IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 35
ARC 20/11

	IN THE MATTER OF	proceedings removed
	BETWEEN	WILLIAM TAN Plaintiff
	AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant
Hearing:	19 July 2011 By submissions filed for the plaintiff on 29 July 2011, 9 and 21 August 2012 And for the defendant on 25 July 2011, 26 July and 14 August 2012	
Counsel:	Rob Towner, counsel for plaintiff Garry Pollak, counsel for defendant	
Judgment:	14 March 2013	

JUDGMENT OF JUDGE B S TRAVIS

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[1] The first issue before the Court was whether the plaintiff, Mr Tan, was entitled to elect to transfer his employment to LSG Sky Chefs New Zealand Limited (LSG), pursuant to subpart 1 of Part 6A of the Employment Relations Act 2000 (the Act) because, allegedly, the nature of his duties at his previous employer, PRI Flight Catering Ltd (PRI), was providing food catering services for the aviation sector. The second issue was to determine the terms and conditions of his employment if he was so entitled.

[2] The matter was removed to the Court by a determination of the Employment Relations Authority (the Authority) on 23 March 2011.[1] It was agreed by counsel that the Court would issue an interim judgment determining the two issues and the issue of remedies was reserved.

[1] [2011] NZERA Auckland 109.

[3] The issuing of this judgment was delayed by the linkage of this case to other litigation in this Court involving LSG and previous employees of PRI and Pacific Flight Catering Ltd (PFC) its associated company through which it traded and by the High Court proceedings brought by LSG against PFC and PRI.[2] The most recent judgment in the proceedings Mr Matsuoka brought against LSG was issued on 21 December 2012.[3]

[4] The Supreme Court decision in *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd*,[4] which set aside orders made by the Court of Appeal on issues of continuity of employment under Part 6A of the Act, was issued on 9 August 2012 and I considered it had relevance to the issues which were required to be determined in the present matter. Counsel were provided with the opportunity to make further submissions on the applicability of the Supreme Court decision and did so. These have been taken into account in this judgment. This all, however, contributed to the delay in resolving this matter.

Factual findings

[5] Mr Pollak, in his closing submissions on behalf of the defendant, accepted that the evidence led on behalf of Mr Tan as to his duties, was not the subject of any disagreement and was not challenged. Mr Tan was not cross-examined on his brief of evidence. The following summary is derived from Mr Tan's evidence.

[6] Mr Tan described himself as an "airline equipment and supply supervisor". He had almost 19 years' experience in airline catering at Auckland International Airport. He had worked fulltime for P&O Flight Catering and Services NZ Ltd (P&O) as an airline equipment supervisor from September 1991. In 1996, PRI bought the flight catering business from P&O and Mr Tan continued as an employee with PRI until 22 February 2011. He was employed as airline equipment and supply supervisor. He stated that the change in his job description, by the inclusion of the words "and supply" did not mean there was any change in his duties. He worked at

[2] See *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2012] NZHC 2810.
[3] *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 220.
[4] [2012] NZSC 69, [2012] 3 NZLR 799.

PFC's premises near the Auckland International Airport. PRI provides food catering services to international airlines through PFC.

[7] In an addendum, dated 19 September 2005, to Mr Tan's individual employment agreement, the first schedule of his P&O individual employment agreement, was replaced with the following:

> … Your duties will encompass, but not necessarily be restricted to the following:
>
> a) To supervise all inward airline equipment and liaise with airlines to ensure a smooth supply of airline equipment
>
> b) To supervise airline equipment stock takes
>
> c) To ensure appropriate systems are used to monitor and keep track of airline equipment
>
> d) To ensure speedy communication with airlines regarding any equipment issues
>
> e) To supervise that airline equipment is issued correctly on the floor
>
> f) To raise any misuse or waste of airline equipment with senior management
>
> g) To train and supervise staff dealing with airline equipment as necessary
>
> h) To implement and supervise the Singapore Airlines Equipment management system
>
> i) To report as necessary to the Managing Director

[8] Clause 8 of the individual employment agreement was amended by the addendum to state that the employee had the sole right to decide to take on an instructor/auditor role, in lieu of his current role, at any time the employee saw fit. This role involved educating, coaching and training staff and auditing equipment management practices, stock takes, use and storage. Mr Tan said he never decided to take on an instructor/auditor role.

