

Transmission of Business: Employees Can be Entitled to Redundancy Even When Comparable Employment is Offered

Employers generally assume there is no liability for redundancy payments in a transmission of business situation if employees continue in a comparable position. The decision of the Federal Court of Australia in *Construction, Forestry, Mining and Energy Union ("CFMEU") -v- Amcor Limited* [2002] FCA 610 (13 May 2002) highlights this may not always be correct.

Amcor Limited ("Amcor") operated a packaging business and a paper manufacturing business. The terms and conditions of employment for relevant employees of the paper manufacturing business were contained in a Certified Agreement (certified by the Australian Industrial Relations Commission under Section 170LT of the *Workplace Relations Act* 1996 (Cth)).

In summary, the facts of the matter are that Amcor separated the packaging business from the paper manufacturing business, selling the paper manufacturing business to a third party.

Relevant employees were advised of their termination from Amcor and, at the same time, offered employment with Paper Australia Pty Limited ("Paper Australia"), a wholly owned subsidiary of Amcor.

The terms and conditions of employment offered to the employees were the same, all benefits were preserved including continuity of employment and accrued leave

entitlements. Most employees accepted the offer from Paper Australia and continued to perform identical work to that performed with Amcor.

The CFMEU commenced proceedings alleging a breach by Amcor of Clause 55 of the Certified Agreement.

Effectively, Clause 55 provided for payment of sick leave, annual leave, long service leave and redundancy entitlements calculated at the rate of 3 weeks' remuneration per year of service, in circumstances where an employee's position was made redundant and that employee was subsequently retrenched.

The CFMEU argued that the employment of the relevant employees had been terminated by Amcor within the meaning of Clause 55 and Amcor was liable to make the relevant payments including redundancy. The Certified Agreement did not provide for the redundancy entitlements in Clause 55 to be offset in the case of transmission of business when comparable employment was offered. Thus the issue of comparable employment was irrelevant.

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Important amendments to the Court's jurisdiction on unfair contracts.

This bulletin is intended to keep readers abreast of current developments in the field of human resources and employment law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers.

Transmission of Business - continued

Ancor argued that there was, in effect, no redundancy due to the continuity of employment and the fact there had been no diminution of rights. It therefore argued no payments were due.

Justice Finklestein commented the result may be on one view an affront to common sense and "unfair". However, he indicated the Court must resist the temptation to "... substitute for arrangements actually made, an arrangement which the Court believes is a better one."

His Honour found that on a strict interpretation, the employees' positions with Ancor had been retrenched due to the

reason of redundancy. Accordingly, Clause 55 of the Certified Agreement was invoked and Ancor must make the required payments.

The decision highlights the importance of reviewing the wording of employment documents such as certified agreements, award, employment contracts or redundancy policies on a strict basis when considering the potential impact of a transmission of business. It also highlights that when drafting such documents, it is important for an employer to ensure that the agreement clearly expresses that employees will not be entitled to redundancy payments in a transmission of business situation, where comparable employment is offered.

Misleading and Deceptive Conduct in Recruitment

Corporations that head hunt prospective employees from secure employment can be liable.

It has been accepted by the courts for some time that pre-employment representations can amount to misleading and deceptive conduct pursuant to s.52 of the *Trade Practices Act 1974 (Cth)* ("TPA"). However, the recent decision in *O'Neill v Medical Benefits Fund of Australia* [2002] FCAC 188 indicates that corporate employers should take particular care when making statements (whether on their own behalf or through recruitment

agencies) to prospective employees who have been head hunted by those employers.

In this case, Mr O'Neill was head hunted by an executive recruitment agency on behalf of MBF. Mr O'Neill had been working in a senior management position at National Mutual for over 12 years at the time of being approached by the agency and accordingly, he expressed concern as to the

security of the employment being offered by MBF. In response to Mr O’Neill’s concerns, the agency represented to him that the position at MBF was at least as secure as his current position at National Mutual. A senior executive of MBF further represented that the position was for the “long haul”. However, two years after taking the position at MBF, Mr O’Neill’s employment was terminated on the ground of redundancy.

Mr O’Neill subsequently commenced proceedings against MBF in the Federal Magistrate’s Court for misleading and deceptive conduct pursuant to s.52 of the TPA. The Federal Magistrate held that MBF had breached s.52 of the TPA, which was upheld by the Full Court of the Federal Court on appeal and remitted to the magistrate to determine the question of damages.

