LabourForce Solutions Pty Limited v Hitchin **[2007] SAIRC 85**

INDUSTRIAL RELATIONS COURT (SA)

LABOURFORCE SOLUTIONS PTY LIMITED

v

SENIOR INSPECTOR CHRISTINE HITCHIN

JURISDICTION: Appeal

FILE NO/S: 2278 of 2007

HEARING DATES: 16 October 2007

JUDGMENT OF: His Honour Judge B P Gilchrist

DELIVERED ON: 6 December 2007

CATCHWORDS:

Appeal - Whether worker entitled to pro-rata long service leave - Whether transfer of employers constitutes the taking over or acquisition of a business or part of business - Whether related businesses - Labour hire industry - Limited evidence placed before Court - Unable to conclude that acquisition or take over of business occurred - Not related employers - No entitlement to long service leave - Appeal allowed - Notice of Compliance set aside - S 3 Long Service Leave Act 1987, S 190 Fair Work Act 1994.

Bainrot v Ansett Limited M23/1999
Minister for Employment and Workplace Relations v Gribbles Radiology (2005) 222 CLR 194
Johnson v Johnson (2000) 201 CLR 488
Waterways Authority v Fitzgibbon (2005) 221 ALR 402
R v Sussex Justices; ex parte McCarthy [1924] 1 KB 256
WorkCover/Royal and Sun Alliance (Adelaide Casino Pty Ltd) v Hunter [2003] SAWCT 63
PP Consultants v Finance Sector Union (2000) 201 CLR 648

On appeal from Industrial Magistrate Lieschke [2007] SAIRC 42

REPRESENTATION:

Counsel:

Appellant:	Mr J Darams
Respondent:	Mr S McDonald

Solicitors:

Appellant:	Clayton Utz
Respondent:	Crown Solicitors Office

1 This is an appeal that involves the construction of the expression "takes over or otherwise acquires the business or part of the business of the other" for the purposes of s 3 of the *Long Service Leave Act 1987* and the application of that expression and the facts of this case.

2 It arises out of an appeal from the decision of a learned Industrial Magistrate who had, despite his protest, placed before him very limited evidence.

3 The issue before the learned Industrial Magistrate was whether Mr George Mettyear was entitled to pro rata long service leave upon the termination of his employment from the appellant, Labourforce Solutions Pty Ltd. That in turn depended upon whether Labourforce, which is a labour hire company, had taken over or acquired part of the business of another labour hire company, Rexco Pty Ltd, for whom Mr Mettyear had previously worked.

4 A brief statement of agreed facts that was tendered at trial revealed that Mr Mettyear commenced employment with Rexco during October 1999 and that on about 22 October Rexco placed him at Iplex Pipelines Australia Pty Ltd to perform maintenance work as a special class electrician at its Elizabeth factory. Mr Mettyear worked continuously for Rexco at the factory until 7 June 2002.

5 On the following working day, 11 June, Mr Mettyear commenced working for Labourforce. Labourforce effectively replaced Rexco and Mr Mettyear worked continuously for it at the factory until 8 December 2006.

6 Under the terms of the *Long Service Leave Act* an employee is entitled to receive pay in lieu of pro rata long service leave upon termination after a minimum period of seven years continuous service with the same or related employers. The expression "related employers" is defined to include one that "takes over or otherwise acquires the business or part of the business of the other".

7 Usually issues relating to long service leave come before the Court through an action for underpayment of wages. They can, however, come before the Court by other means. The *Long Service Leave Act* gives an inspector appointed under the *Fair Work Act* the authority to issue a compliance notice directing an employer to grant long service leave or to make payment in lieu, if the inspector is satisfied that the employer has improperly refused to grant the leave or make the payment.

8 The respondent, Inspector Hitchin, is an inspector appointed under the *Fair Work Act*. She believed that Mettyear's transferral of employment for Rexco to Labourforce satisfied the statutory definition of related

employers. She therefore issued a compliance notice directing Labourforce to pay Mr Mettyear long service leave.

9 Labourforce sought a review of that notice culminating in the hearing before the learned Industrial Magistrate. He upheld the compliance notice and that is the decision that is the subject of this appeal.

