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Illuminating the operation of the transfer of business provisions in the Fair Work Act

The recent decision of Justice Katzmann in *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited*[1] for the first time directly addresses the requirement that for an industrial instrument to 'transfer' for purposes of the transfer of business provisions in Part 2-8 of the *Fair Work Act* 2009 (Cth) (**FW Act**), the work performed by a transferring employee for a new employer must be 'the same, or substantially the same' as the work the employee performed for the old employer.

Background

Prior to the establishment of the National Disability Insurance Scheme (**NDIS**), disability and allied health services in New South Wales were provided by the State Department of Families and Community Services (**FACS**).

Following the advent of the NDIS, from November 2017 responsibility for provision of such services was transferred to various private sector entities, including, Northcott Supported Living Limited t/as Northcott Disability Services (**NSL**). NSL also had a related entity, the Northcott Society (**Northcott**) which also provided disability services in the private sector. Both of these entities were national system employers for purposes of the FW Act. Amongst other things, this meant that they could make, be covered by, and enforce enterprise agreements under that Act.

As part of the process of transferring the provision of disability care services, the employment of some 1,200 FACS staff was transferred to NSL. Most of these employees were classified as Disability Support Workers (**DSW**), whilst others were relevantly classified as Team Leaders (**TL**) and Coordinators Accommodation and Respite workers (**CAR**).

The terms of this transfer included that transferring employees would: be guaranteed employment for a period of two years; receive a transfer payment from the State of up to eight weeks' pay; and continue to enjoy the same terms and conditions of employment as when they were employed by FACS. The terms of the transfer also included that neither NSL nor Northcott could make a new enterprise agreement covering the transferring employees during the two-year period.

In July 2019 Northcott announced a proposed restructure of its operations. This included dissolving NSL and transferring its staff to Northcott. DSWs and CARs would be offered employment with Northcott on the same terms and conditions as they currently enjoyed with NSL. The position of TL was, however, to be made redundant, although existing TLs were to be offered employment as 'Service Coordinators' with Northcott.

As Service Coordinators the former TLs would be covered by the Northcott Enterprise Agreement 2016-18 (**Agreement**). Amongst other things, this would entail a substantial salary cut as compared to that which was payable under their previous arrangements.

1 [2021] FCA 8.

In the same month, Northcott commenced consultation with the Community and Public Sector Union (**CPSU**) about the proposed restructure. In the context of the consultation process, the CPSU argued that the position description of TL under the existing arrangements was substantially the same as that of Service Coordinator under the proposed new structure. Northcott disagreed, arguing that there were significant differences between the TL and Service Coordinator roles. Accordingly, in September 2019 Northcott offered employment to each of the TLs on the basis of the Agreement.

The CPSU then activated the dispute settlement procedures under the industrial instrument that had covered the TLs as employees of NSL. Attempts to resolve the matter by these means proved unsuccessful, and in December 2019 the Union initiated proceedings in the Federal Court of Australia seeking a declaration that three State awards that had covered the TLs whilst they were employed by NSL continued to cover them in the role of Service Coordinators employed by Northcott.

