2 Jobs, 1 Employer = Overtime?…Not necessarily!

It is not an uncommon scenario where an employee is engaged by the same employer in two different and distinct roles. But how does this work in relation to payment? Is this employee entitled to overtime?

In a recent decision from the Federal Court of Australia, *Lacson v Australian Postal Corporation* [2019] FCA 51, it has been upheld that if an employee has two clearly distinct jobs with one employer, overtime or other penalty rates under an enterprise agreement are calculated separately on each job, not cumulatively on all hours worked for the one employer.

This case was first heard back in August 2018 in the Federal Circuit Court of Australia. The facts of the case are below.

Mr Lacson was employed by Australian Postal Corporation (**Australia Post**) in two different roles. His first job was as a Postal Delivery Officer (**PDO**) at the Collingwood Post Shop part-time. He worked this shift 3 hours per day Monday to Friday 6.00am to 9.00am. Mr Lacson's duties in this position as PDO consisted of sorting mail.

Mr Lacson commenced his second part-time job with Australia Post also in 2001 initially as Postal Sorting Officer and then promoted to Postal Services Officer (**PSO**) in 2004. In this role, Mr Lacson was responsible for sorting parcels, some of which was performed by driving a forklift.

Mr Lacson performed work in these two roles each day between 6am and 11.20pm. Both jobs were classified separately and attracted different hourly rates of pay under the relevant enterprise agreement.

He claimed that because he worked for one employer the total hours he worked should be assessed on a cumulative basis entitling him to overtime, rest relief and meal allowances under the relevant enterprise agreement. Mr Lacson sought approximately $200,000 in loss and damages.

The Court had the job of deciding how the relevant enterprise agreement applied to Mr Lacson's employment. The Court was required to assess how section 52 of the *Fair Work Act 2009* (**Act**) should be interpreted. Section 52 of the Act sets out when enterprise agreements apply to employees. It prescribes that enterprise agreements apply to employees in relation to '*particular employment*'.

Does '*particular employment'* mean that the enterprise agreement applies to each individual job or does it apply to all hours worked from all jobs on a cumulative basis?

Decision

The Court found that the phrase '*particular employment'* should be confined to circumstances where the employee is occupying a particular position or particular job. This means that an enterprise agreement applies to the employee while they occupy a particular job and therefore not on a general cumulative basis if an employee does happen to hold two or more jobs with one employer.

The Court found that Mr Lacson ultimately had two distinct employment contracts for each of his jobs with Australia Post.

The Appeal

Mr Lacson recently appealed the decision of the Federal Circuit Court of Australia to the Federal Court of Australia in February of this year. However, the Federal Court upheld the primary judge's findings. The Federal Court confirmed that the term '*particular employment'* applied to each job Mr Lacson had and "not in some cumulative way."

Ultimately, Mr Lacson lost his appeal. The Court said that Mr Lacson "found himself performing two different jobs, at two different locations, with two different kinds of work, for one employer, was a function of choices he had made." Mr Lacson had been paid the correct overtime and other entitlements in respect of each of his jobs and the Court did not accept that he made the choice of working these two jobs under the impression "that they would be treated as one job and he should secure the considerable additional sums of money he is now seeking."

As such the Court found Mr Lacson was not entitled to the overtime, rest relief or meal allowances on a cumulative basis as he claimed.

Key Issues for Employers

It is not uncommon for an employee to work separate roles within the same business. Employers should therefore ensure that if this is the case the following are implemented:

1. employee has two separate employment contracts for each position;
2. employee receives separate payslips for each job; and
3. duties of each job are separately defined and distinct from each other.

Point 3 is particularly important because if the jobs are not separate and distinct, the employer may be liable for overtime and other such payments as if the employee was in a singular role.

For more information on this case and what it may mean for you please contact the VANA Employment Relations team on (02) 9083 0091.

