High Court Decisions on Transmission of Business

The High Court has handed down two decisions that have implications for employee entitlements in the context of business transfers or restructuring.

In *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9 (9/3/05) the issue was whether s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) operated to make a federal award binding on Gribbles. Region Dell Pty Ltd ran a medical clinic in Moorabbin, at which it contracted a series of firms to provide radiology services. In 1999 Gribbles took over this contract, replacing a firm called MDIG. The Federal Court held that by doing so Gribbles became a "successor, assignee or transmittee" of MDIG's business, and was accordingly bound by an award to which MDIG had been a respondent. The court made this finding even though there was no direct dealing or "legal nexus" between the two firms, and their only link was that each had obtained a contract or licence from Region Dell to operate a similar type of business in the same location (see Creighton & Stewart, para [6.41]).

On appeal, the High Court (with Kirby J dissenting) overturned this decision and held that Gribbles was not bound by the award. According to the majority (Gleeson CJ, Hayne, Callinan and Heydon JJ), Gribbles could not be regarded as a successor to MDIG simply because it operated the same kind of business. To be bound under s 149(1)(d), Gribbles would need to "enjoy" some part of MDIG's business. That requirement was not satisfied here, because there was no transaction between the two, and nor could Gribbles be said to have enjoyed any of the tangible or intangible assets deployed by MDIG in operating its business. Although both firms had used the same equipment at the same premises, both the equipment and the premises belonged to Region Dell. And although both employed the same radiographers, the majority observed that "no employee is an asset in the employer's balance sheet to be bought and sold" (at [48]).

The effect then of the decision is that where one provider of outsourced services replaces another, there is not necessarily a transmission of business between them so as to carry over any federal awards or agreements otherwise binding on the previous contractor.

On the other hand, it is important to appreciate that the majority did not rule that there can *never* be a transmission for the purpose of s 149(1)(d) (or similar provisions) where there is no legal nexus between the two firms concerned. There will be instances where the replacement provider *does* take over plant, stock or premises formerly owned by the previous contractor, and on the majority's reasoning this might (or might not) be

enough to establish a transmission. Alternatively, it may be argued that there has been a transfer of goodwill, itself an intangible asset, between the two providers. The majority acknowledged this possibility, but did not feel the need to address it because it said no such argument had been advanced in this case. When the point comes up in subsequent litigation, as it undoubtedly will, courts will need to consider whether the goodwill in question effectively "belongs" to the service provider (and hence can be passed on to any replacement), or remains with the firm or agency granting the contracts. The answer to that question might well differ from case to case.

Unfortunately, therefore, and as so often in recent times, the High Court's ruling in *Gribbles* raises more questions than it answers.

The same can be said of its decision on the same day in *Amcor Ltd v CFMEU* [2005] HCA 10 (9/3/05). The case concerned a group of workers employed within the Amcor group. In consequence of a corporate restructure, it was decided to terminate their employment and offer them jobs with another company in the group on the same terms and with continuity of service preserved. Their union subsequently claimed that in the process they had been "retrenched" as a result of their positions becoming "redundant", and that accordingly they were entitled to severance pay under the terms of a certified agreement binding on their original employer. That agreement, unlike many other instruments, made no provision for an exemption in the event of the employer finding adequate alternative employment for any retrenched workers.

Although the Federal Court accepted the union's claim (see Creighton & Stewart, para [15.57]), Amcor's appeal to the High Court was successful. In four separate judgments, it was unanimously held that the employees had not been made redundant. Although the identity of their employer had changed, their "positions" remained. While some of the judges conceded that the point was finely balanced, a combination of factors (some based on the language of the agreement, others drawn from the broader statutory, industrial and commercial context) suggested that the agreement should not be construed so as to require severance payments.

Unfortunately, it is no easy task to determine what effect this decision might have in other situations. This is partly a function of the differing emphases and observations in the various judgments. But the greater problem lies in the refusal of any of the judges to formulate a coherent definition of the concept of redundancy, or indeed to look very far past the facts of this rather unusual case.

Three particular issues stand out. One is the significance of the fact that there was no change at all here on the terms on which the employees were engaged. In each of the judgments it was either expressly or implicitly recognised that had there been a change in those conditions,

whether in terms of duties, location, pay or other entitlements, the result *might* have been different. Where there *is* a change of one sort or another, it will clearly be an awkward question of fact and degree as to whether the original "position" has or has not survived.

Secondly, there is the question of whether the same result would have been reached had this been a transfer to an unconnected employer as part of an ordinary sale of business, rather than occurring within a group. The reasoning and language adopted in most of the judgments seem to suggest that it would, assuming once more that there was no change in the nature or conditions of the jobs as taken on by the purchaser.

But this produces a striking result. Suppose that the vendor took no steps to ensure the purchaser rehired the existing employees, and/or the purchaser chose to employ new workers instead. On the Court's reasoning, those who had lost their jobs would have no claim for severance pay. This is because it could be said that even if the particular employee had gone, their *position* remained (albeit now filled by someone else). It is hard to believe this is what the Court had in mind, but it seems a logical consequence of the decision.

Thirdly, there is the store placed on the wording of this particular agreement, with its emphasis on a "position" becoming redundant. That leaves open the possibility that a differently worded instrument might be construed to reach a different conclusion.

All in all, employers should be wary of relying on this decision as a basis for not making severance payments, beyond the type of situation (and provision) squarely dealt with in this case.