PG:kw

11 March 2008

Mr J Carter
Secretary
Standing Committee on Employment, Workplace Relations and Education
Parliament House
Canberra ACT 2600

Dear Mr Carter,

I write further to the oral submission to the Senate Committee in Melbourne on Friday 7 March 2008. I thank the Committee for that opportunity and the invitation to provide further details by way of this written submission.

The Australian Nursing Federation (Victorian Branch) seeks an amendment to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 as a matter of public interest, to remedy an ambiguity within the current Act relating to qualifying periods for the purposes of access to unfair dismissal. The amendment to the Bill could be:

At the end of 643(7)

Add:

(d) in the case of 'transferring employees' within the meaning of section 581, the commencement date of employment shall be the employee's commencement date of employment with the transmittor as though that service was with the transmittee.

ANF submits that the Act should be amended to reflect the finding of Commissioner Whelan (attached) – i.e. that the qualifying period is not with a particular employer but should contemplate continuous service where a transmission occurs. Consequently such an amendment merely clarifies the existing law, rather than creating a new obligation on employers.

The Nurses (Victorian Health Services) Award 2000 provides that an employee is entitled to severance pay and notice where they are made redundant. However where that redundancy occurs because of a "transmission of business", and the new employer employees the employee (and accepts their previous service) the outgoing employer does not have to pay severance pay.

Our Award clause is based on the Full Bench standard and is therefore common to most Federal Awards, where the Full Bench decided that severance pay is compensation for loss of employment security ((2004) 129 IR at 194-195 (PR032004 paras 134ff)) and vulnerability to retrenchment. However the Full Bench decided this prior to any concept of a "qualifying period" before rights to unfair dismissal. Consequently a vacuum has been created.

Case Example:

Aged Care Services Australia Group Pty Ltd is a company that is purchasing Commonwealth funded residential aged care facilities, at the rate of 4 or 5 a month, all over Victoria. The company's spokesperson is Arnan Rouse.

Mr Rouse enters into a commercial contract with the seller whereby he typically commits to employing all the employees of the old employer on the same or similar conditions, thus overcoming any obligation on the old employer to pay severance pay. In return, the old employer compensates Mr Rouse for the accrued or contingent liabilities of the transferring employees. In practice this means the purchase price of the nursing home is reduced by the amount of employee entitlements his company becomes responsible for.

Employee entitlements can be split into two parts:

1. Accrued entitlements – that that an employee is already entitled to, but is yet to utilise

2. Contingent liabilities – those that the employee does not yet have a legal entitlement to, but if employment continues as anticipated would result in a cost – generally this is sick leave and long service leave.

ANF was in the Australian Industrial Relations Commission with Mirboo North Aged Care in March, who are selling to Mr Rouse. They advised that they pay Mr Rouse (via the reduced sale cost of the nursing home) pro-rata LSL for each transferring employee. This equates to 1.7333 weeks pay per year of service, per employee. They allocate the cost for each employee from 5 years of service – however LSL is not a legal entitlement until 10 years of service.

(As troubling but not yet abused, is that LSL is not an entitlement until 15 years of service if termination for serious and wilful misconduct occurs between 10 and 15 years of service)

This creates a perverse encouragement for the new employer to take the employees on as transmitting employees, collect the compensation from the old employer for contingent long service leave and terminate the employee during the qualifying period before the entitlement to take the leave arises. Thus the new employer simply pockets the equivalent of 1.7333 weeks pay per year of service, per terminated employee. The worst example to date was one member who was terminated on the first day following the transmission of business.

The relevant current legislative provisions are subsections 643(6) and (7) which are as follows:

"(6) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, unless the employee concerned had completed the qualifying period of employment with the employer at the earlier of the following times:

(a) the time when the employer gave the employee the notice of termination;

(b) the time when the employer terminated the employee's employment.

(7) For the purposes of subsection (6), the ***qualifying period of employment*** *is:*

(a) 6 months; or

(b) a shorter period, or no period, determined by written agreement between the employee and employer before the commencement of the employment; or

(c) a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of the employment."

I seriously doubt it was ever intended to apply in a transmission of business scenario, but nevertheless it has been used repeatedly of late.