Final termination pay – reminder on 2018 Modern Award changes

As we are now well and truly into 2019 it is important to recap on some of the many Modern Award changes toward the tail end of 2018.

These changes (which affect most Modern Awards) change the way in which when final pay is owed to an employee and when and how much an employer can withhold from an employee's pay where they fail to give the correct amount of notice.

Final pay on termination

The Fair Work Commission (FWC) introduced changes on 1 November 2018 to a number of Modern Awards, including the *General Retail Industry Award* (**Award**)*,* which now require an employer to pay an employee their final payment no later than 7 days after the day on which their employment ends.

Previously the Award was silent on the time period within which termination payments must be paid. However, now an employer will need to pay all wages and entitlements owing to the employee within 7 days of their employment ending.

The new requirement provides an employer must pay an employee no later than **7 days** after the day on which the employee's employment terminates. This includes:

- The employee's wages for any complete or incomplete pay period up to the day of the termination; and
- All other amounts that are due to the employee under the applicable Award and the NES.

The requirement to pay wages and other amounts is still subject to further order of the Commission and the employer making deductions authorised by the Award or the Fair Work Act.

It is important to be aware of the changes prescribed above because the FWC may impose financial penalties for a contravention of an obligation arising under the Award.

Withholding from pay

In addition to making changes to the timing of termination payments, the FWC has made amendments to a number of Modern Awards, including the *General Retail Industry Award,* which changes the employer's ability to withhold monies from employees for insufficient notice.

The relevant clause in the Award is clause 14.1. In effect, employers can withhold the maximum of one week's wages in the event that an employee who is 18 years of age or above, does not provide the required amount of notice upon resignation of employment. The monies withheld may only be taken from wages owed. No money can be deducted from accrued annual leave or any other statutory entitlement. It is also important to note that the amount of notice the employee is required to provide is not changed by this decision.

Employers should to check the updated version of the Award prior to making any decision to avoid any breach or underpayment. Further, the model modern award clause provides that any deduction made under the clause must not be 'unreasonable' in the circumstances. This creates uncertainty for employers with respect to the definition of unreasonable circumstances, and employers should also seek advice from the HBIA when in doubt.

For further advice in relation to the changes, please contact the VANA Employment Relations team on (02) 9083 0091.

Mental Wellbeing in the Workplace

Both employees and employers have a part to play to break the taboo of mental health issues and ensure that employees feel like they are able to speak up and reach out for help where they may be struggling. A study undertaken by Beyond Blue in 2014 showed that for every dollar spent on a successful mental health program a business will receive a return of $2.30 in benefits. So, what can employers do to break the taboo surrounding mental illness?

As employers, it is important that you create a working environment where all employees feel like can disclose their concerns without fear of negative backlash. By encouraging employees to feel safe to speak up, this assists you in being able to take an active part in addressing the employee's struggles to ensure they receive the help they need.

A workplace culture where employees feel comfortable in disclosing their mental illnesses does not happen overnight. However, there are a number of active steps you can take as an employer to develop this culture. It may be as simple as having a coffee catch up with an employee seems 'a little off.' This can go a long way in showing support to a staff member and letting them know that you there to help. This simple gesture also sends a message to the rest of the workforce that the business genuinely cares about their welfare, which fosters that supportive work environment.

Moving beyond workplace culture, workplace health and safety laws in Australia require employers to take all reasonable steps to identify and minimise health risks. To ensure you have taken reasonable steps to protect the mental health of your employees in the workplace, you will need to assess psychosocial risks such as work stressors and leadership styles. By actively assessing these risks, an employer is more likely to foster a workplace that complies with workplace health and safety obligations.

If the business has the resources conducting regular training sessions to upskill staff members on how to address mental illness in the workplace can help ensure struggling employees will have someone to turn to. You may also consider an outsourced Employee Assistance Program, which enables employees suffering from mental illness to anonymously contact a provider to receive advice.

For further advice or assistance please contact the VANA Employment Relations team on (02) 9083 0091.