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Workplace View

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FWC Looks Beyond Title and High Income to Find Employee Was Award Covered and Could Access Unfair Dismissal Laws

Connor McClymont and Dominique Hartfield

In the recent decision of *Kaufman v. Jones Lang LaSalle (Vic) Pty Ltd. t/a JLL* [2017] FWC 2623 (*Kaufman*), the Fair Work Commission (FWC) found a successful real estate professional was covered by the Real Estate Industry Award 2010 (the "Award") for the purposes of unfair dismissal despite his title being "Regional Director" and his salary being well in excess of the high-income threshold.

It is a common misconception that once an employee is remunerated in excess of the high-income threshold (currently AU$138,900) or carries a managerial or directorial title that employers can automatically disregard the application of unfair dismissal laws.

An eligible employee is protected from unfair dismissal if the employee is found to satisfy one of three criteria, namely, the employee is covered by an award, an enterprise agreement applies to them or that the employee earns less than the high-income threshold.

Kaufman v. Jones Lang LaSalle (Vic) *Pty Ltd.*

In *Kaufman*, when determining whether a modern award covered the employee at the time of his dismissal, Deputy President Gostencnik (DP) used the "principal purpose test". This involved a factual examination of the nature of work undertaken by the employee and the circumstances in which he was employed to determine whether he was covered by the Award. The employer's primary submission was that the employee held a "senior management position" as a "Regional Director" and, as such, he held a position well beyond the classifications of property sales professionals in the Award.

These submissions were rejected by the DP who found that the employee's role contained no managerial functions and that the title of "Regional Director", while showing seniority and excellence, did not alter the employee's employment duties, which were primarily the same as a property sales representative under the Award. The DP also rejected submissions that the employee's remuneration levels, being in significant excess of the minimum weekly rate paid to a property sales representative under the Award, indicated the employee's position was different in character to that of the Award classification. He stated that this reasoning was incorrect and that the employee's high level of remuneration was only evidence of the individual's success and value to the business and said nothing about whether the individual was covered by the Award.

This decision highlights that it is not an employee's title that determines their award coverage, but rather it is the duties performed by the employee. In *Kaufman*, the employee's "fundamental or principal purpose" was the selling of real estate and, as such, he was covered by the Real Estate Industry Award 2010.

Other Decisions in This Area

This will not always be found to be the case. The FWC has considered this type of application before. In *Baldock v. Squiz Pty Ltd.* [2012] FWA 6223 and *Hehir v. Schweitzer Engineering Laboratories Pty Ltd.* [2011] FWA 3763, industry professionals who had been promoted to managerial and project management roles were found not to be covered by their respective awards. While the individuals still held the expertise and experience of professionals in their field, they were found not to be exercising the duties of the relevant classifications of the Professional Employees Award 2010. Similarly, in *Fry v. BHP Billiton Minerals Pty Ltd. t/a BHP Billiton* [2011] FWA 6927, a supervisor was found not to be covered by the Mining Industry Award 2010, as his duties as supervisor did not fall within the scope of classifications under the Award, which were limited to technical performance positions.

Implications for Employers

In affecting a dismissal and the related dismissal process, it is important for employers to consider whether an employee has access to unfair dismissal laws. For employees who earn above the high-income threshold (and are not otherwise covered by a registered agreement), this means looking beyond the mere title of a position and examining, as a matter of fact, the employee's duties in that position and whether those duties fall under a classification in any applicable modern award. Where an employee's day-to-day duties fall within the scope of an award classification, as they did in *Kaufman*, the employee will be entitled to protection from unfair dismissal.

A New Financial Year Brings New Fair Work Changes

As employers welcome the new financial year, they need to make sure they are up to speed with the 1 July changes to the Fair Work regime to ensure they are fulfilling their obligations to employees.

The *Fair Work Act 2009* (FW Act) requires the FWC to conduct an annual national minimum wage review. This year, the commission's Expert Panel for annual wage reviews (the Panel) chose to increase the national minimum wage by 3.3% (AU$22.20 a week or 59 cents an hour) to AU$694.90 a week (AU$18.29 an hour). Modern award increases to wages and allowances have also been applied.

The wage increase took effect on 1 July 2017 and impacts the employers of over 2.3 million Australian workers who are paid at the national minimum wage or are covered under a modern award.

While pay rates will not need to rise where an employer is already paying well above the new minimum wage, employers paying at, or close to, minimum award wages should ensure that they have reviewed their award coverage and whether the changes affect their pay rates.

