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Redundancy entitlements

These matters were on appeal from a decision of the Full Bench of the Federal Court, *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 57, in which the Minister for Employment and Workplace Relations intervened.

Amcor Ltd v Construction, Forestry, Mining and Energy Union; Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union

High Court of Australia, 9 March 2005, [2005] HCA 10

Background

The appellant, Amcor Ltd (Amcor), owned and operated four paper manufacturing mills, in New South Wales, Queensland and Tasmania. Employment conditions were subject to a federal certified agreement between Amcor and two unions, one being the CFMEU. The agreement was certified on 9 June 1998. Clause 55 of the agreement contained specific rights in relation to redundancy, including the requirement that Amcor consult with employees and unions at the earliest possible opportunity, and pay severance pay in cases of retrenchment.

In June 1998 Amcor underwent a corporate restructure, selling two paper mills to Paper Australia Pty Ltd ('Paper Australia'), a wholly owned subsidiary of Amcor. Paper Australia leased the plant and assets of the two remaining mills until Amcor sold the mills to Paper Australia in March 2000. Paper Australia operated all four mills from June 1998 but the employees remained employed by Amcor, pursuant to an agreement between Amcor and Paper Australia which was effective from 1 July 1998.

In February 2000, Amcor transferred its shares in Paper Australia to PaperlinX Ltd (PaperlinX), another of its wholly owned subsidiaries. The result was that Paper Australia was then owned by PaperlinX, which was subsequently floated as a public company. This process was described by the High Court as a 'demerger'.

As a consequence of the demerger, Amcor wrote to the employees at the paper mills, terminating their employment with Amcor. The letter also enclosed an offer of employment from PaperlinX under the same terms and conditions as the employees had been subject to in their employment with Amcor. Employment with Amcor was to cease on 31 March 2000 and to commence with PaperlinX on 1 April 2000.

In June 2000, the CFMEU filed an application in the Federal Court for an order under s.178 of the *Workplace Relations Act 1996* (the WR Act) imposing penalties on Amcor for breaching cl.55 of the agreement. The CFMEU argued that the positions of employees whose employment was terminated by Amcor had become 'redundant' under the terms of the agreement, enlivening the operation of cl.55 of the agreement. The CFMEU also sought orders that Amcor pay employees severance pay, on the grounds that the termination of 'redundant' employees by Amcor had resulted in the 'retrenchment' of the employees, triggering an entitlement to severance pay under the agreement.

At first instance, in *Construction, Forestry, Mining and Energy Union v Amcor Ltd* [2002] FCA 610, Finkelstein J found that as Amcor no longer required the work previously carried out by the employees to be performed, the employees had become 'redundant'. Further, the Court held that in deciding whether or not an employee had become redundant, the fact that the employee had a new employer was 'irrelevant' as redundancy involved loss of the employee's position with his or her employer, rather than the loss of the employee's position generally. Finally, the Court held that the employees had been 'retrenched' as they had been dismissed for reasons of redundancy, therefore satisfying the two requirements of the agreement for the operation of cl.55.

Amcor appealed this decision, with the Minister for Employment and Workplace Relations intervening pursuant to s.471 of the WR Act. In *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 57, the Full Court of the Federal Court, comprising Moore, Marshall and Merkel JJ, affirmed the decision of the primary judge.

Decision of the High Court

The appeal was heard by the Full Court of the High Court. Judgment was delivered on 9 March 2005. All members of the Court were unanimous in allowing the appeal and setting aside the orders of the Federal Court on the ground that no redundancies had arisen. The case turned on the interpretation of cl.55 of the agreement.

Gleeson CJ and McHugh J found that the interpretation of 'redundant' by the primary judge was too narrow and inflexible to accommodate industrial and commercial realities. Gummow, Hayne and Heydon JJ held that the positions to which cl.55 referred were positions in a 'business of making and selling paper'. The sale of the business to Paper Australia did not affect the existence of the positions, and therefore no positions became redundant. Kirby J, after considering the contextual issues, also found that the better view of cl.55 was that the positions continued to exist but were taken over by another company. Callinan J held that the positions had not become redundant because the persons filling them continued to fill them, but with a different employer. Callinan J looked to previous statements by industrial tribunals to support that construction, briefly considering the law around the transmission of businesses under the WR Act for the purposes of certified agreements.

The case suggests that redundancy will not generally arise where there has been a transmission of business and employees have continued to do the same job. But the case sheds little light on general transmission of business questions.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2005/10.html

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