

Employment & Industrial Case Note

November 2007

DRAGO AND INVESTA PROPERTIES LIMITED

This is a decision of Commission Lewin delivered on 24 October 2007. The matter before the Australian Industrial Relations Commission was an Application by a terminated employee that the termination was harsh, unjust or unreasonable pursuant to s.643(1)(b) of the *Workplace Relations Act 1996*. The employer filed a Notice of Motion to dismiss the Application for want of jurisdiction based upon its argument that the employee was not employed under award derived conditions and that prior to the termination the employee's rate of remuneration exceeded the jurisdictional limit.

The decision is instructive in respect of how the Commission will go about assessing these types of Applications to dismiss. The employee relied upon a clerical award for her argument that she was employed under award derived conditions.

The Commission found the facts of the case were appropriate to assessing the argument as to whether the employee was employed pursuant to award derived conditions based on the principal purpose test. The principal purpose test has been spoken about in previous decisions of the Commission and in particular decisions of *Brand v APIR Systems Limited [PR 938031]* and *Briggs v Customtone Kitchens Australia Pty Ltd (1988) 24 IRJ*.

Of interest is that the employee's base rate of remuneration was \$25,750.00 per annum plus a sales commission of 1.5% of the sale price per land lot that was sold. The employee was employed by a property development company and her title at the time of termination of employment was that of Sales Manager. In the 12 months immediately prior to termination the employee had received \$197,644.59 gross in remuneration.

The principal purpose test requires *an examination of the major and substantial duties of the position held by the employee to assess whether the principal purpose of the employee's employment falls within the scope and application of a particular award* [at paragraph 29 of the decision in Drago].

Although the Commission found that the employee's evidence about her tasks and duties should be accepted it was clear that she was principally employed to sell land lots for the company. This was further backed up by the remuneration that she had received in the previous 12 months. To quote from Commissioner Lewin at paragraph 67:

I find that the principal purpose of the employment was the sale of land and not clerical, administrative employment. The methodology and tasks for the achievement of that purpose are not the primary determining factors of how that purpose should be construed. In this case, I am influenced, among other things, by the structure of the remuneration applicable to the employment. While the presence of commissions or bonus payments will not of itself determine the question, in my view, the commission arrangements are clearly indicative of the principal purpose of the employment, in the particular circumstances of this case.

As a result the application with respect to the termination of employment was dismissed.

In our experience it is becoming prevalent that some employees are seeking to utilise the Commission in respect to termination of employment matters particularly where their remuneration exceeds the jurisdictional limit. If an award can be located and the principal purpose test overcome then employees may be able to pursue such applications where their remuneration exceeds the jurisdictional limit. A key will be examining whether the employees are professional employees or basically executive officers. In those cases they will not fall within the principal purpose of for example clerical work. Therefore for termination of employment matters where the employee does earn above the jurisdictional limit the question of award derived conditions does require an examination by employers in assessing what steps an employee may take if employment is terminated.

For all termination enquiries please do not hesitate to contact our employment and industrial team. (07) 32236400