DECISION

Fair Work Act 2009
s.318 - Application for an order relating to instruments covering new employer and transferring employees

Smit Lamnalco Towage (Australia) Pty Ltd
(AG2016/3639 and C2016/1403)

VICE PRESIDENT WATSON MELBOURNE, 17 AUGUST 2016

Application by Smit Lamnalco Towage – transferrable instrument – application that transferrable instrument will not cover transferring employees – application by the Australian Institute of Marine and Power Engineers – application to deal with a dispute concerning transfer of business – Fair Work Act 2009, ss.311, 312, 317, 318 and 739.

Introduction

[1] This decision concerns two applications concerning Smit Lamnalco Towage (Australia) Pty Ltd (Smit Lamnalco), SMIT Marine Australia Pty Ltd (SMA), and the Australian Institute of Marine and Power Engineers (AIMPE).

[2] The first is an application by AIMPE under s.739 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (the Commission) to deal with a dispute, and concerns Smit Lamnalco and SMA. The dispute relates to provisions of the *SMIT Marine Australia Pty Ltd and the AIMPE Enterprise Agreement 2015* (SMA EA) relating to transfer of business.

[3] The matter was listed for conference on 27 June 2016 by telephone. The parties were unable to reach a resolution.

[4] The second application is an application by Smit Lamnalco for an order under s.318 of the Act. That section permits orders to be made relating to instruments covering a new employer and transferring employees in the context of an expanded notion of transfer of business.

[5] That application concerns employees of SMA who are employed as engineers and are covered by the SMA EA (transferring employees). Smit Lamnalco is proposing to transfer employees employed by SMA to Smit Lamnalco. Smit Lamnalco seeks an order that the SMA EA will not cover Smit Lamnalco and any transferring employees and the *Smit Lamnalco Towage (Australia) Pty Ltd & AIMPE Marine Engineers Harbour Towage Enterprise Agreement 2014* will cover any transferring employees, subject to undertakings set out in the draft order filed by Smit Lamnalco.

[6] Currently different employing entities employ employees on Smit group contracts and the operations are conducted by different companies within the group. In essence, Smit

Lamnalco is seeking to have all of the group operations in Australia conducted by a single entity, all employees employed by a single employer and one enterprise agreement cover all of the operations for each group of employees.

[7] For the purposes of s.311(6) of the Act, SMA and Smit Lamnalco are associated entities within the meaning of s.12 of the Act and s.50AAA of the *Corporations Act 2001*.

[8] AIMPE opposes the application.

[9] The dispute about the change in entity is largely resolved by determining the application under s.318.

[10] The matters were listed for hearing on 8 August 2016 in Gladstone. Mr M Coonan, of counsel, appeared on behalf of Smit Lamnalco and SMA, and Mr A Herbert, of counsel, appeared on behalf of AIMPE.

[11] Statements from the following persons were admitted into evidence:

- Ms Veronica (Nikki) Carter, Contract Manager and Senior Industrial Relations Advisor – Australia, Smit Lamnalco
- Mr Gregory Yates, Senior National Organiser for AIMPE
- Mr Geoffrey Handicott, elected delegate representing members of AIMPE employed by SMA operating tug boats in the Port of Gladstone
- Mr Desmond Bull, Engineer employed by SMA, and elected representative of engineers employed by SMA in the Port of Gladstone
- Mr Edwin Campbell, Marine Engineer employed by SMA in the Port of Gladstone
- Mr Cameron Turnbull, Marine Engineer employed by SMA, operating tug boats in the Port of Gladstone, and former AIMPE Delegate
- Mr Philip Immoos, Marine Engineer
- Mr Raymond Bunyard, Marine Engineer employed by SMA in the Port of Gladstone
- Mr Rowan Bunyard, Marine Engineer employed by SMA in the Port of Gladstone

[12] Ms Carter and Mr Yates were cross-examined.

Background

[13] Smit Lamnalco and SMA are in the process of integrating. As a final step of the Australian region integration process, Smit Lamnalco has embarked on an exercise to have all employees employed by the same employer.

[14] Smit Lamnalco is proposing to transfer employees employed by SMA to Smit Lamnalco on a date no later than seven days after the successful application of the order in

this proceeding and similar proceedings involving the Australian Maritime Officers' Union and the Maritime Union of Australia.

[15] The Smit Lamnalco EA was approved on 2 April 2015. Its nominal expiry date is 30 June 2017. The SMA EA was approved on 5 April 2016. Its nominal expiry date is 30 June 2016. There are currently thirty six engineers employed under the SMA EA.

The relevant legislation

[16] Part 2-8 of the Act defines a transfer of business for the purposes of the Act and s.313 provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one employer to another employer. This default position is able to varied by order of the Commission.

[17] Section 311(1) contains the definition of transfer of business in a wider manner than the ordinary English or legal meaning of the term. The definition is:

> "(1) There is a transfer of business from an employer (the old employer) to another employer (the new employer) if the following requirements are satisfied:
>
> (a) the employment of an employee of the old employer has terminated;
>
> (b) within 3 months after the termination, the employee becomes employed by the new employer;
>
> (c) the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
>
> (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6)."

[18] Sections 317 and 318 of the Act relevantly provide:

> "**317 FWC may make orders in relation to a transfer of business:**
>
> This Division provides for FWC to make certain orders if there is, or is likely to be, a transfer of business from an old employer to a new employer.
>
> **318 Orders relating to instruments covering new employer and transferring employees**
>
> *Orders that FWC may make*
>
> (1) FWC may make the following orders:
>
> (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a transferring employee because of paragraph 313(1)(a) does not, or will not, cover the new employer and the transferring employee;

(b) an order that an enterprise agreement or a named employer award that covers the new employer covers, or will cover, the transferring employee.