The FW Act's high-income threshold has also increased from AU$138,900 to AU$142,000 (HIT). Where an employee is covered by a modern award and an employer provides a written undertaking guaranteeing annual earnings will be on or above the HIT, the modern award terms will not apply. However, these employees remain "covered" by the award and may still access unfair dismissal provisions

Employers should also be aware that unfair dismissal remedies have become more costly. The maximum amount of compensation an employee can recover in successful unfair dismissal proceedings has been increased from AU$69,450 to AU$71,000.

The penalty unit under the *Crimes Act 1914* (Cth), on which FW Act civil penalties are based, has also increased as of 1 July 2017 from AU$180 to AU$210. For example, this means the maximum civil penalties that can be imposed for a breach of the adverse action provisions have increased for an individual from AU$10,800 to AU$12,600 and for a company from AU$54,000 to AU$63,000 (which is in addition to any compensation that may be awarded to the individual).

Lastly, the recent landmark decision of the Full Bench of the FWC handed down on 5 July 2017 has determined a casual conversion clause will be included in 85 modern awards that do not currently contain such a provision. While the draft model clause has not yet been finalised, it currently has the following features:

- A qualifying period of 12 calendar months
- During the qualifying period the casual employee must have worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed full time or part time
- The employer must provide all casual employees with a copy of the clause within the first 12 months after their initial engagement
- A conversion may be refused on the following grounds:
  - It would require a significant adjustment to the employee's hours of work to accommodate them full time or part time
  - It is known or reasonably foreseeable that their position will cease to exist or the employee's hours will significantly change or be reduced within the next 12 months
  - Other reasonable grounds based on facts that are known or reasonably foreseeable.

Did You Know …?

Connor McClymont and Dominique Hartfield

Labour hire organisations cannot terminate employees (protected from unfair dismissal) solely for the reason a host employer has revoked their working arrangement.

In the recent case of *Tasmanian Ports Corporation Pty Ltd. v Gee* [2017] FWCFB 1714 (*Gee*) the Full Bench of the FWC dismissed an appeal by a labour hire organisation against a decision that found that the employer had unfairly dismissed an employee.

The Full Bench cited with approval the case of *Kool v. Adecco Industrial Pty Ltd.* [2016] FWC 925 (*Adecco*) where the FWC held that labour hire organisations cannot use contractual relationships to deploy employees to a host employer to abrogate their responsibility to treat employees fairly. To find otherwise would effectively give labour hire organisations the power to contract out of unfair dismissal legislation.

In *Gee*, the appellant labour hire company was a marine port owner-operator, which also supplied labour to privately owned ports. The respondent was assigned to work for a private port in 2009.

After six years of working for the private port, the respondent's site access was revoked due to a series of alleged indiscretions investigated by the principal contractor, including failing to follow reasonable work directions, circumventing reporting protocols and improperly using his mobile phone and social media while on site. The labour hire company then terminated the worker's employment, reasoning that his removal from the site left him unable to perform the inherent requirements of his job.

In dismissing the labour hire company's appeal, the Full Bench noted that the principal contractor's investigation was procedurally flawed and its outcomes were unsound. The commission determined that the labour hire company had simply adopted the other business' findings without further inquiry and had not made any effort to find the worker alternative work before dismissing him.

This decision should remind labour hire employers to be aware of their obligations to treat employees fairly, irrespective of a host employer revoking their placement, and genuine efforts should be made to find an employee alternative suitable roles before terminating their employment.

Employer Reminder – Workplace Policies

Employers Beware of Involvement in Confidentiality Breaches by New Employees

Madeleine Smith and Dominique Hartfield

In the recent decision of *Lifeplan Australia Friendly Society Ltd. v. Ancient Order of Foresters in Victoria Friendly Society Limited* [2017] FCAFC 74; [2017] FCAFC 99 (*Lifeplan*), a Full Federal Court has found a new employer was knowingly involved when two employees used their former employer's confidential information to its advantage. The court ordered the new employer to account for profits of more than AU$6.5 million, which it made from using the confidential information to establish a business venture.

In this case, a senior manager and his subordinate conducted an "orchestrated plan" to take the appellant's business. While still in the employment of the appellant, the pair relied on the appellant's confidential financial information and business records to prepare a business plan, which they presented to the respondent company's board to convince it to enter into a commercial venture with them.

The respondent was deemed an active participant in the fiduciary breaches by the employee pair. The court found board members: "knew or ought to have known (by the standards of honest and reasonable people) that they were being supplied with confidential business information of a competitor by the competitor's current employees, in order to have them make a decision to enter into a business relationship with the current employees of the competitor to the likely commercial disadvantage of the competitor, and the likely and intended commercial advantage of their company".