[9] Mr Tan said he performed a broad range of duties which were accurately summarised in the first schedule of his amended employment agreement set out above. His role involved supervising all equipment and inventory at PFC's premises and liaising with airlines about equipment by email to ensure a smooth supply of

airline equipment at PFC at all times. The purpose of his job was to ensure that all parts of the business had the equipment in stock that was needed to provide catering to all of the different airlines with which PFC had contracts.

[10] Mr Tan explained that with flight catering there are two different types of equipment: rotables and consumables. "Rotable" equipment means reusable materials, such as plates, cutlery, cups and trays. "Consumable" equipment means disposable items such as plastic lids used for meals, aluminium foil, plastic cups, paper napkins, condiments and tea and coffee. Condiments, tea and coffee were the only food stuffs Mr Tan was responsible for ordering; the purchasing officer in the kitchen was responsible for ordering all other food items. Both rotables and consumables items were used in providing in-flight meals for airlines; without the correct equipment, PFC could not provide the airlines' requirements. Most of the rotable equipment went from the store area to the kitchen, where it was used for preparing meals for airlines. Some rotable equipment was packed straight onto planes by the ground stewards, without going through the kitchen first. This was the equipment used for first and business classes on some airlines as sometimes meals were plated on the flights rather than in PFC's kitchen. Several of the consumable items were used in the kitchen, for example, the plastic lids and aluminium foil were used to cover meals before they were packed onto the trolleys that were taken onto the planes. Other consumable items such as disposable napkins and condiments were packed by the ground stewards directly into the trolleys without going through the kitchen first.

[11] Each of the airlines for which PFC performed work had different equipment needs and therefore it was important to have an accurate system within PFC's stores to ensure that the inventory levels could be checked and further equipment ordered when that was necessary. The main storage area of PFC was divided into aisles for six different airlines, with rotables on one side and consumables on the other. Some airline equipment was also stored outside the main store area to make it more accessible for staff that needed to use it.

[12] Mr Tan continually checked the stock levels for all of the equipment for the airlines serviced by PFC. At the end of each month, he would assist with a stock

take, enter his results on his computer and send the results to each airline. He would also send each airline an order for the equipment which was running low.

[13] Sometimes he was required to send orders for stock during the month when equipment that had previously been ordered had not arrived or when PFC was running low on equipment and needed it urgently. Orders placed during the month were known as "cabin load requests" because they would be loaded into a cabin on the next available flight to Auckland by the particular airline.

[14] Mr Tan liaised with the airlines by email, which were sent on the computer in Mr Tan's office. Mr Tan had his own office with a computer and printer for his use during all of the time of his employment with PRI. He used his computer daily but did not spend much time in his office, apart from when he needed to use the computer. He was responsible for the training, support and supervision of another staff member employed as the airline equipment officer by PFC and who acted as his assistant.

[15] Cathay Pacific was the only airline which sent its equipment, which Mr Tan had ordered, by shipping container. With the assistance of the airline equipment officer and other store persons, the container would be unloaded and the equipment placed in the storeroom. Mr Tan was "an accredited person" for Ministry of Agriculture and Fisheries (MAF) purposes. This authorised him to open containers from Cathay Pacific when they arrived at PFC's premises and did not require MAF personnel to be present. Mr Tan was required to check the container for unwanted pests and disease and then give clearance to unload it. He would then check the equipment against the orders he had made.

[16] The other airlines sent equipment to PFC by air cargo where it would pass through customs and MAF inspection and then get delivered by truck to PFC.

[17] If there was alcohol contained in the deliveries it needed to be sent to a bond cage immediately. There were two bonded alcohol supervisors who were responsible for making sure the alcohol was locked away securely.

[18] Mr Tan, a licensed forklift operator, would use a forklift to remove pallets to the main store area when necessary and a pallet jack to move equipment if the forklift was busy.

