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LIVING AWAY FROM HOME ALLOWANCE: Not 'Earnings'

An unfair dismissal application may proceed despite an employer's jurisdictional objection that the employee was paid an amount above the high income threshold.

Senior Deputy President (**SDP**) Acton's decision is an important ruling on what constitutes 'earnings' under the *Fair Work Act 2009 (Cth)* (**FW Act**).

The FW Act provides that an employee's earnings include:

- the employee's wages;
- amounts applied or dealt with in any way on the employee's behalf or as the employee directs;
- the agreed money value of non-monetary benefits; and
- amounts or benefits prescribed by the regulations.

However, an employee's earnings do not include:

- payments where the amount cannot be determined in advance;
- reimbursements;
- contributions to a superannuation fund; or
- amounts prescribed by the regulations.

The Case

In the case in question, the employee came to Australia from the UK on a class 457 visa sponsored by the employer and was subsequently terminated. The employee filed an application with Fair Work Australia (**FWA**) claiming the termination was unfair.

The employer lodged a jurisdictional objection to the employee's application, submitting that the employee's annual rate of earnings and other amounts (worked out in accordance with the *Fair Work Regulations 2009 (Cth)*) was above the high income threshold (currently \$108,300). The employer claimed the employee's earnings totalled \$109,133 per annum, representing:

1. \$78,900 in wages;
2. \$26,100 living away from home allowance (**LAFHA**), being an amount 'applied or dealt with in any way on the employee's behalf or as the employee directs'; and



- \$4,133 in health insurance, being a benefit other than the payment of money as described by the FW Regulations.

However, SDP Acton found that the employee's LAFHA was not 'earnings' within the meaning of the FW Act. SDP Acton concluded that: *'an allowance paid to an employee by an employer is regarded as a LAFHA where it is reasonable to conclude from all the surrounding circumstances that some or all of the allowance is in the nature of compensation to an employee for additional expenses incurred because the employee is required to live away from their usual place of residence in order to perform their duties of employment.'*

SDP Acton dismissed the employer's jurisdictional objection, allowing the employee's application to proceed with FWA.

Outcomes

Payments made by employers for expenses incurred in living away from home are unlikely to be considered 'earnings' for the purposes of calculating the high income threshold.

Recommendation

If you have any queries in relation to calculation of earnings for the purposes of the high income threshold or generally regarding your obligations with respect to the termination of employees, you should seek advice.

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