Further, the respondent knew the employees were soliciting clients for them while still employed by the appellant and was acting in concert with the employees to facilitate this.

The court found that while the employees did not directly generate profits as a result of their breaches, the business venture would not have gone ahead without them. Without the dishonest advantage of the confidential information, the respondent would not have employed the employees and would not have made the profits it did from the business plan. Accordingly, the court overturned the decision of the primary judge to find that the respondent was liable to pay the appellant almost five years' worth of profits from the business plan.

The *Lifeplan* case is a warning to employers of the costly risks of taking advantage of a competitor's confidential information when recruiting or entering into business ventures with their competitor's current or former employees. Employers should be proactive in undertaking due diligence when hiring employees from competing companies. Employers may wish to consider including a warranty in the employment agreement, whereby the new employee undertakes that they have the legal right to enter into the agreement and in performing their duties they will not be in breach of any obligation to a third party.

The case is also a reminder that employers need to take care in guarding their own confidential information from departing employees by ensuring that they have adequate confidentiality agreements and restraints in place. Where an employer suspects an employee may be taking or have taken confidential information, it may consider undertaking a forensic investigation with a view to obtaining relevant evidence.

Legislation Update

Legislative Instrument	State	Status	Proposed Changes
Fairer Paid Parental Leave Bill 2016	Cth	Withdrawn from Parliament 10 May 2017.	The bill proposed to amend the paid-parental leave system so that parents will receive government-funded paid parental leave only to the extent it is not provided for by their employer and payments be made directly by the Department of Human Services, unless otherwise agreed.
Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017	Cth	Passed the House of Representatives 11 May 2017. Read for a second time in the Senate on 13 June 2017.	Amends the Fair Work Act to: • Increase maximum penalties for serious contraventions • Hold franchisors and holding companies responsible for certain contraventions by their franchisees and subsidiaries where they knew or ought to have known about them and failed to take reasonable steps to prevent them • Provide the Fair Work Ombudsman with evidence gathering powers • Prohibit individuals from obstructing the functions of the Fair Work Ombudsman or an inspector or giving misleading information
Fair Work Amendment (Corrupting Benefits) Bill 2017	Cth	Passed the House of Representatives on 23 May 2017. Read for a second time in the Senate on 13 June 2017.	Amends the Fair Work Act to respond to recommendations of the *Final Report of the Royal Commission into Trade Union Governance and Corruption*, to promote the better governance of registered organisations.
Fair Work Amendment (Protecting Take Home Pay) Bill 2017	Cth	Read for a second time in the House of Representatives on 19 June 2017.	A private members' bill to amend the Fair Work Act to prevent penalty rates being varied under modern awards in a way that decreases an employee's take-home pay.
Labour Hire Licensing Bill 2017	QLD	Introduced into the Legislative Assembly on 25 May 2017. It was opened to public consultation. Since then, the parliamentary committee has failed to reach a decision on whether it should become law.	Introduced by the Palaszczuk Labor Government to establish a mandatory business licensing scheme for labour hire in Queensland. Under the scheme, labour hire providers will have to be licensed to operate in Queensland. Businesses will only be able to engage licensed labour hire providers. Similar bills are likely to be introduced in South Australia and Victoria.

Events Update

Our Labour & Employment Seminar Series

Following the successful seminars in Perth and Sydney on the topic "On-boarding new employees", the Labour & Employment team presented the second seminar in its employment seminar series on "Off-boarding employees – how to get it right" in Perth on 26 July 2017, with over 60 attendees.

The second seminar will also be presented in our Sydney office for those of you on the East Coast. Please see further details outlined below:

- Wednesday, 2 August 2017 – 8:15 a.m. registration/ breakfast (for an 8:30 a.m. start) at Level 10, Gateway, 1 Macquarie Place, Sydney. The seminar will be presented by Anna Elliott (partner), Dominique Hartfield (of counsel) and Jessica Geelan (associate).

This seminar looks at the dismissal process and provides practical tips on getting the process right. It also outlines the key legal issues to watch out for relating to specific termination situations and the steps that can be taken to mitigate the risk of legal claims.

If you did not receive our invite and would like to attend, please do not hesitate to contact Isla Knight on +61 8 9429 7624 or isla.knight@squirepb.com or Danielle Bova on +61 2 8248 7851 or danielle.bova@squirepb.com

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