pose was not that of securing the conviction of a thief - but rather an effort to protect the police service, or some of its officers, or to vindicate them".

The analogy between a civil case offer to settle and the indemnity was likewise rejected.

What Now

As the Magistrate had not assessed damages at first instance, the matter has now been remitted to Cairns Magistrates Court for an assessment of damages. That is where the matter currently rests.

Aftermath

The story doesn't end there. You're probably wondering what happened to some of our leading characters. Well, you may be surprised to hear that:-

- Lennon was charged and convicted of money handling offences and left the police force
- The Qantas security guard did not have his contract renewed
- Qantas changed their money handling procedures
- Queensland police no longer require defendants to sign indemnities
- Mr Ryan no longer works for Qantas

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Transmission of business: section 149 of the Workplace Relations Act (1996)

***North Western Health Care Network v Health Services Union of Australia* [1999] FCA 897 (2 July, 1999)**

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The recent decision of the Full Court of the Federal Court in the North Western Health Care Network Case has attracted some media comment.

Leaving aside the political aspects of such comment, it appears that the decision has been characterised as concerning "contracting out". Caution should be exercised in assessing the impact of the decision.

Summary

Section 149

The matter before the Court involved a dispute as to whether a federal award applying to the State of Victoria applied to Health Care Networks who took over from the State the provision of mental health services. The union relied on Section 149 of the Act to argue that the award applied as there had been a transmission of business from the State to the Health Care Networks.

The decision deals with the meaning of "business" and "transmission" in the context of Section 149.

"Business"

The Full Court held that "business" referred to the activity of the employer that gave rise to the industrial dispute underpinning the award. Accordingly, the State of Victoria could be engaged in business.

"Transmission"

The Court decided that under Section 149 a transmission occurred if there was a substantial identity between the old activities and those carried on by the new employer which correspond with the old activities. The Court held that it was not necessary to identify a particular legal transaction constituting a formal transfer of property.

Caution

The decision does not apply in all cases of contracting out. Advice should be sought by unions before initiating any proceedings in reliance upon the decision. We would anticipate that the decision will be appealed to the High Court.

Discussion

Section 149

The decision concerned the proper construction of Section 149 of the Workplace Relations Act 1996. Relevantly, that Section provides:

"149(1) *Subject to any order of the commission, an award determining an industrial dispute is binding on:*

....

(e) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation who has acquired or taken over the business or part of the business of the employer; ..."

The Court's decision:

(a) deals with the meaning of "business" in Section 149 and whether the provision of mental health services by the Victorian Department of Health constituted "part of the business" of the State of Victoria; and

(b) addresses the question of whether there was a "transmission" of the provision of mental health services from the Department of Health to the Health Care Networks.

Background

The matter before the Court arose as a result of the "mainstreaming" of psychiatric services by transferring them from the Victorian Department of Health to hospitals and agencies providing general health services. It appears the Full Court has treated the expressions "mainstream" and "outsourcing" as synonymous. In fact, the two concepts are quite distinct. As Marshall J. observed in his Judgment at first instance, mainstreaming:

"....involved the gradual replacement of large psychiatric hospitals with a range of services co-located with general hospitals and other community based services."

"Outsourcing" involved the provision of mental health services by an agency under the terms of a health service agreement with the Department of Health rather than the provision of such services by the Department itself.

Features of the arrangement between the Department of Health and the Health Care Networks that attracted the attention of the Court included:

a) there being a "date of transfer" on which the activity of providing mental health services ceased to be carried out by the State of Victoria and began to be carried out by the Health Care Networks;

b) the industrial activity constituted by the management and provision of the mental health services became the responsibility of the Networks which assumed the obligations and liabilities of the Secretary of the Department in relation to the provision of those services;

c) the health service agreements between the State of Victoria and the Networks provided for the Networks to indemnify the State of Victoria in relation to the provision of the mental health services; and

d) the fact that the State appeared to regard itself as divested of the activity of the provision of mental health services for the duration of the agreement (5 years).

The Industrial Context of "Business"

The three members of the Full Court in dismissing the appeal from Marshall J.'s decision published separate judgments. However, Madjwick and Spender JJ. agreed with the reasoning of R. D. Nicholson J. while making their own observations.

The Court found that the word "business" took its flavour from the context of Section 149. The Court considered that context to involve a focus on the employer as party to an industrial dispute. This is reflected in the following comments from the judgments:

- "....the purpose of the WR Act is to facilitate the resolution of disputes between employer and employees and the intention of the WR Act is that disputation in the area of industrial activity is settled by the making of an award."
- "....the words 'the business' take their colour and context from the reference to the 'industrial dispute' in relation to which the employer is involved."
- "the policy objective of this provision is to make the power to settle industrial disputes effective by extending the instrument of settlement to 'the ever changing body of persons within the area of such disturbances'".
- "once it is accepted that the object of the transmission must be 'the business or part of the business of an employer who was a party to the industrial dispute' attention is directed to what it is that the party to the dispute is doing."
- "....it is the existence of the 'the industrial dispute' and the presence of an employer in it which identifies 'the business or part of the business'. This supports a construction of the reference to 'the business or part of the business' to *whatever it is an employer who was a party to the industrial dispute has been conducting in order to fulfil the role of employer*."
- "...the reference to 'the business or part of a business' [takes] its colour from the *activity in which the employer was involved and in relation to which the industrial dispute arose*."

The Court, in view of this approach, had no difficulty in deciding that the word "business" is capable of application to the activities of Government.

The decision is important for its adoption of a wide meaning of "business" consistent with its industrial context. It is especially important in its rejection of the argument that Government is not engaged in business.