The legislative context

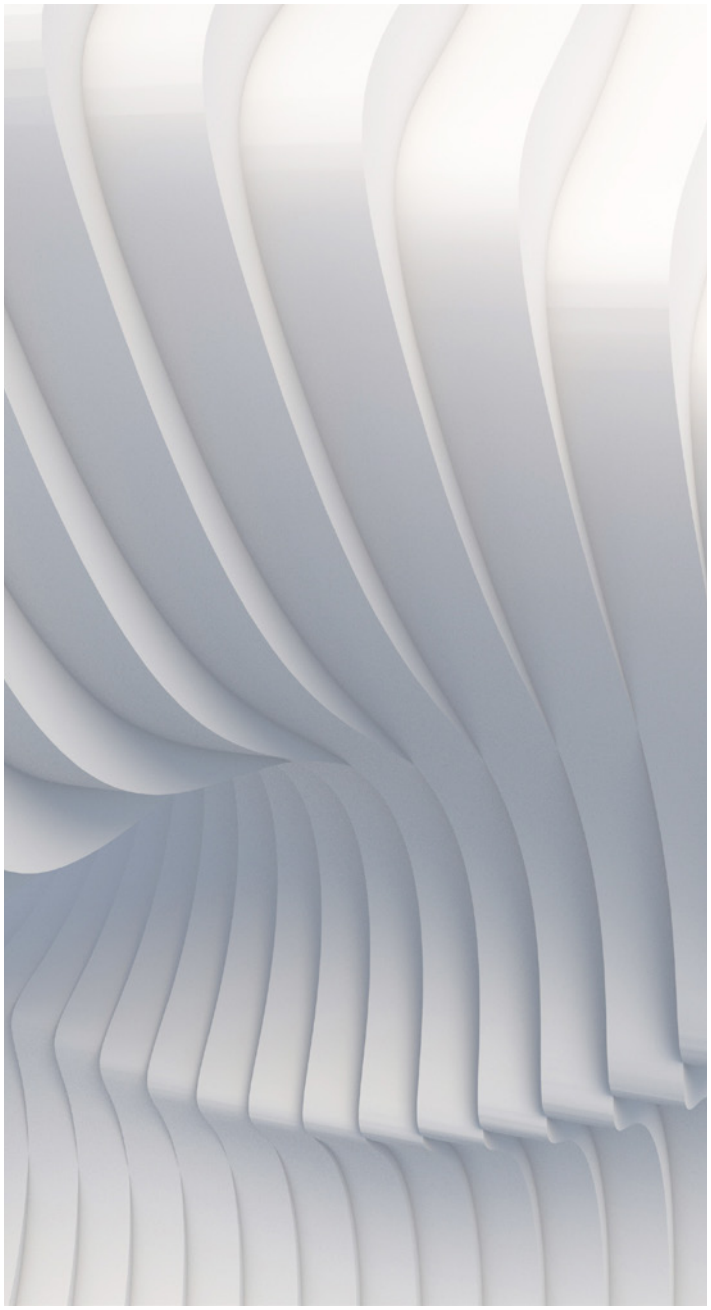
Immediately following the initial transfer, the three State awards that covered the TLs became 'copied State instruments' by force of Part 6-3A of the FW Act.[2]

Amongst other things, this meant that if there was a 'transfer of business' in the relevant sense between two national system employers then any copied State instrument that covered FACS (**the old employer**) also covered NSL (**the new employer**) in relation to any employees of the old employer who transferred to the new employer.

According to section 311(1) of the FW Act, for there to be a transfer of business in this context, four conditions must be satisfied:

a. the employee's employment with the old employer must have terminated;
b. the employee must become an employee of the new employer within three months of the termination;
c. the work performed by the employee for the new employer must be 'the same, or substantially the same' as the work the employee performed for the old employer; and
d. there must be a 'connection' between the old employer and the new employer within the meaning of section 311(3)-(6) of the FW Act.

These criteria were clearly satisfied in the context of the transfer from FACS to NSL. The issue before the Court in the present case was whether they were also satisfied in the context of the transfer from NSL to Northcott.



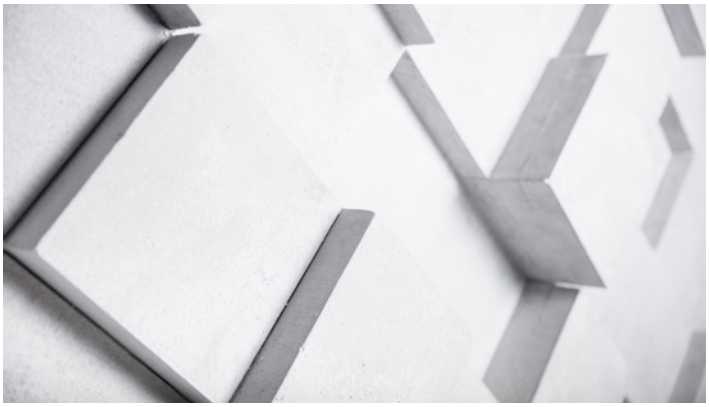
Justice Katzmann's decision

There was no dispute as to the first, second and fourth criteria: the TLs' employment with NSL had been terminated; the TLs who had accepted Northcott's offer of employment had become employees within the prescribed period; and there was a connection for purposes of section 311(6) by virtue of the fact that NSL and Northcott were 'associated entities'.

The case turned, therefore, upon whether the work performed by the former TLs in their roles as Service Coordinators was 'the same or substantially the same' as that performed as employees of NSL.[3] Justice Katzmann determined that it was.

2 Copied 'State instruments' include both 'copied State Awards' and 'copied State employment agreements' – FW Act, section 768AH.