10 The statement of agreed facts noted that the duties performed by Mr Mettyear at the factory for Labourforce were the same as those that he performed there when he worked for Rexco.

11 The learned Industrial Magistrate received a written statement from Mr Robert Edwards, who at all relevant times was Labourforce's Business Development Manager.

12 Mr Edwards said that Labourforce supplied labour to Iplex in various States and from October 2000 that included South Australia. He said that by June 2002 Labourforce supplied about ten or twelve employees who worked at the factory in Iplex's production and process department and another three or four employees who worked in Iplex's warehouse. He said that at around that time Iplex had its own workforce of about 50 working at the factory and it also engaged the services of five maintenance workers who were supplied to it by Rexco. One of those was Mr Mettyear.

13 Mr Edwards said that in May of that year he had a meeting with Iplex's General Manager, Mr Russell Wheeler, and was told that Iplex wanted Labourforce to "do all the maintenance work…". This was understood to relate to maintenance work being undertaken at the factory.

14 Mr Edwards indicated that he would need to talk to those engaged by Rexco and said words to the effect: "If they are happy to switch across that's fine. But if they won't come across we will have to find replacements". He said that Mr Wheeler said words to the effect: "Ian Brooker is in charge of the maintenance guys. I'll set up a time for you to speak to him and bring him up to speed about what is going to happen."

15 Mr Edwards met with the Rexco employees working at the factory and all of them, including Mr Mettyear, commenced employment with Labourforce on 11 June 2002.

16 The learned Industrial Magistrate heard evidence from Mr Mettyear.

17 Mr Mettyear said that the person who was responsible for managing his employment at the factory was Mr Brooker. He described Mr Brooker as the maintenance manager and said that was an employee of Iplex.

18 He said that when he was working at the factory he did so at a specified workbench. He said that when he moved from Rexco to Labourforce his duties were exactly the same and he worked at the same bench.

19 Mr Mettyear was asked some questions about others that worked at the factory. He confirmed that Iplex employed some of them directly and that some were supplied by other labour hire companies.

20 He was asked some questions about the maintenance section:-

> "Q The other maintenance employees – can you tell me who they were, at the time when you began?
>
> A Time that I began? Well, there was Gordon Wainman, Tony Sangregorio. Scott Atkins was a Rexco employee, Darren Koch, Cliff Walkington – I think his name was…
>
> Q Obviously while you were there some employees would have come and gone?
>
> A For sure, yes."

21 He was then asked:-

> "Q You said there were other electricians there. Mr Edwards says in his statement there was probably one other electrician. I'm not sure at what stage that was. Do you recall whether it was one or more other electricians?
>
> A When I first started with Rexco in 99 there was three other electricians besides myself. Two of those were got rid of between that period between Rexco and LabourForce. When LabourForce took over, there was one other electrician. His name was Scott Atkins.
>
> Okay, and did he do the same work as you?
>
> A He did the same work as me.
>
> Q Were you interchangeable effectively?
>
> A Yes. He now works for Iplex Pipelines….
>
> Q You said Scott was employee by Iplex. Do you know when that happened? I'm curious about whether that was after LabourForce became your employer?
>
> A. I believe it was – no. No, that was when Rexco was his employer. There was another electrician Craig Garde and he had only been with Rexco for one week before LabourForce

took over. Craig Garde took over Scott Atkins' position. Scott went to work for Iplex."

22 Also placed in evidence before the learned Industrial Magistrate was a letter that was sent out by Iplex to all of its employees on 8 December 2006. It commenced:-

> "Please be advised that effective Saturday 9 December 2006, the company has decided to outsource all maintenance tasks to a company called O'Donnell Griffin."

It ended with the following statement:-

> "We will continue to retain our existing full time maintenance and tool making employees."

23 It was an agreed fact that there was no commercial relationship between Labourforce and Rexco.

24 The learned Industrial Magistrate identified the issues for his determination as being:-

- Whether Labourforce needed to be in some form of relationship with Rexco that included the transfer of assets.
- Whether a part of Rexco's business was the supply of all maintenance workers for Iplex's Elizabeth factory.

