

Employee Relations News

Edition 33

8 October 2015



I have more than 25 years' experience and Employee/Industrial Relations, EBA's, unfair dismissals and policies/employee handbooks are a speciality. Qualifications include IR and HR, Training & OH&S systems.

For further information, please see my LinkedIn profile:

https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

Please consider me should you require a HR or ER/IR person on a full-time, temporary or contract basis.

In this edition:

- FWC determines rights of employees when business is taken over by a new employer
- Procedural rights not afforded in unfair dismissal, but application dismissed

FWC determines rights of employees when business is taken over by a new employer¹

This decision examines in great detail what needs to be considered when purchasing an existing business. In this case, the company, as part of its due diligence (quite rightly), tested the waters by attempting to have an existing – albeit – expired EBA, set aside. *Read on...*

Sonic HealthPlus Pty Ltd, which is the new employer/company, (“SHP”) made an application to the FWC that the EBA not apply to its to the transferring employees. The previous EBA being the Medibank Health Solutions Enterprise Agreement 2012. SHP wanting its exiting EBA's to apply. The Medibank EBA's covered 513 employees, with 60 employees to be made offers by SHP.

The Australian Nursing and Midwifery Federation (ANMF), opposed the application. The Community and Public Sector Union (CPSU) did oppose the application as it would have no coverage at SHP.

SHP submitted that its EBA:

- Would enable a more streamlined integration of the businesses;
- Reduce the costs of the acquisition;
- Enable SHP to make a larger number of offers of employment to affected employees; whilst
- Not granting the orders would have a negative impact on productivity in the workplace.
- The Medibank Agreement has been a business killer in that it has killed the Medibank businesses financially in terms of jobs.
- The SHP EBA's would reduce the cost base for those SHP transferring because the Medibank EBA pays more than the SHP EBA's.

There had been extensive consultation with the affected Medibank employees. This included meetings, conference calls, roadshows involving SHP management representatives, weekly updates to employees, FAQ's and a comparison document showing the differences between the Medibank and SHP Agreements on the Medibank intranet, and a dedicated email address.

The Union contended that the employees were still confused on the process, and the effect it would have upon them.

SHP stated that it was prepared to enter into an undertaking that all transferring employees, who have an annualised base salary which is higher under the Medibank Agreement, will have the same annualised base salary if they accept employment with SHP. It will also recognise prior service. There were also benefit in the SHP EBA in excess of the current arrangements, and other benefits that apply as being an employee of SHP (gym memberships, etc).

¹ Sonic HealthPlus Pty Ltd T/A Sonic HealthPlus (AG2015/4290) [2015] FWC 6460. Cribb, C. 21 September 2015.

However, the ANMF that transferring employees will suffer a reduction or loss in relation to several other entitlements. These included:

- An increase in hours of work from 37.5 to 38 hours per week.
- An increase in the span of ordinary hours from 7 am-6 pm to 7 am-8 pm.
- Loss of a shift allowance of 15% for hours worked between 6 pm and midnight.
- Loss of payment of time and a half for ordinary hours worked on a Saturday.
- No minimum number of hours for part-time employees and the minimum payment for casual employees is reduced from 3 hours to 2 hours.
- Overtime is no longer payable for additional hours beyond the employee's rostered hours on any one day but rather after 10 hours excluding meal breaks.
- Employees who currently qualify for 5 weeks annual leave will only receive 4 weeks.
- Employees working an evening shift will no longer receive 5 weeks annual leave.
- Employees entitled to 5 weeks annual leave will no longer receive a 20% leave loading.
- A reduction in compassionate leave from 5 days per occasion to up to 2 per occasion.
- A reduction in paid parental leave and paid paternity leave from 14 weeks paid maternity leave and 2 weeks paid paternity leave to 6 weeks paid maternity leave with 2 weeks return to work bonus.
- An additional day off per year (Good Health day) is no longer provided.
- A reduction in the quantum of long service leave...together with other long service leave components.
- A reduction in redundancy entitlements except for clinic employees engaged prior to 20 December 2012
- A reduction in superannuation contributions from 10% to 9.5%.

The Medibank Agreement has a nominal expiry date of 30 September 2015.

It was submitted by SHP that there is an industrial uncertainty for both the transferring employees and SHP in accepting an expired agreement as there is no guarantee that the current terms and conditions under the existing agreement will be maintained if a new agreement is negotiated [and] also no guarantee that employees coming across will have the benefit of any wage increases that would otherwise be payable under an enterprise agreement that is still within its nominal expiry date. (The Commission was referred to the decision in Catalina Country Club).

It was contended that "public interest" concerns more than just the interests of the parties immediately concerned and the Commission was referred to the decision of Justice Munro in Joy Mining Machinery (Moss Vale site) Certified Agreement 1998/1999. SHP relied on His Honour's observations which included:

"The most fundamental considerations relevant to the public interest must be those which have most substance to what are perceived to be the interests and welfare of the community."

SHP submitted that the ongoing viability of a national business which provides important health services to the community and which can offer continuing employment to over 150 employees across the country is, at its highest, in the interests and welfare of the community.

The Commissioner considered The Explanatory Memoranda to the Fair Work Bill 2008:

"These factors...are intended to enable FWA to balance appropriately the protection of employees' entitlements under certain instruments with the need for some flexibility to depart from the default rules about coverage of instruments following a transfer of business. They recognise that in some circumstances, having regard to matters such as the views of the persons covered by the instruments and the public interest, there may be good reason for an alternative instrument to cover the transferring employees."

