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Outsourcing and restructuring risks

In 2004, the High Court will review two important employment issues affecting plans to restructure. We look at both special leave applications heard by the High Court in December 2003.

Outsourcing risks – Gribbles Radiology

While outsourcing functions such as IT can generate cost savings, there can be unexpected risks in replacing one outsource provider with another. Senior Associate Tony Saunders reports.

High Court appeal

In AAR *Focus: Workplace Relations*, April 2003, we reported on the appeal by Gribbles Pathology against a Federal Court decision of Justice Gray. Justice Gray found that the replacement of one outsource provider with another resulted in a transmission of part of the first outsource provider's business to the second outsource provider.

After losing its appeal to the Full Court, Gribbles applied for special leave to appeal to the High Court. The special leave application was heard and granted by the High Court on 12 December 2003. We consider the High Court's reasons for allowing special leave.

Background

In this case, Region Dell owned and operated medical clinics in Victoria, a number of which included radiography services. Region Dell owned the radiography equipment in its clinics, but did not employ any radiographers. It outsourced the employment of radiographers to a third party, MDIG, which was a respondent to a federal award. During 1999, Region Dell decided to replace MDIG with Gribbles.

Gribbles employed the radiographers previously employed by MDIG and began to provide radiography labour to Region Dell. To Region Dell's customers, it was a seamless transmission: the same radiographers continued to provide the same services at the same clinic.

The issue was whether or not Gribbles was a successor to a part of MDIG's business. If so, Gribbles would have been bound by the MDIG award and would have had to provide the benefits under that award to its radiographers, including severance payments based on the employees' combined periods of service with MDIG and Gribbles.

If a business is successful in replacing one of its competitors as the service provider to a client, it may become bound by its competitor's enterprise agreement or award

The distinguishing feature of this case is the finding by the Full Court on appeal that there was a transmission of business from MDIG to Gribbles, even though there was no contractual relationship between them. The relevant contracts were between Region Dell and MDIG and then Region Dell and Gribbles. Justice Hayne of the High Court emphasised this point in a number of his questions to counsel for the Health Services Union of Australia during the hearing of the special leave application hearing:

[The decision of the Federal Court] would mean, would it not, that there would be succession if a retailer operating a premises ceased operating on expiration of the lease, simply went out of business, and a new retailer set up under a new lease in the same premises doing pretty much the same sort of retail outlet?

Implications

The outcome of the High Court appeal, which will be heard during 2004, has critical implications for outsource providers and employers looking to start a new business. In particular, if a business is successful in replacing one of its competitors as the service provider to a client, it may become bound by its competitor's enterprise agreement or award. This risk must be taken into account in evaluating the price at which a service provider may be willing to undertake work for a new client.

The outcome will also impact on employees. If the effect of taking on the employees of the former outsource provider is to effect a succession of transmission, this provides an incentive for the new outsource providers to overlook these employees and staff its operations from elsewhere.

Restructuring risks – Amcor

Employers intending to transfer employees between related corporations as part of a business restructure will be interested in the outcome of Amcor's appeal to the High Court. Partner and the solicitor for Amcor in these proceedings, Julian Riekert, reports.

High Court appeal

In March 2000, Amcor Limited terminated the employment of a group of employees in its fine paper division as part of a restructuring that was to culminate in the public float of PaperlinX Limited. On the same day, its then wholly-owned subsidiary, Paper Australia Pty Ltd, offered all the affected employees employment on their previous terms and conditions and with full preservation of their accrued entitlements. Virtually all of the employees accepted the new offer by reporting for duty at their usual place of work.

Interpreting the wording of the redundancy clause of the applicable certified agreement, Justice Finkelstein of the Federal Court found that the employees had been made redundant and were entitled to full redundancy payments, notwithstanding their acceptance of the offer of no less favourable employment with Paper Australia. His decision was confirmed by the Full Court on appeal. The next stage was the special leave application to the High Court.

Before granting special leave, Justice McHugh posed a question to counsel for the union during the special leave hearing that concisely stated the key disputed issue:

Is not the important point of principle that both Justice Finkelstein and the Full Court reasoned that redundancy involves the loss of the employee's position with his or her employer rather than the loss of the employee's position as such? Does that not raise an important point of principle?

Implications

Employers who contemplate a sale of business or an intra-group restructure will be keenly interested in the full High Court's answer to this question. Is an employee 'redundant' when his or her position with a former employer is transmitted to a successor employer with full preservation of rights and accrued entitlements?

Employees in suits – approach with care

Employers in New South Wales must ensure that dealings with employees starting unfair contract actions while still employed do not amount to criminal contempt.¹ Senior Associate Andrew Cardell-Ree reports.

Background

In August 2001, the Uniting Church stood down two employees on full pay over performance concerns. Before the church decided to terminate their employment, the employees began unfair contract proceedings seeking protection from what they described as unfair termination procedures.

If an employee lodges a claim prior to termination, and the Commission has begun its dispute resolution processes, the employer must tread carefully and avoid pressuring the employee to resign, or otherwise compromise their claim

The New South Wales Industrial Relations Commission granted the employees a shortened timetable, so that conciliation of the claims was to be attempted on 26 November 2001. On 23 October 2001, the church required the employees to attend a meeting to answer concerns about their performance, and threatened that, if they did not attend, they would be dismissed.

The employees refused to attend, saying the meeting and the threat of dismissal was an abuse

of court process, which would undermine the ability of the Commission to order the employer to follow a fair procedure. Each employee was subsequently dismissed on 2 November 2001.

Contempt

The Commission found that, as a matter of practical reality, the church's actions amounted to improper interference with the administration of justice because it placed unreasonable pressure on the employees to settle, compromise or withdraw their claims.