[19] Mr Tan was constantly in contact with other people in PFC's business about issues relating to stock and equipment. He had contact with personnel in the operational side of the business such as ground stewards or duty managers, as well as kitchen staff such as chefs or catering assistants. They would discuss when some issue with equipment arose, for example, when stocks were running low or could not be found. He helped personnel use the equipment control system which ensured that the records of stock levels were accurate. Stock requisition sheets had to be completed and forwarded to Mr Tan or his assistant and they were then entered into the computer system to ensure that the record showed how much of each type of equipment remained in stock.

[20] Mr Tan was responsible for the systems used to monitor stock and equipment levels across the business and he would make suggestions to senior managers about how the equipment could be managed better or more efficiently.

[21] Mr Tan would work Monday to Friday, usually from 6 am to 2.30 pm, but with flexible hours of work, totalling 40 hours per week. On 22 February 2011, according to his evidence, his hourly rate was $28.25 per hour gross. If he worked overtime he would receive additional pay at time and a half or time in lieu. He claimed to have a contractual entitlement to redundancy compensation and that he received five weeks' annual leave per year and five days' sick leave per year.

[22] Mr Tan did not report to any particular manager. Previously at P&O he reported to a purchasing manager. At PRI there was no such position or any other manager who directly oversaw his duties. He reported straight to the senior management team. He did not report to the duty managers or the sous chefs in the kitchen. He wore his own clothes to work and was not required to wear a uniform.

[23] Singapore Airlines (SQ) was PFC's biggest client and it took nearly two days to complete a stock take for that airline. Cathay Pacific would take slightly less time. The other airlines were less time intensive.

[24] Mr Tan's evidence was that in December 2010 he found out that PFC had lost the SQ contract to LSG. PFC told him that he had a right to elect to transfer his employment to LSG on the same terms and conditions that he enjoyed at PFC and gave him a form to confirm his election. He completed the form and returned it to PFC on 29 December 2010, ticking the box which indicated that he elected to transfer to LSG. A copy of that document was produced. On 21 February 2011 he received an information sheet from PFC purporting to summarise his rights in relation to his employment at LSG. The same day, PFC provided him with a letter which confirmed that he had been employed by "Pacific Flight Catering" from 23 September 1991 to 22 February 2011 as an equipment supply officer and that his employment had to cease due to restructuring.

[25] Mr Tan attended a meeting on 23 February 2011 at LSG where he met Marie Park, LSG's Human Resources Manager. He was told by Ms Park that LSG did not accept him as a transferee from PFC. On 2 March 2011, he received a letter from Ms Park which set out what were described as LSG's concerns about his transferring as a vulnerable worker, including a statement that he was a supervisor at his previous employment which was supported by his pay rate and employment agreement.

[26] Ms Park gave evidence for the defendant. Ms Park expressed the view that LSG could not agree that Mr Tan was an employee who was subject to Schedule 1A of the Act because he was not involved in food catering services at Auckland International Airport. LSG accepted that he was an employee of PRI, which was a business that performs food catering, but considered that he was in an administrative role.

[27] Ms Park said she met Mr Tan on 21 February 2011 for the first time and that he was represented by Eddie Mann, an industrial advocate. She said Mr Tan stated that he had accrued four weeks' annual leave, although the information that Ms Park

had received from PRI stated that his accrued leave was five weeks. She stated that Mr Tan could not confirm which figure was correct.

[28] Ms Park met with Messrs Tan and Mann again on 23 February 2011. At that stage Ms Park had received a copy of Mr Tan's employment agreement with PRI. She advised Messrs Mann and Tan that she needed to obtain some advice about whether or not Mr Tan was a food catering services employee, and required a few days. She claimed that Mr Tan said he was feeling tired after working in relation to the termination of the SQ contract and asked for the rest of the week on leave, to which she agreed. She then wrote to Mr Tan setting out her concerns and suggesting a meeting which took place at the offices of Bell Gully on Monday 7 March. Following that meeting, she wrote to Mr Tan, care of Bell Gully, on 9 March 2011 confirming that LSG had not accepted that Mr Tan was an employee of PFC eligible to elect to transfer to LSG but "in the meantime and in good faith, until this matter is resolved, we offer you conditional employment with LSG Sky Chefs New Zealand Ltd". After accepting that offer, Mr Tan commenced work with LSG on 13 March 2011.

