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Scope of the Related Employer provisions within the meaning of the South Australian *Long Service Leave Act 1987*

An appeal from a decision of the Full Industrial Relations Court recently found that that a labour hire company had acquired a part of another business (also a labour hire company) in accordance with the provisions of the *Long Service Leave Act 1987,* and were related employers within the meaning of the Act.

Section 3 of the *Long Service Leave Act 1987* ("**Act**") defines employers to be related if one "takes over or otherwise acquires the business or part of the business of the other". An entitlement to long service leave derives from service to a business rather than to an individual employer. The entitlement focuses on the business for which an employee has continuously worked over a number of years, rather than on the legal identity of the individual owner of that business.

The recent Supreme Court judgement in *Hutchin v Labourforce Solutions Pty Ltd [2009]* SASC 85 addresses the issue of "related employers" for the purposes of the Act, and identifies potentially wider issues for all contracting employers in South Australia.

The Case

In this decision the Full Court of the Supreme Court of South Australia addressed the scope of the "related employer" provision of the Act. In particular, the question arose as to whether an employer Labourforce Solutions Pty Ltd ("**Labourforce**") took over or otherwise acquired part of a business of another employer, Rexco Pty Ltd ("**Rexco**"), also a labour hire company. The Court heard evidence to determine whether a former employee of Labourforce was entitled to pro-rata long service leave having completed seven year's continuous service with the alleged related employers.

The background to this case is as follows:

The employee was a qualified special class electrician. Between October 1999 and December 2006, the employee worked full-time maintaining the electrical plant and equipment at the Elizabeth plant of Iplex Pipelines of Australia Pty Ltd ("**Iplex**"). Rexco and Labourforce were both labour hire companies used at different times by Iplex to provide skilled maintenance workers.

The employee was first employed by Rexco for the period October 1999 to June 2002. In June 2002, Labourforce became the sole labour hire company to Iplex and subsequently employed the employee. The employee continued to perform the same maintenance duties at Iplex but as a Labourforce employee. Labourforce terminated the employee's employment in December 2006 when Iplex ceased using their labour hire services.

The employee sought payment in lieu of pro rata long service leave.

In making their decision, the Court relied of the High Court analysis in *K-Generation Pty Ltd & Anor v Liquor Licensing Court & Anor [2009]*, which stated:

> *"Subclause (3) provides for the linking of employers to ensure that the continuity of service of a worker who remains with the same business is not affected by a change in his or her employer."*

The Court held that section 3(3) of the Act should be read in a way that gives effect to its legislative purpose such that *"[t]he purpose of the section is to protect workers who remain working with the same business from losing their relevant entitlements due to a change in their employers."*

The business of Rexco was that of a labour hire company. The Court held that *"its assets included the arrangements it had with employees on its books, the contracts for the placing of labour on hire from which it earned fees and the goodwill that was generated from the conduct of the business."* It was also assumed that there were other assets (eg premises and office equipment).

At other times, part of the business of Rexco consisted of the hire of labour to Iplex in regard to its maintenance requirements including the hiring of skilled tradespersons who performed maintenance work. The Court held that *"[t]his part of the business was a distinct activity, capable of being taken over or acquired."* However, the employee was not employed in this part of the business – it utilised the long-term hire of labour to perform particular work at a specific site.

Labourforce was also a labour hire company that provided workers on hire to Iplex. Labourforce was asked by Iplex to meet all of its labour hire requirements, in particular at their plant in Elizabeth, South Australia. In order to meet this arrangement, the Court determined that Labourforce *"took over, using that term in a most general sense and not necessarily in the statutory sense, the business of Rexco."*

In its decision the Court held that when Labourforce took on the supply of maintenance labour to Iplex, it acquired as an asset the substance of the arrangements that Rexco had with the relevant employees. These assets were applied in the same activity as they had done previously. Labourforce continued to supply, as its employees, the same skilled labour that had formed the supply of labour hire by Rexco. Furthermore, those employees who constituted the relevant skilled labour continued to perform the same work tasks under exactly the same conditions as they had previously.

The Court held that in every practical way, Labourforce was operating the same part of the business as was previously operated by Rexco.

The appeal was upheld and the Court determined that Labourforce had acquired a part of the business of Rexco in accordance with section 3(3) of the Act. It was held that Rexco and Labourforce were related employers within the meaning of that section.

Summary

This decision has implications to contracting employers who on change of contract agree to engage employees as the incoming contractor, of the outgoing contractor. The decision suggests that where this occurs, the incoming contractor may, for the purpose of long service leave entitlements under the Act, be deemed as acquiring (or taking over) part of the business from the outgoing contractor (i.e. the contract itself), particularly where those employees continue to perform the same work tasks under exactly the same conditions as they had done previously. On this basis, service with the previous contractor is counted as service for long service leave purposes and therefore, the incoming contractor will then be liable for payment of long service leave.

We recommend that each case be assessed on its merits to determine whether this decision may impact your business and given the complexity of the issue, advice should be sought before a decision is made on changes of contract and the engaging of employees of the outgoing contractor.

It should be noted that this decision is not one that interprets the *Fair Work Act 2009*, and that Act has different tests when determining whether a transfer of business has occurred. The judgment relates only to the *Long Service Leave Act 1987* as it applies in South Australia, but given that a number of contracting employers have operations in more than one state, it is not a decision which only affects employers based in South Australia.

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