)).

42 As s 3(a) of the FEG Act makes clear, the focus of the FEG Act is the payment of an advance on account of “unpaid” employee entitlements. If the employer’s obligations with respect to annual leave or redundancy pay had been wholly *discharged* by earlier payments of a loading (which they could not have been for the reasons given earlier), then there would not be an unpaid annual leave or redundancy pay entitlement and no question would arise under s 16 or s 19(2). If either entitlement had been *partly discharged* by earlier payments of a loading (which they could not have been for the reasons given earlier), the basic amount of the employee entitlements would have been less. In both scenarios, the answer to question (1) at [32] above would be different and the question under s 19(2) would have been posed with respect to the lesser unpaid employee entitlement.

43 *Secondly*, the language of the FEG Act, construed in context, indicates that a payment can be “attributable” to an entitlement whether or not it is a payment made in strict conformity with the FW Act or an Award. Section 19(2) covers payments made “by anyone” (s 19(2)(b)) and payments “to someone else for the person’s benefit or in accordance with the person’s direction” (s 19(2)(b)(ii)). Section 19(2) does not require that the payment be made at the time the payment should have been made in discharge of any legal obligation or entitlement or as required either by the FW Act or the Award, ie, for the purpose or with the effect of discharging the employer’s liability. Section 19(2) simply requires that there be a payment which is “attributable” to an entitlement.

44 Section 19(3) captures amounts which are payable but have not been paid and are “attributable to an entitlement”. There is no reason to read s 19(2) as not intended to capture a payment made before the payment of an obligation or entitlement as required by the FW Act or an Award or before such an entitlement arose. An example is afforded by payments made on behalf of employees to a redundancy trust to cater for future redundancy.

45 *Thirdly*, by the employment contract in the letter agreement, Mr Warren and his employer agreed that Mr Warren would be paid an additional loading. The terms of the contract reveal that this was intended to compensate Mr Warren in respect of the various benefits, or for the absence of the various benefits, referred to in cl 3.3. These included annual leave and redundancy benefits. The parties also agreed in cl 3.4 that the loading would: (i) discharge the employer’s obligation with respect to the benefits in cl 3.3; and (ii) be set off against any entitlement to payment of the various benefits which might be found to arise. The first sentence of cl 3.4 was ineffective to displace the statutory obligation of the employer with

respect to annual leave and redundancy pay, but cll 3.3 and 3.4 are not therefore deprived of contractual effect. Indeed, cll 3.3 and 3.4 have contractual effect, albeit that effect cannot go so far as to displace the employer's liability under the National Employment Standards in the FW Act or operate to deny an employee's entitlement under the Award. The parties intended the loadings to be for the purposes identified in the letter agreement, whether or not the whole of the employment contract was legally capable of achieving each intended result. A conclusion that the loadings are "attributable" to the employment entitlements respects what the parties intended as reflected in the language of their contract.

46 The primary judge stated at [119] that it would be "difficult to conclude that a payment made by way of compensation for the absence of entitlements ... could ... be attributable to those entitlements". In our view, an amount paid to an employee can be "attributable to the entitlement" even if the payment is made as consideration for the employer not providing a particular benefit, or in substitution for that benefit, or to increase the base hourly rate in recognition of the fact that the employee is not provided with certain benefits because the employment is (or was thought to be) casual rather than permanent. The sense in which the word "attributable" is used in sub-ss 19(2)(a) and (3)(a) includes payments other than those that the employee received in strict legal discharge of the employer's obligations.

47 The purpose of the FEG Act is to create a scheme to provide financial assistance to an employee adversely affected by the insolvency of his or her employer by ensuring that he or she receives an advance "on account of employment entitlements" (s 5) under a formula in Pt 3 that has regard to the practical, as opposed to the strictly legal, effect of the employer's underpayment of certain of his or her employment entitlements. This is why the Parliament used the expression "attributable to the entitlement" in sub-ss 19(2)(a) and (3)(a) as a criterion for reduction in the basic amount if a person is eligible for an advance for a particular employment entitlement. Parliament intended to broaden the class of receipts by the employee that could be taken into account in the calculation of what advance "on account of employment entitlements" would be payable to him or her so as to include payments that, realistically, could be ascribed to, be characterised as due to, or produced by, the relevant employment entitlement, even though the employer had not paid that specific entitlement to the employee. The loadings under the letter agreement were paid to replace, or substitute for, the benefits or entitlements identified in cl 3.3, as cl 3.4 made clear. In those circumstances, the loadings to Mr Warren can be described appropriately as "attributable to the entitlement[s]" that he was not paid.

48 *Finally*, something should briefly be said about the relevance of the question whether the employer could have set off the loadings if Mr Warren had pressed for his entitlements on the basis he was a permanent employee.

49 The question of whether an employer, facing a claim for underpayment, could set off casual loadings paid to an employee incorrectly treated as a casual employee, or whether such amounts could discharge the employee's entitlements, was considered in *WorkPac v Rossato* [2020] FCAFC 84; 378 ALR 585 – see: at [221] (Bromberg J); [824]-[870] (White J); [986]-[1008] (Wheelahan J). The question did not require resolution on appeal to the High Court, because the employee was found to be a casual employee: *WorkPac Pty Ltd v Rossato* [2021] HCA 23; 392 ALR 39 at [8]-[10].

50 If the employer could have set off the loadings or a part of them from any requirement to pay the amount of an employment entitlement, that would fortify the conclusion that the loadings were “attributable” to the benefits identified in cl 3.3. But it is not necessary to resolve that issue. Irrespective of whether the employer could have set off amounts paid by way of loading, the parties to the letter agreement in this case objectively intended the loading to be referable in part to the employer's annual leave obligations and in part to the employer's redundancy pay obligations, or the absence of the employee's right otherwise to receive those benefits, with the result that it was open to conclude for the purposes of the FEG Act that some part of the loading was “attributable to the [annual leave and redundancy pay] entitlement[s]” within the meaning of s 19(2).

51 It might be noted that the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), which came into effect after the filing of the appeal to the High Court in *Rossato*, inserted a definition of “casual employee” into the FW Act and provided that an award of compensation for permanent employee entitlements payable to an employee mistakenly treated as a casual must be reduced by the amount of any identifiable casual loading paid to the employee – see: *Rossato* at [10].

CONCLUSION

52 The appeal should be allowed.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment of

the Honourable Justices Rares,
Thawley and Anderson.

Associate:

Dated: 12 July 2022