"Transmission"

The Full Court rejected an argument that the responsibility for the provision of the relevant health services still rested with the State. It did not accept that the State of Victoria continued to provide the health services, the only difference being that the State had re-organised its method of providing services.

The approach adopted by the Full Court was that it is not necessary to identify a particular formal legal transaction whereby the business carried on by the employer becomes by way of succession, transmission or assignment the property of a new entity. As R. D. Nicholson J. observed:

"It is not necessary to search for some legal form of succession, assignment, transfer, corporate acquisition or take over. What is necessary is to determine as a question of fact whether "the business" understood in the wide sense so found has been transmitted to other hands. That does not require a search for some legal mechanism as a nexus between the pre and post transmission stage."

The Court adopted the "substantial identity test" adopted by the High Court in the ATOF Case. That test enunciated by the High Court in the context of the eligibility rule of a registered organisation was expressed as follows:

"the ultimate issue is whether there is a substantial identity between the old activities and those now carried on by the RTA which correspond with the old activities."

The Full Court held that there was a transmission. On the facts of the case, there was little doubt that there was a substantial identity in the activities carried on by the Department and subsequently by the Health Care Networks. Importantly, the Court held that the retention of some control by the transmittor was not inconsistent with the transmission. R. D. Nicholson J. observed:

"While the State retained control over funding and audit, that was but the consequence of it having transferred the responsibility for the provision of the relevant mental health services so that it was now required to pay for the delivery of such services."

It is important that the Court rejected the argument that the continued existence of the relevant function of Government militates against there being any transmission is important.

Madgwick J. in his separate judgment took the view that Section 149(1)(d) involves a single, large conception. His Honour described it as follows:

"That is that settlements by award-making, aimed at quelling present industrial disputes and the prevention of future disputes, should be kept effective, pending conscious variation or replacement of the award, regardless of mere changes in arrangements as to which legal entity might be the employer of an unchanged industrial class of employees, regardless of such matters as whether the original employer had other classes of employees as well and may have remained their employer, and regardless of whether the legal ownership of all of the plant and equipment used by the employees for their work and the other resources of the employer utilised in the undertaking should have likewise changed."

The "Core" of the Business

One significant unresolved issue arising from the Full Court decision is the question of what constitutes the "core" of a business for the purposes of Section 149.

RD Nicholson J. rejected the Health Care Networks' reliance on the case of *Crosilla v. Challenge Property Services* (1982) 2 IR 448 at 456-7. In *Crosilla*, the proprietor of an Adelaide motel, which had previously used its own staff to clean its premises, contracted with the respondent to provide cleaning services in the motel. Crosilla's employment with the motel was terminated and she immediately commenced employment with a cleaning contractor for whom she performed essentially the same cleaning work of the motel as she had previously done when employed by the motel. Russell J. of the South Australian Industrial Court found that there was not a succession for long service leave purposes under the relevant legislation which required that there be a transfer, conveyance, assignment or succession of a business or any part of a business.

RD Nicholson J. speaking of the transfer of the relevant mental health services to the Health Care Networks observed:

"What was involved was a transmission of the core of the relevant services not, as in **Crosilla** *or* **Kelman v. Care Contract Services** *(1995) ICR 260, a peripheral activity."*

His Honour's observation on this issue raises, but does not resolve, the question of whether, for there to be a transmission, the services transferred need to be of the core of the relevant services.

In *The Finance Sector Union of Australia v. PP Consultants Pty Ltd* [1999] FCA 631 (12 May, 1999) (unreported) Justice Matthews, in a decision handed down prior to the Full Federal Court decision, expressed reservations about the use of the substantial identity test **of itself** for the purpose of establishing transmission. Her Honour, after referring to the High Court decision in ATOF and Marshall J's decision at first instance in the Health Services Case, said:

"However, I do not take those cases to be suggesting that a substantial identity between the activities carried on by the two successive entities is, on its own, sufficient to establish succession under Section 149(1)(d). If it were, it would, for example, encompass the contracting out of cleaning work in **Crosilla**, *a decision which, with respect, I think is patently correct."*

Matthews J's observations illustrate a difficulty in the reasoning of the Full Federal Court. That is, having adopted the substantial identity test for the purposes of determining whether or not there has been a transmission, and having adopted a general and not legally specific characterisation of the expression "business" relating to the role of the employer as an industrial disputant, it is not at all clear on what basis the court found it necessary to distinguish between the transmission of the core of the relevant services and the transmission of peripheral activity. One might have thought that, if the part of the business concerned had the requisite industrial character, and there was a substantial identity between the activities concerned, whether the business was "core" or not would be irrelevant.

Contrary Orders

The opening words of Section 149 are "Subject to any order of the Commission.......". The Health Care Networks sought to avoid the impact of Section 149 by identifying another award that had the effect of excluding the operation of Section 149. The Full Court found that there was no such order.

It should be noted that an employer can make an application to the Commission for an order to exclude the operation of Section 149 (eg. *CPSU - Employment National Case*). It might be expected that such applications will become part of future public sector privatisation exercises.

Conclusion

The Court's decision is important. However, it should be noted that the decision does not extend Section 149 to all situations of "outsourcing" or "contracting out". The decision by an employer (governmental or not) to terminate the employment of its staff and to contract with a separate entity for the provision of particular services will not necessarily render the contractor within the scope of Section 149(1)(d) and subject to the previous award.

In view of the decision, it might be expected that in future privatisation exercises, public sector employers will be less likely to arrange for the transfer of employees to the new (private) employer/contractor/provider and private providers will be less likely to take on former (public sector) employees.

The "peripheral activity" uncertainty left by the decision may well influence the scale of activities transferred in any single transaction by a public sector authority. That is, the transactions may relate to a series of small (and thus peripheral) activities. ■

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