Who may apply for an order

(2) FWC may make the order only on application by any of the following:

(a) the new employer or a person who is likely to be the new employer;

(b) a transferring employee, or an employee who is likely to be a transferring employee;

(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that FWC must take into account

(3) In deciding whether to make the order, FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the order;

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;

(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when order may come into operation

(4) The order must not come into operation in relation to a particular transferring employee before the later of the following:

(a) the time when the transferring employee becomes employed by the new employer;

(b) the day on which the order is made."

Which enterprise agreement should apply?

[19] The Act contains a default position that upon a transfer of business, as defined, enterprise instruments that formerly applied to the former employer and its employees continue to apply to transferring employees and the new employer. Such an outcome is able to be modified in appropriate circumstances having regard to the non-exhaustive list of considerations in s. 318(3).

[20] In my view this application calls for a consideration of the most appropriate agreement to cover the operations of the new employer in all of the circumstances having particular regard to the factors in s.318(3). A number of the considerations overlap, and must be assessed in the quite unusual circumstances of this case.

[21] The new employer, Smit Lamnalco is the applicant and favours the application of the Smit Lamnalco EA in furtherance of its objective of securing a single workforce and an approach it describes as "One Company, One System". This objective is based on the desire for uniformity and unity of purpose which has significance with respect to safety and operating practices especially when employees are transferred between ports. The reasons for the support of the change are logical and well-intentioned.

[22] The most direct evidence about the views of employees is to the effect that the change is not supported because they want the opportunity to bargain for a new enterprise agreement to apply to the Gladstone operations. The reasons for this position are understandable. The loss of the opportunity to bargain for new terms for a period until bargaining on the national agreement begins and the loss of the opportunity to take protected industrial action for approximately twelve months means that changes are unlikely to be available for at least that twelve month period and will depend on a consideration of the entire Smit Lamnalco workforce rather than those only engaged in Gladstone.

[23] There is an obvious overlap between a disadvantage to employees and the reasons why employees oppose the order. In my view there is a disadvantage to employees to effectively have their enterprise agreement extended by 12 months without any counterbalancing benefit. In other respects the existing benefits under the Gladstone agreement are intended to continue by way of undertaking. I am prepared to assume that this will limit any disadvantage arising from a comparison of the terms of the agreements. The actual disadvantage of an extension of the agreement is speculative as the outcome of any negotiations is unknown. However the loss of an opportunity to support claims with protected industrial action is in my view a real disadvantage and this must be given weight.

[24] As I have noted, the SMA EA expired on 30 June 2016. The Smit Lamnalco EA expires on 30 June 2017. The implications of this are mentioned in part in the consideration of disadvantage above. It could also be said that the additional length of operation of the agreement provides for a period of stability for a period after the transfer of employees to the new entity. I do not regard the consideration of stability as a significant factor in this case.

[25] It is contended by Smit Lamnalco that inheriting the SMA EA would have a negative impact on the productivity of its new workplace. This is said to relate primarily to the difficulties in transferring employees between ports because the SMA EA does not have the same facilitative provisions for transfers that the Smit Lamnalco EA contains. I consider that this point has substance. However some of the advantages the company seeks to gain can be achieved through the change in employing entity without a change in applicable instrument.

[26] A related notion is whether Smit Lamnalco would incur significant economic disadvantage as a result of inheriting the SMA EA. The change in employer is voluntary and the SMA EA is an instrument recently negotiated by a related company. In my view it would be an overstatement to suggest that there is a significant economic disadvantage arising from the Act's default position.

[27] There are several differences in the two instruments. As it is intended to continue to apply all of the benefits of the SMA EA I am of the view that there is a general degree of business symmetry between the two instruments, but in relation to transfers and portability, the synergy is deficient.

[28] In my view this matter is confined to the parties involved and the respective effects on the operations, rights and obligations. I do not consider that the public interest has any significance in this matter.

[29] The discretion to make an order is to be guided by the above considerations. The making of an order alters the Act's default position. It is not agreed. I must be satisfied that an appropriate merit case exists for making the order. As I have found, the adoption of the Smit Lamnalco EA carries with it some disadvantage to employees. Nevertheless, its rationale is understandable and there are clear benefits for the employer in having it apply.

[30] Where a change in agreement coverage is likely to positively affect an employer but negatively affect employees it is preferable that all avenues to achieve the change by agreement through the bargaining process are exhausted before the Commission is called upon to effectively arbitrate the appropriate agreement to apply. It is unfortunate that a rationalisation of agreement coverage was not achieved in the lengthy negotiations leading to the recently made SMA EA. Notwithstanding the practical issues concerning the Act's bargaining procedures, there is an opportunity to address this matter in bargaining for the renewal of the two agreements. While there is an understandable benefit in bringing all of the operations under one agreement I consider that in the absence of agreement all attempts should be made to achieve the outcome through bargaining.

[31] I am not persuaded that it is appropriate to make the orders sought in this matter.

Conclusion

[32] For the above reasons the application for orders under s.318 is dismissed.

VICE PRESIDENT

Appearances:

Mr M Coonan, of counsel, with Ms A Mansini on behalf of SMA and Smit Lamnalco.
Mr A Herbert, of counsel, with Mr G Yates on behalf of AIMPE.

Hearing details:

2016.
Gladstone.
8 August.

Final written submissions:

SMA and Smit Lamnalco on 4 July 2016 and 5 August 2016.
AIMPE on 18 July 2016.

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