25 On the first issue Labourforce submitted to the learned Industrial Magistrate that a necessary ingredient of the expression "takes over or otherwise acquires the business or part of the business of the other" is the existence of a commercial relationship between the one business and the other that led to the takeover or acquisition and that as that was lacking here the claim had to fail.

26 The learned Industrial Magistrate rejected that submission. In doing so he relied on the decision of Mr Hardy IM in *Bainrot v Ansett Limited*[1] where Hardy IM said:-

> "It is my view that the Act uses the terms in a broader sense and in a manner intended to preserve the rights of employees to long service leave despite changes in ownership of the business in which they have been to all intents continuously employed. The 1987 Act does away with the previous of concept of a "transmission" between employers wherein continuity of service was deemed not to be broken… I am of the view that the current legislation is considerably wider than that in that it introduces the concept of 'related' employers which is so deemed by virtue of no more than a

[1] M23/1999

> taking over or acquiring of the business and not by virtue of any agreement or operation of law."

27 As to the second issue the learned Industrial Magistrate found that:-

> "Rexco's business was to provide labour to different clients. The provision of all maintenance labour to Iplex was a severable and distinct part of Rexco's broader business operations. … It was an exclusive commercial relationship with one customer. The workers were to provide a defined maintenance function. The work was performed at the same place and on a continuous basis. In my view the exclusive supply of <u>all skilled labour</u> to Iplex for its factory maintenance needs was a part of Rexco's business."
>
> (emphasis mine)

28 Having found that: "Labourforce started to do exactly the same and again on an exclusive basis" the learned Industrial Magistrate concluded that this part of Rexco's business was acquired by Labourforce. He therefore found that the legislative definition of related employers was satisfied and for that reason upheld the compliance notice.

29 On appeal Labourforce contended that the learned Industrial Magistrate erred on both issues.

30 On the commercial element point it maintained its contention that the relevant statutory provision envisages a commercial relationship between the two employers. I was taken to a number of cases decided by this Court concerning the relevant provision in which there was a discussion about the commercial relationship between the former and later employer. It was rhetorically asked: If this was an irrelevant inquiry why the discussion?

31 The fallacy in that argument is that is does not follow as a matter of logic that because the absence of a commercial relationship is not decisive it is irrelevant. The fact of a commercial agreement between the former and later employer might throw light upon whether or not there has been an acquisition or takeover of part of a business. Hence, even though proof one-way or the other is not decisive, it may nevertheless be a fruitful inquiry. The High Court said as much in *Minister for Employment and Workplace Relations v Gribbles Radiology*[2]:-

> "Where there has been some transaction between them, it will be possible to see whether the former employer transferred the whole, or part, of its business to the new employer."

32 Moreover, I agree with the observations of Hardy IM that the answer lies in the history of the provision. By amending the Act Parliament revealed

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[2] (2005) 222 CLR 194 at 212.

an intention to widen the circumstances in which earlier service would qualify for inclusion in the calculation of an entitlement to long service leave. That being so there is no warrant to read into the expression takes over or otherwise acquires a commercial element. In note the High Court arrived at a similar conclusion, albeit in the context of a different Act, in *Gribbles* where they said:-

> "…there may be no transaction between the two employers but it may be clear that the new employer is the successor of the business of the former employer. Thus, the existence of some transaction between the two employers is not essential in order to show that one is the successor to the business of the other."[3]

33 In my opinion the learned Industrial Magistrate's rejection of Labourforce's submission on this issue was correct.

34 As to the other issue, underpinning the learned Industrial Magistrate's conclusion was his identification of the relevant part of Rexco's business as being the labour associated with all of Iplex's skilled maintenance workers at the factory.

35 There was evidence pointing towards this conclusion but there was also evidence pointing the other way.

36 There was evidence from Mr Edwards about Iplex wanting Labourforce to do all the maintenance work, but Mr Edward's statement also referred to Mr Brooker and we know that he was the head of the maintenance team at the factory and that he worked directly for Iplex. It leaves open the possibility that when Mr Edwards was speaking of Labourforce doing all of the maintenance work he meant all of the maintenance work then being carried out at the factory by Rexco.

