

The bleached skeleton of a vibrant horse

Section 197 of the Labour Relations Act (LRA) was widely believed to protect employees whenever a business was transferred to a new employer by ensuring their employment contracts were automatically transferred to that new employer. It was hoped that this case would ease the devastating effects of outsourcing on workers and unions by bringing this practice within the automatic transfer provisions of the section. This decision, however, effectively removes outsourcing from the application of section 197 of the LRA by drastically curtailing the protection it offers in all commercial transfers of businesses.

The facts of the case

After negotiations with Nehawu deadlocked, the University of Cape Town (UCT) decided to outsource what it termed its 'non-core' activities. This involved the dismissal of around 200 workers, many of whom were later re-employed by the service providers who concluded contracts with UCT. The union had launched an earlier urgent application asking that the Labour Court find that the outsourcing amounted to a transfer of a part of UCT's business, trade or undertaking. This would have ensured that the transfer of employees to the new employers (service providers) and the termination notices could not have been

*The Labour Appeal Court's (LAC) recent decision in **Nehawu v University of Cape Town and others** comes as a major blow to the labour movement. Andrew Burrow looks at how this decision effects the interpretation of section 197 of the LRA.*

enforceable. The Labour Court dismissed the application. Hence the proceedings before the LAC.

The majority decision

Van Dijkhorst AJA wrote for the majority of the court (Comrie AJA concurred). The majority decision is a sustained technical interpretation of section 197 of the LRA. The court found that key to understanding the section lay in grasping the extent to which it changed the common law position. It had always been the case that an employer could not transfer an employee's contract of employment to another employer without the employee's consent. The section confirms this rule. It creates an exception in one case only: namely where a business, trade or undertaking, or part of one, is

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transferred from one employer to another *as a going concern* (what we will call 'the exception').

Van Dijkhorst AJA found, however, that because the section is silent on the issue of the consent or agreement of the old and new employers, it did not intend to change the common law position, namely that they would have to agree that the employment contracts entered into between the old employer and the employees would be transferred to the new employer. In the absence of explicit agreement on this issue, the employment contracts would be terminated and there would be nothing to transfer to the new employer.

Even if we accept that the court's approach is the correct one, one still has to decide how to use this tool of interpretation. The answer to this question depends to a large extent on what one believes the focus of section 197 is in the first place. If the focus of the section is merely to make the transfer of employment contracts in the abstract easier, then business would seem to be the main beneficiary of the section, as the old employer is saved the considerable burden of retrenchment payments. If, however, the section, and its change to common law employee rights, is interpreted from the point of view of those employees, which seems reasonable, then the focus of the section is clearly individual employees.

The court, however, without any investigation of what the intention of the legislature might actually have been, arrived at the conclusion that the exception referred to above 'evidences an intention on the part of the legislature that transfers of businesses as going concerns be facilitated'. The court's next task was to interpret the important term 'going concern'. While the majority adopted what would seem a generous interpretation of the phrase, the way in which it then used it ensured that while large chunks of

businesses could be transferred from one employer to another, if the labour force was not explicitly included in the transfer, it would not qualify as a going concern. The court said: 'To say that there can be a sale of a business as a going concern without all or most of the employees going over is to equate a bleached skeleton with a vibrant horse'.

This approach would generally seem to augur well for labour, especially when one reads a little later in the judgment that 'When used in section 197(1) the phrase "going concern" must necessarily include the employees and where the seller and purchaser negotiate and agree on a sale as a going concern of a business or part thereof, the necessary implication is that they agree that the employees or a material part thereof are part and parcel of the transaction.' The court, however, immediately undermined this position by holding that the old and new employers could agree between themselves what parts of the business would be transferred: 'Purchasers and sellers of businesses as going concerns are at liberty to define what is included in that concept.' It is this voluntarist element that will ensure that outsourcing and, indeed, any commercial transfer of a business in future will be possible without the statutory protection section 197 was supposed to provide.

This approach also seems artificial: while many businesses would certainly be described by both seller and purchaser as 'going concerns' when transferred, to rely exclusively on what the two parties call the transaction might often ignore the substance of what is taking place. While the judge felt obliged to state that a court would not hesitate to call what was obviously a going concern transfer just that if the employers concerned tried to construct a sham, he did not consider the manner in which outsourcing actually

occurs in practice in this country.

The following scenario is only too common: a security department is outsourced. After the outsourcing, the same work is performed on the same premises. Often, it is even the same workers who perform the work. The only differences between this scenario and a section 197 transfer, of course, are that the workers' terms and conditions have been substantially downgraded, their continuity of service has been broken and their job security is now in the hands of often-shady 'labour brokers'.

It is hard to imagine why such an example would not satisfy anyone's definition of going concern, but it clearly does not satisfy the court's, as the labour component of the business has not explicitly been included in the transfer. What was intended, and what has in fact occurred bear no resemblance to each other. But what was actually intended? We have referred above to a loosely stated 'common understanding' of what the legislature meant section 197 to achieve, as well as to what the court thought was intended. Is there any evidence to support either view?

What did Parliament intend?

What did the legislature intend to change and what is the relevance of that intention anyway? To start with the second question, it has been an abiding, if somewhat contentious, presumption of our law that the intention of the legislature is a governing factor of interpretation.

Although there is some support for the view that this device should only be resorted to when the plain meaning of the words of the statute is not clear, it appears to be generally accepted that acts should generally be interpreted so as to give effect to what Parliament intended. However, there is a further consideration when dealing with an act like the LRA. To a large extent, as is apparent from the

Explanatory Memorandum¹ which accompanied the bill, the LRA is what we would call a remedial statute. This means that it was drafted specifically to cure certain deficiencies in our common law, and its interpretation is affected accordingly. As a well known writer says: 'Where a statute is remedial of a mischief or grievance it ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow.'²

We come now to the first question: what deficiencies might the LRA have been intended to cure? We do not need to guess about this aspect: the LAC had previously, in the *Foodgro* case, found it 'quite apparent' that the provisions of section 197 'are primarily aimed at the further protection of employees'.³ We can gather from this that the problem the legislature wanted to remedy was the loss of benefits and job security suffered by workers after a transfer or who were retrenched outright. These considerations were not taken into account by the majority.

Conclusion

While there is little to challenge about the court's technical interpretation of section 197, the sense one gets after reading the judgment, is that the judges have missed the mark. While the decision is open to challenge, and has in fact been referred to the Constitutional Court, it is clear the intention of the legislature has not been given effect to and it now seems incumbent on Parliament to rectify the situation once more.

Endnotes

¹ *Government Gazette, 10 February 1995*

² *EA Kellaway, (1995) Principles of legal interpretation, p 105*

³ *At 2525 C-D*

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