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The truth isn't always in the title - Commission makes important decision on award coverage

The Fair Work Commission recently considered whether a Regional Director of a multi-national real estate company could bring an unfair dismissal application, despite the Director earning above the high income threshold. Mr James Kaufman (the Applicant) was made redundant from his position in December 2016 and subsequently commenced unfair dismissal proceedings claiming his dismissal was not a case of genuine redundancy.

Jones Lang LaSalle (the Respondent) objected to the claim on the basis that the Commission did not have jurisdiction to determine the application. Jones Lang LaSalle argued Kaufman earned above the high income threshold and was not covered by the Real Estate Industry Award 2010 (Award) because his role as Regional Director involved significant managerial functions.

Jones Lang LaSalle argued that Kaufman's senior position went beyond the middle-level management classifications in the Award because Kaufman performed high level executive duties beyond those described under the Award classifications and held the executive position of Regional Director which demonstrated seniority of his role.

Kaufman argued he was covered by the Award because, despite his position of Regional Director, the nature and duties of his role did not require him to discharge any managerial functions.

The Commission held that Kaufman was covered by the Award and was therefore eligible to proceed with his unfair dismissal claim on the basis that his promotion to Regional Director was recognition of his capacity as a winner of business and he had no managerial responsibilities and no direct report duties. In addition, it was found the expectation attaching to his role relating to leadership,

mentoring and business generation responsibilities would be common of most long serving, experienced and successful property sales representatives employed in a real estate business.

The Commission noted that where the duties or principle purpose for which an employee is engaged correspond with the coverage provisions of a relevant award, high remuneration and senior position titles will only demonstrate the employer's view that the employee is a valuable part of the business.

Lessons for Employers

This case highlights that the courts, when considering award coverage, will consider the substantive duties performed by the employee rather than the employee's position title. This means that employers need to have regard to the nature and duties of the position when considering if an employee is covered by a modern award.

Employers can also consider entering into a 'guarantee of annual earnings' with high income employees to mitigate exposure to unfair dismissal claims. The effect of a 'guarantee of annual earnings' is that a modern award does not apply to an employee that earns above the high income threshold where the employer undertakes to pay an employee a specific sum per annum.

The advantage of entering into this arrangement is that high income earners are no longer subject to the terms and conditions of the relevant modern award and do not have access to unfair dismissal claims.

Mr James Kaufman v Jones Lang LaSalle (Vic) Pty Ltd T/A JLL [2017] FWC 2623

New WHS offence to be created to target deadly workplace practices

The Queensland Government has recently announced that it is committed to introducing a new WHS offence of 'negligence causing death' at work, implementing a recommendation arising from its Best Practice Review of Workplace Health and Safety. The deaths of visitors at Dreamworld and of workers at an Eagle Farm building project last year prompted a review of work health and safety laws, including the effectiveness of offences and penalties under the *Work Health and Safety Act 2011 (Qld)*.

It is expected that this new offence will fill the perceived void between the provisions of the health and safety laws and criminal laws in Queensland. Specifically, it will fill the gap where someone is given a negligent instruction or direction to undertake a task, which can have severe implications for employers operating in high risk industries.

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