In particular, the Federal Magistrate held that the aggressive manner in which Mr O’Neill was recruited and the representations made to him regarding his job security induced Mr O’Neill to resign from his employment with National Mutual. The Federal Magistrate found that Mr O’Neill would not have resigned had he thought that within such a short period of time his position would be declared redundant. Importantly, the Federal Magistrate also found that MBF had no defence to Mr O’Neill’s claim because it had little regard for the truth of the representations made, and in particular, it had no honest and reasonable belief as to the truth of the statements made by it.

The lessons from this case are that corporate employers need to take particular care, when head hunting executives from other organisations (whether on their own behalf or through recruitment agents), to avoid making statements as to job security or longevity of employment unless the employer has a reasonable and honest belief as to the truth of those statements. In particular, “employers who engage in conduct that is designed to deliberately persuade executives to leave secure employment should ensure that the executive is given a clear indication that he or she is leaving secure employment for an uncertain future if that be the case”.

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Furthermore, it is clear from this case that employers who engage recruitment agencies will be liable for statements made by those agents if those agents are deemed to have the authority of the employer in the recruitment process.

It is also worth noting that a likely result of the recent amendments to the *Industrial Relations Act 1996* (NSW) (see article on page) is that employees who are excluded from the unfair contracts jurisdiction may seek an alternative basis for compensation, such as that provided by s.52 of the TPA. Furthermore, the establishment of the Federal Magistrate’s Court has meant that the cost of Federal proceedings is no longer as prohibitive for employees as was once the case.

Industrial Relations Act (NSW) (1996) Section 106 Amendments

The Industrial Relations Amendment (Unfair Contracts) Act 2002 came into effect on the date of its assent, 24 June 2002. The amendments have the effect of amending the jurisdiction of the New South Wales Industrial Relations Commission in Court Session ("the Court") in the relation to section 106 of the *Industrial Relations Act 1996* (NSW) which provides the Court with a very broad power to review a contract whereby work is performed in an industry in and of New South Wales and the power to determine whether that contract is or was "harsh, unjust or unconscionable".

If a determination is made that the contract is an unfair contract then the Court has power to make orders to declare void or vary the contract from any point, and then make orders for compensation as appears "just in the circumstances".

3. A time limit for making a section 106 application has been introduced.
4. In making any orders under section 106 the Commission must take into account whether or not the applicant took any action to mitigate loss.

Overview of Amendments:

1. In relation to an employment contract an application cannot be made if the applicant's remuneration package, meaning the total value of monetary remuneration and employment benefits payable or receivable under a contract of employment, exceeds \$200,000.00 during the period of 12 months prior to the application being made or the termination of employment.
2. A claim by partners in respect of their partnership contract where their remuneration under that contract was more than \$200,000 per year are precluded.

Remuneration Cap

Probably the most important aspect to note about the amendments is the remuneration cap for employees bringing a claim. The remuneration cap only applies to employees and does not apply, for example, to contractors. The \$200,000 per year remuneration cap is to be indexed each year. The amendments provide that an application cannot be made if a remuneration package that exceeds the remuneration cap is paid or received (or is payable or receivable) during the period of 12 months immediately before the application is made (or if the application concerned relates to a contract that has been terminated, immediately before the termination).

It is not necessary for an employee to have served a period of 12 months to be precluded from making an application if the remuneration earned is in excess of the remuneration cap.

Certain terms are defined, although undoubtedly there will be decisions handed down on the interpretation of the amendments and definitions.

"Contract of Employment" is defined to include an arrangement and includes any related condition or collateral arrangement.

"Remuneration Package" is defined as meaning "the total value of monetary remuneration and employment benefits payable or receivable under a contract of employment".

"Monetary Remuneration" is defined to include "any performance – related bonus or incentive payment". On this definition bonus payments made to employees during the 12 months before termination would be included in the definition of monetary remuneration.

"Employment Benefit" is also defined and means "a benefit provided to an employee at the cost of his or her employer (being a benefit of a private nature)" and it is specifically defined to include "the provision by an employer of a motor vehicle for private use by the employee". On this basis it would include arrangements such as share option plans and superannuation funds.

In making any orders under section 106 the Commission must take into account whether or not the applicant took any action to mitigate loss.

Time Limit

The 12 month time limit from the date of termination of the contract to make a claim is an absolute time limit and the Court does not have any discretion to extend the time to allow an application outside that 12 month limit in any circumstance.

Mitigation

The amendments provide that the Court must take mitigation into account but does not require the Court to do so.