"The issuing of an order under s.318(1) is a discretionary decision. In exercising that discretion, the Commission is required to take into account, and to balance, all of the factors set out in s.318(3) of the Act. The outcome of the weighing up of all of the factors is that the Commission must be persuaded to exercise its discretion."

The Commissioner:

- *It can be concluded that some of the affected employees oppose the application. With respect to the views of the balance of affected employees, it is probable that they did not necessarily oppose the application, being primarily concerned about their future job security. Therefore, this factor weighs slightly in favour of granting the application.*
- *There would still be a net and considerable reduction in the entitlements of the transferring employees...This factor weighs considerably against granting the orders.*

- *The Medibank Agreement, will have expired by the date of acquisition, is as an advantage for the new employer. This is because there will not be an agreement, which transferred with the employees, which will be in place for a long time. The new employer, therefore, has a range of options for dealing with this situation. Therefore, the fact that the Medibank Agreement will have expired by the date of acquisition does not weigh in favour of granting the orders.*
- *It was argued strongly by the company that having two people working side-by-side, performing the same work but on different sets of entitlements, would have a negative impact on productivity in the workplace. This was because of the company's strong culture based on equality and fairness. It was also submitted that, if the orders are not made, the company would have to actively manage the disparity in conditions between employees. This was said to impact significantly on productivity.*
- *While it is unusual for different conditions to apply to employees performing the same work, there is little concrete evidence, apart from opinion evidence, to show how the differing conditions that apply to how the work is performed, will have a negative impact on productivity. This factor weighs against issuing the orders sought.*
- *The cost of SHP's undertaking to pay the current Medibank Agreement annualised base salaries of the transferring employees \$10.2 million per year [plus] employing additional people \$170,000 per annum [and] \$605,000 per annum.*
- *The cost of integrating a new agreement and ensuring compliance, together with the cost of the difference in entitlements, is not, in my view, of such a magnitude which would result in significant economic disadvantage to the company. Therefore, I have not been persuaded that the company will incur significant economic disadvantage if the orders are not made. This weighs against issuing the orders sought.*

"All enterprise agreements reflect the history of the employer and the industry in which the employer operates. I have not been convinced that the fact that the Agreements do not share a common background is germane to this factor. The differences between the Agreements relate mainly to the quantum of the entitlements.

"However, each of the Agreements do contain entitlements that the other Agreement does not. Whatever the historical genesis of the differences, I have been persuaded that there is not a great deal of business synergy between the Medibank Agreement and the SHP Agreements. This factor weighs in favour of issuing the orders sought.

"Regardless of the outcome of the application, SHP has stated that it will be making job offers to affected Medibank employees. However, if the orders are made, the number of offers will increase from 60 to 159. That the company could offer more jobs is, in general, "in the interests and welfare of the community". Therefore, this factor weighs slightly in favour of making the orders sought."

The Commissioner concluded:

*"I have not been persuaded to exercise my discretion and issue the orders sought by the Applicant. It is my view that those factors weighing against the making of the orders outweigh those in favour. In balancing the protection of employees' terms and conditions and the interests of employers in running their enterprises efficiently, if there is a transfer of business..., **I have not been persuaded to exercise my discretion and issue the orders sought.**"*

Procedural rights not afforded in unfair dismissal, but application dismissed²

In this matter the SP decided that even if the procedures had been followed, the result would not have differed – that is, the applicant's employment would have ended. I believe this to be a departure from the usual trend that even if a valid reason was determined for the dismissal (as in this matter), procedural fairness must be applied.

Ms Rani performed duties as a restaurant manager at the employer's place of business in Mackay, Queensland from 21 September 2013 until her dismissal on 4 March 2015.

The reasons given for Ms Rani's dismissal were set out in writing and handed to her at a meeting conducted on 4 March 2015:

"I am writing to you about the termination of your employment [...] due to the following reasons:

- *Being late to work on numerous occasions including today.*

² Ms Palak Rani v Limitless Ventures Toscas Pty Ltd T/A Toscanis Mackay. (U2015/3939) [2015] FWC 6429. Richards. SDP. 25 September 2015.

- *Have failed to provide a weekly stock take reporting as requested by the owner of the franchise. The owner had to come into its stock take on several occasions.*
- *Weekly stock take recently were only down on 15 February 2015 and 1 February 2015.*

Regular customers have also brought to the attention that you had mentioned to them the owners inability to order products and showing a “no care attitude” towards the business by them.

- *Was wilful or deliberate behaviour by you that is inconsistent with the continuation of your contract of employment.*
- *Caused a serious and imminent risk to the reputation, liability or profitability of the employer's business in that as a lot of business has been lost because of the comments made to customers, resulting in loss of trade.*

We consider that your actions constitute serious misconduct warranting dismissal.”

The SP concluded that:

“The employer had a sound, defensible and reasonable basis - and thus a valid reason - for the dismissal of Ms Rani from her employment as a restaurant manager. Ms Rani could not be relied upon to perform critical roles as a manager and her conduct had been less on occasions than might reasonably be expected by her employer.

*“Ms Rani, however, **was not accorded the procedural opportunities** to defend her position that an employee ordinarily would anticipate under the Act: she was not notified of her dismissal in advance nor provided an opportunity to respond to the conduct and performance issues that were relied upon for her dismissal.*

*“That said, when all the circumstances of this matter are taken into account, **I do not consider that the result would have been any different had Ms Rani been able to exercise her rights** in relation to such procedural opportunities.*

“Given my conclusion in this regard, Ms Rani’s application ... is dismissed for reasons that her dismissal was not harsh, unjust or unreasonable.”

Until next time...

Greg Reiffel
Principal Consultant