AIRC Case examples:

William Rogers and Reflections Group Pty Ltd a decision of Senior Deputy President Richards on 2 January 2007

On 7 November 2006 Mr Rogers made an application for relief in respect of the termination of his employment by Reflections Group Pty Ltd. The Applicant's employment, having commenced at midnight on 1 September 2006, was terminated on 20 October 2006. The Applicant had been employed as security guard at The Oasis Shopping Centre by the owner of that shopping centre, Thakral Pty Ltd, for what appears to have been a substantial period of time.

The application raised the question as to whether or not, in a transmission of business context the employee's contract, or the employment relationship itself, can be seamlessly transferred, assigned or novated to another employer such that the qualifying period can be said to have been served or served out with the previous employer.

His Honour decided:

- that the transmission documentation provided that the various entitlements and credits that had been accrued by the employees during their employment with the transmitter, would be recognised by the transmittee, as a condition of employment of the employees with the transmittee.

- the Act focuses attention on the period of the employment with "*the employer*".

- the applicant had not completed the qualifying period and consequently he was unable to bring his claim

Lisa Patricia Stanfield and Childcare Services Pty Ltd a decision of Commissioner Cargill on 11 February this year.

The applicant was given notice of her dismissal 7 November 2007 effective 9 November 2007. If a qualifying period was in place, it began on the completion date of the sale of the business, 18 June 2007.

The contract for sale provided that the respondent must make an offer of employment to each employee which it wishes to employ. That offer is to be on terms which recognise the employee's

previous service and are “in aggregate no less favourable than the terms and conditions” that previously applied.

The Commissioner did not accept:

- that the agreement for the sale of the business can be the written agreement to waive or reduce the qualifying period

- that any verbal representations made by or on behalf of the new employer can displace the specific requirement of the Act that any agreement to alter or remove the qualifying period altogether must be “written”

- that the agreement for the sale of the business set aside any qualifying period.

- that the absence of any mention of a qualifying period to the applicant indicates that the employment was continuous

The Commissioner was satisfied that the applicant had <u>not</u> completed the qualifying period and consequently she was unable to bring her claim.

Ziday, Clarke, Tan, Paskins, Walker and Aged Care Services Australia Group Pty Ltd, a decision of Commissioner Whelan of 29 February 2008

Prior to 1 June 2007, Ms Paskins and Ms Tan were employed by Professional Aged Care Enterprises Pty Ltd (PACE) at Rosanna Views Aged Care Facility. Ms Clarke and Ms Ziday were employed by PACE at Lower Plenty Gardens Aged Care Facility. Prior to 1 September 2007, Ms Walker was employed by Blue Cross at the Kirralee Aged Care facility.

In each case the facts are substantially the same. Prior to 1 June 2007 the applicants (except Ms Walker) were employed in residential aged care facilities owned and operated by Professional Aged Care Enterprises Pty Ltd (PACE). They had been so employed for varying periods of time but in each case for a period of at least twelve months.

On 1 June 2007 the businesses operated by PACE were purchased by Aged Care Services (Rosanna Views) Pty Ltd and Aged Care Services (Lower Plenty Garden Views) Pty Ltd. On the same date the new employer, Aged Care Services Australia Group Pty Ltd, “took over” the employment of the staff working at these facilities

Commissioner Whelan found that:

"In a situation where transferring employees have their ongoing rights and entitlements protected by the statute, the employer expressly recognises and assumes responsibility for *“all entitlements which may have accrued during your employment prior to the business transfer date” and* also recognises prior service for the purpose of calculating employment entitlements into the future, it would be incongruous to treat the employees as ‘new employees’ for the purpose of section 643(6) only"

While Commissioner Whelan has been able to find a way through this, we fear it will be appealed.

Proposed amendment to the Act

The Act, if amended to include a new sub-clause (7)(d) would read:

"(6) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, unless the employee concerned had completed the qualifying period of employment with the employer at the earlier of the following times:

(a) the time when the employer gave the employee the notice of termination;

(b) the time when the employer terminated the employee's employment.

(7) For the purposes of subsection (6), the ***qualifying period of employment*** *is:*

(a) 6 months; or

(b) a shorter period, or no period, determined by written agreement between the employee and employer before the commencement of the employment; or

(c) a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of the employment.

(d) in the case of 'transferring employees' within the meaning of section 581, the commencement date of employment shall be the employee's commencement date of employment with the transmittor as though that service was with the transmittee

I again thank the Senators for their time and interest in this matter.

Yours sincerely

Paul Gilbert
Senior Industrial Officer
ANF (Vic Branch)