37 Mr Mettyear talked of Rexco employing all of the maintenance employees but what is to be made of his evidence regarding Mr Scott Atkins? It strongly suggests that Mr Atkins was working for Iplex by the time Labourforce took over. It leaves open the possibility of an inference that Mr Atkins was working for Iplex as a maintenance worker at the factory.

38 Finally, what is to be made of the statement in Iplex's letter of 8 December 2006 about it retaining its existing full time maintenance employees? This strongly indicates that it directly employed maintenance workers at the factory. We do not know when they did so but the statement is consistent with it employing some maintenance workers there when Labourforce began employing Mr Mettyear.

[3] (2005) 222 CLR 194 at 212.

39 Collectively this evidence places real doubt about the extent to which Iplex supplied some its own staff to perform maintenance work. We know for certain that when Labourforce began employing Mr Mettyear, Iplex directly employed one maintenance worker, Mr Brooker. It may have employed a second, Mr Atkins. It may have employed others.

40 There was no discussion about these matters by the learned Industrial Magistrate.

41 With respect I have two difficulties about this.

42 The learned Industrial Magistrate may have considered all of the evidence and reached the conclusion that notwithstanding the evidence suggesting otherwise, overall the evidence supported the conclusion that it was part of Rexco's business to the supply all skilled maintenance workers at the factory. In that event, with respect, I think his reasons were inadequate.

43 The adequacy of reasons has to be looked at through the eyes of the hypothetical reasonable bystander that is spoken of in cases such as *Johnson v Johnson*[4]. The bystander's views about the adequacy of reasons reflects the parties' and the public's need for justice to be "manifestly and undoubtedly be seen to be done".[5] Absent a discussion of this evidence the hypothetical reasonable bystander would, in my view, conclude that this has not occurred.

44 The learned Industrial Magistrate's failure to discuss this evidence may reflect his failure to consider it. In that event he denied himself of the possibility of finding that Rexco supplied some, but not all of the maintenance workers at the factory. That finding could have led to a conclusion that in employing these maintenance workers Labourforce did not take over or acquire part of Rexco's business.

45 On either count there has been a miscarriage of justice that requires intervention. The issue that then arises is what should that intervention comprise of.

46 The *Fair Work Act 1994* governs the appeal before me. The powers of the Court sitting on appeal are sufficiently wide to make it clear that the hearing before me is a rehearing and, subject to the constraints that can arise if issues of credit are involved, I am obliged to attempt to reach my own conclusion on the facts and the law. I should only remit the matter for a re-trial if I am satisfied that I cannot do justice between the parties by basing my decision on the written material alone.

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[4] (2000) 201 CLR 488 at 508 – 9.
[5] *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259*; WorkCover/Royal and Sun Alliance (Adelaide Casino Pty Ltd) v Hunter* [2003] SAWCT 63 at para 66.

47 Like the learned Industrial Magistrate I am concerned by paucity of evidence. In light of that I have given anxious consideration as to whether the better course is to remit the matter for a re-trial in the hope that this might yield a sounder evidentiary basis upon which to decide this case. I have nevertheless resolved that I should not take that course. To borrow the words of Kirby and Heydon JJ "…the first trial was not a rehearsal, warm up or dummy run. It must have been conducted against the possibility of all available factual findings being made [or the lack of them]" [6]. (new words added mine)

48 Moreover, the parties could have but did not seek to adduce further evidence before me.[7]

49 That being so and given that there are no issues of credit that depend upon an evaluation of evidence that could be influenced by observing oral testimony being given, the proper course is for me to decide the case myself.

50 Having re-evaluated the evidence I find that Rexco was at all relevant times a labour hire company. I find that as at June 2002 it was supplying five tradespersons to Iplex and that these tradespersons undertook maintenance work at the factory and worked under the supervision of a supervisor who worked for Iplex. In June 2002 these tradespersons began working for Labourforce doing the same work at the same location as they were when they worked for Rexco. At least one of these tradespersons, Mr Mettyear, had been doing the same work at Iplex since October 1999. Mr Mettyear worked continuously at Iplex until December 2006. I do not know what became of the other four tradespersons.

51 The evidence does not permit me to make any other findings about Rexco. I do not know, for example, whether these five tradespersons were the only tradespersons that Rexco employed in South Australia or anywhere else as at June 2002.

