SUPREME COURT DECIDES VULNERABLE WORKERS RIGHT TO BARGAIN FOR REDUNDANCY ENTITLEMENTS

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Recently, the Supreme Court handed down its decision in a long running dispute between OCS Ltd and 50 members of the New Zealand Services & Food Workers Union (“SFWU”). The decision concerns the rights of ‘vulnerable’ employees to bargain for redundancy entitlements.

What does the Supreme Court decision mean?

Where an employment agreement does not expressly exclude certain redundancy entitlements, vulnerable employees may bargain for those entitlements.

The Supreme Court held that a collective employment agreement which excluded the making of ‘redundancy payments’ to vulnerable employees did not prevent the employees from being able to bargain for non-monetary redundancy entitlements (such as re-training assistance).

The key facts

In 2010, OCS took over the cleaning contract at Massey University from the previous provider of cleaning services. The employees employed by the previous provider elected to transfer to OCS as their new employer.

The contract required OCS to perform the services at significantly reduced hours per person than what had previously been in place. After transferring to OCS, the employees were informed that they would be made redundant unless they were prepared to accept different and less beneficial conditions of employment.

OCS and the SFWU applied to the Employment Relations Authority for direction in respect of the employee's redundancy entitlements.

What does the law say?

The Employment Relations Act (“the Act”) gives special protection to certain ‘vulnerable’ employees, where as a result of restructuring their work will be performed by a new employer.

Vulnerable employees are defined in the Act. They generally include employees providing cleaning services, food catering services, caretaking or laundry services in the education, health and residential care sectors.

Vulnerable employees have special protection when the business they work for is sold. They have the right to transfer to a new employer under the same terms and conditions of employment.

Vulnerable employees also have the right to bargain for redundancy entitlements from the new employer if they are subsequently made redundant, provided their employment agreement does not already provide for redundancy entitlements or expressly exclude redundancy entitlements.

‘Vulnerable’ employee's rights to redundancy entitlements

The Supreme Court held however, that if a vulnerable employee's existing employment agreement expressly excludes all redundancy entitlements, vulnerable employees will not be
entitled to bargain for any redundancy entitlements. However, if the employment agreement excludes only redundancy compensation, then vulnerable employees will be entitled to bargain for non-monetary redundancy entitlements as a result of the Supreme Court’s decision. By way of example, non-monetary entitlements could be re-training, job seeking assistance, assistance with CV preparation or time off to attend job interviews.

**Proposed Employment Relations Act changes to come into effect in 2013**

Since the Supreme Court decision, the Government has announced further reforms to the Act which it proposes to include in legislation to come into effect in the second half of 2013.

One proposed change is to the special protection provisions to protect ‘vulnerable’ employees. It is proposed that small to medium sized (“SME”) businesses, with fewer than 20 staff, will be exempt from these provisions.

This means, that SME’s would not be required to employ vulnerable employees affected by the restructuring or carry over their redundancy entitlements if they decide to employ them.

**How does the Supreme Court decision affect you?**

The Supreme Court's decision confirms that employment agreements should specifically spell out exactly what redundancy entitlements employees are entitled to, especially in the case of vulnerable employees.

If your organisation is negotiating the takeover of a contract or the purchase of a business which will involve the transfer of vulnerable employees you need to be aware of any potential liabilities that may arise should you later decide to make any vulnerable employees redundant. We recommend you review the existing employment agreements as part of your due diligence investigations. Your legal adviser can assist in identifying any potential future liabilities.

If you would like us to review your standard employment agreements or to discuss how these changes may affect your future plans, you can contact a member of our employment law team below.

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