The Fair Work Commission (FWC) clarified the hurdles for establishing a transfer of business, and so enforcing any prior employee agreements, where a new service provider (after winning a tender bid) takes over a prior service provider.

**In Issue**

- What ‘arrangements’ establish a transfer of business pursuant to s 311(1) of the *Fair Work Act 2009* (Cth) (the Act) between a successful tender bidder and prior service provider so as to effect a transfer of the successful tender bidder’s employment agreements.

**THE BACKGROUND**

A pathology service provider (the old employer) employed medical scientists and laboratory technicians to operate two hospital laboratories pursuant to an agreement approved by the FWC on 24 October 2014 (the agreement).[1]

On 1 July 2015, a new pathology service provider (the new employer) replaced the old employer following a successful public tender process. The new employer employed almost all the old employer’s medical scientists and laboratory technicians (the transferred employees). The new employer, for a limited time, also used some of the old employer’s equipment (the equipment).

The Health Services Union (HSU) sought orders that the agreement applied to the new employer on the basis that there was a transfer of business from the old employer to the new employer.

The crux of the issue in dispute was if there was an ‘arrangement’ between the old employer and new employer for the new employer to ‘own or have the beneficial use of ... [the old employer’s] assets (whether tangible or intangible).’[2] All other requirements for satisfying a transfer of business under s 311(1) of the Act were uncontroversial.[3]

HSU argued multiple arrangements had been made in relation to the equipment, transferred employees (including their ‘know-how’) and use of hospital laboratories.
THE DECISION

The FWC followed Full Bench authority[4] by adopting a broad interpretation of ‘arrangement’ to include a ‘moral obligation, assurance or undertaking’. Further the FWC held that conduct itself cannot result in an ‘arrangement’.

The FWC rejected the HSU’s view that the use of hospital laboratories resulted in an ‘arrangement’. The continued use of the laboratories by the new employer was considered a benefit from the hospitals to the New Employer and not from the old employer.

The HSU argued that the new employer was morally obliged to use the equipment. The FWC said that any moral obligation would be to the patients and for their welfare, rather than to the old employer. The FWC was also satisfied that the new employer used the equipment ‘out of self-interest’ and there otherwise was no communication establishing any kind of ‘arrangement’.

The FWC considered no ‘arrangement’ was made regarding the employment of the transferred employees despite the old employer providing access to them and the new employer making employment offers. This is because those actions were considered to be supported by the tender letter and hospitals, rather than any arrangement between the old employer and new employer.

The FWC also found the transferred employees’ ‘know-how’ was not an intangible benefit because the new employer’s equipment was different and required different protocols and training. This was despite the transferred employees’ knowledge of hospital policies and procedures because it was accepted (on evidence) that this formed only a small part of the work.

Ultimately, no ‘arrangement’ between the old employer and new employer was found to establish a transfer of business, resulting in the Agreement being inapplicable to the new employer.

IMPLICATIONS FOR YOU

Insurers, brokers and insureds should be aware of prior agreements upon notification of a successful tender bid. In some circumstances care may need be taken to ensure a statutory transfer of business is not established so that no subjection to any earlier agreement occurs.

Health Services Union [2018] FWC 2527 (8 May 2018)

Hayden Gregory, a graduate in our Insurance & Health team, assisted with writing this article.

[5] At [56].