Implications

Prior to this decision, employers in New South Wales were already required to ensure that dealings with employees while employed were fair from a procedural point of view. The decision in this case makes it clear that if an employee lodges a claim prior to termination, and the Commission has begun its dispute resolution processes, the employer must tread carefully and avoid pressuring the employee to resign, or otherwise compromise their claim.

The church is currently considering an appeal.

What is the value of a good record in OHS?

A recent New South Wales Industrial Relations Commission decision² indicates that a good occupational health and safety (**OHS**) record may do little to minimise the penalty imposed by a tribunal in a prosecution for breach of OHS legislation. Consultant Ric Morgan reports.

Background

Powercoal was installing a boom on a piece of mining equipment. The equipment was powered-up to assist with the installation, resulting in the automatic retraction of a stabiliser jack. The jack crushed an employee's legs and caused his death.

1. *Industrial Registrar of New South Wales v The Uniting Church in Australia Property Trust* (NSW) [2003] NSWIRComm 387.

2. *Rodney Morrison v Powercoal Pty Ltd* [2003] NSWIRComm 416.

Powercoal knew that the retraction of the stabiliser jack occurred automatically, and that there was no way to override this function. While Powercoal had procedures for the isolation of plant and for the operation of the equipment, none of the procedures dealt specifically with the maintenance being undertaken. Powercoal did not provide any information or training relevant to the stabiliser jack or the maintenance work.

The penalty imposed at first instance was \$65,000. The Commission took account of Powercoal's exemplary OHS record as a mitigating factor.

The Workcover Authority appealed the sentence as manifestly inadequate. Workcover argued that Powercoal's good record may have simply resulted from good fortune, and it was not relevant to understanding the nature and quality of the offence.

The Full Bench decision

On appeal, the Full Bench set aside the penalty and ordered Powercoal to pay \$155,000 instead. While not directly addressing the impact of a good OHS record on the penalty imposed, the decision implies that the record may not assist unless it is clear that the record follows proper compliance with OHS duties. Mere good fortune in not having had a prior incident is unlikely to assist.

Common rule awards for Victoria

The *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth) came into effect on 1 January 2004, reintroducing a system of common rule awards in Victoria. Lawyer Rosemary Bryant-Smith reports.

Earlier in 2003, the *Federal Award (Uniform System) Act 2003* was passed by the Victorian Parliament, referring to the Commonwealth the power to legislate for the making of common rule awards in Victoria.

Common rule awards

The Australian Industrial Relations Commission (**AIRC**) now has the power to declare that an existing federal award will apply as a common rule for a particular industry in Victoria. The AIRC can exercise this power on application by an employer, a union or an employer organisation.

In exercising this power, the AIRC must take into account:

- the importance of avoiding the overlap of awards and minimising the number of awards applying in relation to particular employers; and
- whether there are other awards that apply to work performed in the industry or public sector in relation to which the industrial dispute arose, and whether those awards are the most relevant and appropriate awards for the work performed in that industry or public sector.

Although awards can be declared to be common rule awards from 1 January 2004, the common rule awards will not become binding on employers until 1 January 2005.

The declaration of a common rule award will mean that any employer in the industry covered by the award will be bound by it, even though that employer is not individually named as a respondent. Victorian employees will move progressively off the second-tier set of terms and conditions under Schedule 1A of the *Workplace Relation Act 1996* and onto the federal award safety net.

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Previously, an employee earning more than \$85,400 per year was unable to make an unfair dismissal claim, unless he or she was covered by an industrial award or agreement.



Under the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth) (the **WR Amendment Act**) all employees covered by a common rule award will be able to access the unfair dismissal jurisdiction, irrespective of remuneration.

Coverage

The WR Amendment Act applies only to employers and employees not already bound by a federal award or agreement. Workplaces that have some employees covered by a federal award/agreement and some Schedule 1A employees will be affected by the WR Amendment Act only in respect of the Schedule 1A employees.

The declaration of a common rule award will mean that any employer in the industry covered by the award will be bound by it, even though that employer is not individually named as a respondent

Other amendments

The WR Amendment Act introduces changes to minimum conditions applying to Victorian employees who are not subject to a federal award, certified agreement or Australian Workplace Agreement, as contained in Schedule 1A of the *Workplace Relations Act 1996* (Cth). These amendments take effect on 1 January 2004. The major changes are:

- the addition of a legislative right to two days' bereavement leave on each occasion of the death of a member of his or her immediate family or household;

- consolidating sick leave and carer's leave into eight days of paid personal leave, five days of which can be used as sick leave; and
- giving Schedule 1A employees an entitlement to payment for work performed in excess of 38 hours a week;
- employment contracts for Schedule 1A employees are deemed to contain a stand-down provision, and some matters associated with annual leave entitlements are clarified;
- the introduction of new record-keeping requirements; and
- strengthening the enforcement provisions in relation to the Schedule 1A minimum entitlements.

The WR Amendment Act also gives contract outworkers in the Victorian textile, clothing and footwear industry an entitlement to the same minimum rates of pay as employees in that industry, and gives the Victorian Government rights of intervention in certain proceedings before the AIRC.

Implications for employers

The amendments introduced by the WR Amendment Act have significant implications for employers in Victoria whose employees are not currently covered by federal awards or agreements. Those employers should check that the terms and conditions of their employees' employment are consistent with the increased minimum entitlements in Schedule 1A, and modify their employment contracts accordingly.

As employees shift from Schedule 1A coverage to the new common rules, the terms and conditions set out in Schedule 1A will be of less relevance to employers.



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