3 56 TLs accepted Northcott's offer of employment as Service Coordinators, whilst 22 elected to accept voluntary redundancy packages – [2021] FCA 8, [36].



The Court's reasoning

Her Honour started from the premise that it would not be appropriate to adopt a 'technical approach' when considering whether an employee was performing substantially the same work as had formerly been the case. The focus should be on whether the 'fundamental nature' of the work had changed, rather than upon a comparison of the particular duties of the two positions.

Justice Katzmann considered that this approach was consistent with the objects of Part 2-8 as set out in section 309 of the FW Act:

> The object of this Part is to provide a balance between:
>
> a. the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and
> b. the interests of employers in running their enterprises efficiently,
>
> if there is a transfer of business from one employer to another employer.

This approach was also seen to be consistent with the legislative intent of section 311(1)(c) as expressed in the Explanatory Memorandum for the Fair Work Bill 2008 (**EM**):

> **It is intended that this provision not be construed in a technical manner**. It recognises that, in a transfer of business situation, there may well be some minor differences between the work performed for the respective employers. However, **the requirement is satisfied where, overall, the work is the same or substantially the same – even if the precise duties of the employees, or the manner in which they are performed have changed**.[4] [Emphasis in Reasons of Justice Katzmann]

In practical terms, this means that an employee can be seen to be performing substantially the same work even if:

a. the manner in which they perform their duties has changed;
b. the new position contains additional duties;
c. some duties are no longer required; and
d. a typical working day in the new position has a 'different composition'.

Justice Katzmann also addressed the reality that transfer of business exercises commonly involve changes of employer by groups of employees rather than just individuals. In that context her Honour referred to the following passage from the EM:

> [A]lthough paragraph 311(1)(c) is framed in terms of the work undertaken by an individual employee, **in many instances a transfer of business occurs and a group of employees is engaged by the new employer. In this circumstance, it may be possible to categorise the work more generally.** For example, if the old employer runs a supermarket and sells the supermarket to the new employer, **the work might be characterised generally as retail work in a supermarket. The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee.**[5] [Emphasis in Reasons of Justice Katzmann]

'Team Leaders' vs 'Service Coordinators'

Whilst employed by NSL, TLs managed the day-to-day operations at the relevant care home. They were specifically rostered for a certain number of hours dedicated to administrative duties and a certain number of dedicated patient care hours. They were not 'on call' in terms of providing care, but during patient care hours they acted as 'patient care role models' to other employees.

TLs also had some involvement in the recruitment, induction and training of new team members for the care facility at which they worked, and helped create the facility's roster, although they were not permitted to upload it to the payroll management system.

According to Northcott, Service Coordinators occupied a more senior managerial role than the TLs. Whilst they continued to work onsite, Service Coordinators did not work on a roster, with the consequence that they had more flexibility in when they performed their duties. They were 'on call', but were involved in patient care only as a 'last resort'. Unlike TLs, they were permitted to upload rosters to the payroll management system and had more involvement in recruitment and training than in their former roles. They also had more responsibility for determining the care home's patient load.[6]

Despite these ostensibly greater responsibilities, Justice Katzmann determined that Service Coordinators were in fact performing substantially the same work as TLs. Her Honour characterised both roles' fundamental nature as 'frontline management in a disability care home'. This

4 EM, para 1217.
5 EM, para 1218.
6 A table prepared by Northcott setting out what it claimed to be the 'key differences' between the roles of TL and service coordinator appears as an Annexure to the decision of Justice Katzmann.

characterisation was not altered either because their duties changed 'in some respects' or because the Service Coordinators enjoyed more managerial responsibility.

In reaching this conclusion, Justice Katzmann took account of a range of factors:

- **Similar seniority and duties**: In both roles, the employees were the most senior employee at the care home. They retained similar administrative responsibilities regarding the care home's management. They continued to supervise other workers and continued to perform managerial functions such as rostering, recruitment, and holding team meetings.
- **Similarities in position descriptions**: The additional responsibilities in the Service Coordinator position were clearly encompassed by the TLs' position description, and vice versa.
- **Similar purposes**: The position descriptions for both roles indicated that the employees' 'primary purposes' were supervising, leading and modelling best practice at the care home to junior employees.
- **The differences 'on paper' were not reflected in reality**: According to their position descriptions, Service Coordinators were meant to assist in patient care only as a 'last resort'. However, several employees gave evidence in the proceedings to the effect that, in reality, they were regularly required to assist with patient care. Some employees also said they had not realised they were expected to perform some of the new managerial duties.
- **An unchanging 'organisational context'**: When the employees transferred, there was no significant change to the 'organisational context' in which they worked. They continued to work for a disability service provider providing accommodation care services.
- **Changes in roster patterns**: The fact that the Service Coordinators were no longer rostered on designated 'patient care shifts', or worked to a roster, was 'immaterial'. This was despite TLs receiving higher remuneration because they worked to a roster.
- **Additional training (or the lack thereof)**: The fact the TLs had been expected to 'walk into' their new roles as Service Coordinators without any training was an 'entirely neutral' consideration in determining whether the two roles were the same or substantially the same. This would also have been the case if training had in fact been required.

Lack of relevant judicial authority

Despite the fact that the 'same or substantially similar' formulation has been in place for more than a decade, this appears to have been the first occasion on which the term came to be interpreted by a court of law. Nevertheless, Justice Katzmann did note that certain of the 'sham contracting' provisions in Division 6 of Part 3-1 of the FW Act were couched in essentially similar terms to section 311(1)(c),[7] with the logical inference that decisions under those provisions (and their predecessors in the *Workplace Relations Act 1996* (as amended)) could provide some guidance as to the interpretation of section 311(1)(c).

Her Honour was not in fact taken to any relevant decisions under the sham contracting provisions,[8] but it seems reasonable to suppose that in appropriate circumstances assistance could be derived from decisions such as *Myers v Arenco Holdings Pty Ltd*, where it was held that an offer of yoga-teaching work to a recently-dismissed employee whose previous role had been a combination of yoga-teaching and administrative assistance was an offer of 'substantially different work'. This was because the new position would not have involved administrative duties.[9]

Her Honour did, however, expressly refer to two British cases which lend support to the proposition that the duties of an employee can change over the course of employment without changing the essential character of the relationship:

- In *Cresswell & Ors v Board of Inland Revenue* computerisation of the processing of tax returns was found not to have fundamentally changed the nature of the employment of the employees who had formerly performed this work by manual means. In reaching this conclusion, Justice Walton observed that "there can really be no doubt as to the fact that an employee is expected to adapt himself (sic) to new methods and techniques introduced in the course of his employment", albeit that "in a proper case the employer must provide any necessary training or retraining".[10]
- In reaching this conclusion, Justice Walton referred to the earlier case of *O'Neil v Merseyside Plumbing Co Ltd*[11] where a direction to a gas fitter to work as a plumber was determined not to constitute such a substantial change in the nature of the fitter's work as to make his position redundant.

7 Specifically section 358 makes it unlawful for an employer to terminate an employee's employment in order to re-engage them to perform 'the same or substantially the same' work as an independent contractor, whilst section 359 makes it unlawful to knowingly make a false statement to a current or former employee in order to 'persuade or influence' them to perform as an independent contractor 'the same or substantially the same' work as they formerly performed as an employee.

8 [2021] FCA 8, [154].

9 [2019] FCCA 3077, [48]. Note also that in *Flageul v WeDrive Pty Ltd* [2020] FCA 1666, Justice Steward observed that an offer of consultancy work to a recently-dismissed CEO was not an offer of substantially the same work.

10 [1984] 2 All ER 713, 721.

11 [1973] ICR 96.

Key learnings for employers

The decision in *Northcott* provides an interesting illustration of the practical operation of an aspect of the transfer of business provisions that has hitherto received little or no consideration from any court or tribunal.

In some respects this lack of consideration is counter-intuitive. It is, after all, a key requirement for the application of the transfer of business provisions in Part 2-8. The explanation for this lack of judicial consideration may reside in the fact that the question of whether the work performed by a transferring employee for a new employer in a transfer of business situation is the same or substantially the same as that performed for the former employer is a matter that would normally be resolved by negotiation between the new employer and the transferring employee(s) and their representatives. *Northcott* was unusual in that the matter could not be resolved by these means.

