INDUSTRIAL RELATIONS UPDATE

May 2017

Myth about unfair dismissals busted

Contrary to public belief, a high earning employee can still pursue an unfair dismissal claim if they are covered by a modern award.

In a recent FWC case, a former regional director claimed that a multibillion dollar real estate business unfairly dismissed him when it made him redundant.

The employer made a jurisdictional objection to the application, arguing that he was not a person protected from unfair dismissal. This was on the basis that the director's earnings were in excess of the high income threshold and the general accountabilities/requirements of his position were beyond the classifications in the Real Estate Industry Award.

However, the FWC disagreed and said that there was nothing in the director's regular duties that could be described as a managerial function or as a direct report. He said that award coverage is not determined by the person's title but rather, the duties performed.

In this factual scenario, the principal purpose of the director's position was to attract and sell high-value real estate transactions rather than perform managerial duties. As such, his duties fell within the role definition of a property sales representative under the Award and therefore, was protected from unfair dismissal.

Employers cannot assume that paying above the high-income threshold, and conferring executive style titles on experienced employees, will guarantee immunity from unfair dismissal claims. If the employee's duties are covered by a modern award, then they will be protected from unfair dismissal despite being highly paid.

Mr James Kaufman v Jones Lang LaSalle (Vic) Pty Ltd T/A JLL [2017] FWC 2623 (15 May 2017)

Minor errors in notice of representational rights

Minor errors such as typos or incorrect contact details in the notice of representational rights continue to be a burden for employers trying to get their enterprise agreements approved. Not only do these errors delay the process, but they inconvenience and cost employers as applications involving non-compliant NERRs are automatically dismissed by the FWC.

The government has finally acknowledged the need for the tribunal to have discretion to correct such errors in the NERR. In a submission to the Senate Inquiry into the Fair Work Amendment Bill, the FWC said it has put on hold any agreement applications that are non-compliant due to defective NERRs until a final decision has been made on the matter.

This is a step in the right direction, as a whopping 18% of agreements on average over the last couple of years failed to be approved due to defective NERRs.

FWC submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill, May 12, 2017

Low wage rises continue

Private sector wage increases continue to echo the limbo dancer's challenge - how low can you go? The year on year rise as at the March '17 quarter is just 1.7%, the lowest ever recorded in the 20 years the Wage Price Index has been surveyed.

The astonishing aspect of this is that even the CPI for the same comparison period is higher at 2.1%. There is a general expectation, reflected in the assumptions underlying the May Budget, that wage rises (and the inflation rate) will increase in the near future.

However the Reserve Bank of Australia has been predicting that for a year or two now, and even it is puzzled why its predictions fail to eventuate. With enterprise bargaining falling away dramatically as well, it is not easy to see how long this trend will continue. In the short term, it does mean claims in the 2-3% range are about as much as any prudent business ought to concede.

ABS Wage Price Index March Quarter 2017

Farewell Nicola Scott!

After five years with First IR, that friendly voice on the phone you hear when you call us is moving on. Nicola has graduated from university and is taking up an exciting position with a larger firm from 30th May 2017. We wish her all the best in her career and hope that her transition into the next chapter of her life will be as smooth as her recent camel ride in the Sahara Desert. It has been a joy working with her and we'll miss her.

CONTACT US

Please contact us if you have any questions or queries about these matters or any other industrial relations matters.

T: (02) 9231 2088
E:dan@firstir.com.au
shane@firstir.com.au

Privacy Matters

In an age where information is at anyone's fingertips, it's no surprise that potential embarrassment is not enough to convince an FWC full bench to uphold confidentiality orders.

In a dispute over an employee's allegedly offensive Facebook comments, a union argued for continued confidentiality orders as the employee involved suffered adverse publicity from an earlier decision.

However, the bench said that there was no direct evidence that the employees had suffered or will suffer from the information being in the public domain. It also rejected the union's claims that the case was likely to attract significant media interest, would damage the employer's investigative process or lead the Commission to adopt a harder line sanction.

If any party decides to go to court over a dispute, it must accept that any information about the proceedings and those involved will be almost always be open to the public. They must also be aware of the wider implications of "open justice hearings". Finding out the history of an employer or employee is very easy now. Employees can be reference-checked online just as employers can, including by customers and suppliers. Sometimes it might just be better to settle disputes quietly.

United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board [2017] FWC 1708 (27 March 2017)