52 Prior to June 2002 Labourforce was also supplying labour to Iplex at the factory and elsewhere. None of those working at the factory were undertaking maintenance work. The evidence does not permit me to make any other findings about Labourforce. I do not know, for example, whether the five tradespersons who commenced working for it in June 2002 where the only tradespersons working for it at the factory, or in South Australia, or anywhere else.

53 As at June 2002 Iplex directly employed at least one person, the supervisor, in connection with the maintenance work at the factory. It

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[6] *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at 426.
[7] See: s 190(2) *Fair Work Act 1994.*

may have directly employed another, Mr Atkins to work there. It is conceivable that it may have employed others.

54 In light of these findings I now turn to consider whether Labourforce took over or acquired part of Rexco's business.

55 In a sense, everyone who is employed by a commercial entity is a part of the business of that entity. In that sense, whenever an employee leaves the employ of one employer and goes to another the later employer takes over or acquires a part of the business of the former employer. It cannot, however, have been Parliament's intention that the word "business" would have such a wide meaning. Otherwise it would have simply provided that whenever an employee leaves the employment of one employer and moves to another the earlier service carries over for the purposes of the *Long Service Leave Act.* Something more is required.

56 In resolving this issue I think that the approach suggested by Gleeson CJ, Gaudron, McHugh and Gummow JJ in *PP Consultants v Finance Sector Union* should be adopted. There they said:-

> "The question whether one person has taken over or succeeded to the business or part of the business of another is a mixed question of fact and law. For this reason and, also, because "business" is a chameleon-like word, it is not possible to formulate any general test to ascertain whether, for the purposes of s 149(1)(d) of the Act, one employer has succeeded to the business or part of the business of another. Even so it is possible to indicate the manner in which that question should generally be approached, at least when a non-government employer succeeds to the commercial activities of another non-government employer …
>
> As a general rule, the question whether a non-government employer who has taken over the commercial activities of another non-government employer has succeeded to the business or part of the business of that other employer will require the identification or characterisation of the business or the relevant part of the business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer."[8]

57 Since I do not know how many people Rexco employed or what range of skills and experience it employees possessed as at June 2002 and I know that Iplex employed at least one person and perhaps more as part of the

[8] (2000) 201 CLR 648 at 655.

maintenance team at the factory I find it difficult to identify or characterise the labour that Rexco was supplying to Iplex at that time.

58 For the reasons set out above the evidence does not substantiate a finding that Rexco was supplying Iplex with all of the factory's maintenance needs as at June 2002. Indeed the evidence is such that I am not prepared to find that Rexco was supplying Iplex with all of the factory's maintenance needs as at June 2002, other than the supervisor. It might have, but such is my uncertainty about Mr Atkins I am not satisfied to the requisite degree that it did.

59 If the only tradespersons that Rexco employed at all or perhaps even in South Australia as at June 2002, were the five tradespersons that it was then supplying to Iplex at the factory, I might have been able to identify them as such and characterise them as an identifiable part of Rexco's business capable of being taken over or acquired. I do not, however, have to resolve this issue because the evidence does not enable me to make such a finding.

60 The state of the evidence is such that the only identification or characterisation that I can make of the five tradespersons that Rexco was supplying to Iplex in June 2002 for work at the factory is that they comprised of an unknown proportion of the tradespersons engaged by Rexco in South Australia who worked at a particular site supplementing an indeterminate proportion of the maintenance needs of their host employer. I would not identify or characterise this as part of Rexco's business capable of being taken over or acquired.

61 In other words, the lack of evidence is such that the resolution of the second step that was spoken of in *PP Consultants*, being the identification of the character of the transferred business activities in the hands of the new employer, does not arise. Nor, obviously, does the final step of comparing the two.

62 In my opinion, the limited evidence placed before the Court did not enable findings to support a conclusion that in employing these tradespersons Labourforce took over or acquired part of Rexco's business. Labourforce and Rexco were therefore not related employers. As this was the only basis upon which it was contended that Mr Mettyear was entitled to pro-rata long service leave the notice cannot stand.

63 The appeal is allowed and the notice of compliance is set aside.