Perhaps a more plausible explanation may derive from the fact that the question of whether work offered by a transferee was the same or substantially the same as that performed by the transferring employees for the transferor would normally be resolved in the context of the application of the 'suitable alternative employment' concept in section 122(3)(a) of the FW Act, or equivalent provision in an enterprise agreement.[12]

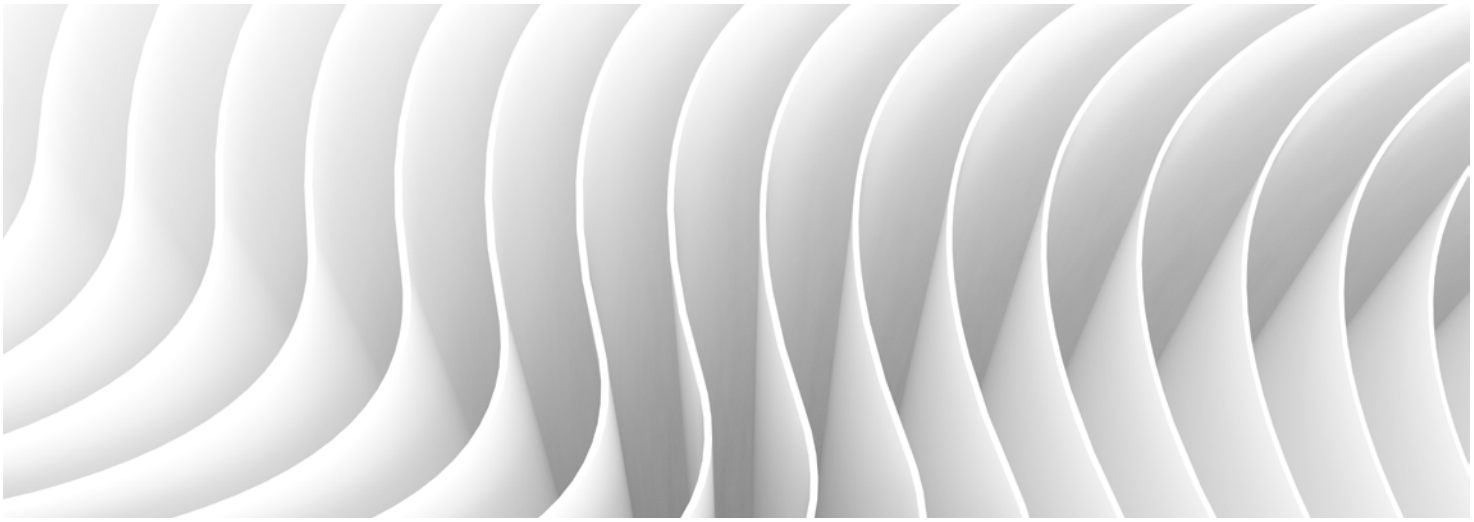
In other words, the question of whether proffered employment is the same or substantially the same as that formerly performed for the transferor is normally subsumed in the broader question of whether alternative employment is 'on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of the employment with the first employer immediately before the termination'. Put another way, the 'same or substantially the same' issue has normally been resolved before it is necessary to address the matter in the context of section 311(1)(c).

Be that as it may, the decision in *Northcott* clearly indicates that if and when it is necessary to determine the section 311(1)(c) issue, the courts (and tribunals) are not likely to be persuaded by overly-technical analyses of ostensible differences between roles when applying the statutory criterion.

That said, section 311(1)(c) is clearly intended to have some effect in practice. To take the supermarket example in the EM, it may be asked: "what if the shelf stacker was required to undertake stock control tasks in the transferee's warehouse, or to perform 'back of house' functions in the supermarket office?"[13] As the authors of this question observe, "there must obviously be a point at which the 'more general' categorisation cannot accommodate the difference between the work performed for the two entities".

This suggests that employers who find themselves in potential 'transfer of business' situations should carefully consider the position descriptions of potential transferring employees, with particular reference to any provisions which refer to the 'purpose' of the position, in order to ascertain whether new roles may be found to be the same or substantially the same for purposes of section 311(1)(c).

Employers should also take care to ensure that any ostensible differences between roles are real and genuine – that is, that they have substance and do not exist only 'on paper'. In seeking to ensure this, employers would do well to note Justice Katzmann's relative indifference as to whether training is provided to transferring employees and to changes in their rostering arrangements.



12 This appears not to have been an issue in *Northcott*, as evidenced by the fact that all TLs were offered voluntary redundancy packages, and, as indicated, 22 of them accepted the offer.

13 B Creighton & E Shi, 'The Transfer of Business Provisions of the Fair Work Act in National and International Context' (2009-10) 23 *Australian Journal of Labour Law* 39, 47.

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