[29] Ms Parks said in evidence that she found the duties outlined in Mr Tan's employment agreement and those that he later gave in his brief of evidence, reflected what LSG would have regarded as an equipment supervisor and that LSG's equipment supervisors were also MAF accredited persons. An equipment supervisor at LSG supervised approximately 10 employees, whereas Mr Tan had supervised one employee at PRI. Ms Park stated that this simply reflected the difference in size of operations between LSG and PRI.

[30] Ms Parks's evidence was that LSG did not regard equipment supervisors as food catering service employees as they did not handle, nor were they involved in food preparation or with the delivery or transport of food to the customer.

[31] Ms Parks advised that LSG took issue with whether Mr Tan had accrued more than four weeks' annual leave each year, or whether he was entitled to have his own dedicated office. Her evidence was that there were a number of discussions with Mr Tan as an employee of LSG in an attempt to settle him into LSG's business

and to get him familiar with the different stores and equipment systems. Her evidence was that, after a number of discussions, he expressed his intention to resign and could not be persuaded to stay with LSG. During the course of the submissions, I was advised that there may be litigation concerning the alleged resignation. The circumstances surrounding the termination of what might have been conditional employment were not addressed before the Court. I shall therefore make no further reference to it.

[32] Ms Parks confirmed in cross-examination that Mr Tan was accepted as a temporary employee and that PFC's employees, who had been employed washing up in the scullery, were accepted by LSG as transferring employees. She also confirmed that Mr Tan was required to share office facilities with four other supervisors, but who were not all on shift at the same time.

Principles of statutory interpretation

[33] Mr Towner on behalf of the plaintiff cited the following passages from my judgment in *Matsuoka v LSG Sky Chefs New Zealand Ltd*:[5]

> [37] All counsel made submissions on the legislative history of pt 6A and contended that the Court could have regard to extrinsic materials, such as explanatory notes, to guide it in its task, because they accepted that the provisions in question were ambiguous and unclear. I accept Mr Oldfield's submissions on the Court's role in interpreting statutes based on *Commerce Commission v Fonterra Co-operative Group* in relation to s 5 of the Interpretation Act 1999:
>
> > It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[5] [2011] NZEmpC 44, [2011] ERNZ 56.

[38] To similar effect the full Court in *Gibbs v Crest Commercial Cleaning Ltd* stated:

> Where Parliament's intention is clearly expressed in the statutory words, the Court must give effect to this intention and to the legislative scheme so expressed. If the statute is apparently ambiguous or deficient, the Court may have recourse to the background material relied on by the proponents of the legislation and by Parliament to attempt to discern what may have been its intention.

[34] Mr Pollak took no issue with those principles of statutory interpretation applying to Mr Tan's case.

Statutory provisions

[35] Counsel referred to the principal object of subpart 1 of Part 6A of the Act:

> **69A Object of this subpart**
>
> The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give –
>
> (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment;
>
> …

[36] Section 69F provides that subpart 1 of Part 6A is to apply to an employee if Schedule 1A applies to the employee and, as a result of a proposed restructuring, the employee will no longer be required by the employer to perform the work performed by the employee. Mr Towner adopted what I said in *Matsuoka* about s 69F:

> [49] This section must be interpreted in light of the objects of the Act. I accept Mr Towner's submission that the object of subpt 1, as set out in s 69A, is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person. I accept Mr Oldfield's submission that, also relevant to the interpretation of s 69F, is s 3(a)(ii), which provides that the object of the Act is:
>
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship-

…

(ii) by acknowledging and addressing the inherent inequality of … power in employment relationships; …

[50] This object was also called in aid by the Court when dealing with s 69N in the *Service and Food Workers* case [[2010] NZEmpC 113, [2010] ERNZ 331 at [17]].

[37] Again, I note that Mr Pollak did not appear to disagree with this interpretation.

[38] Section 69I insofar as it is relevant provides:

(1) An employee to whom this subpart applies may, before the date provided to the employee under section 69G(1)(b), elect to transfer to the new employer.

[39] Schedule 1A provides, insofar as it is relevant:

Employees who provide the following services in the specified sectors, facilities, or places of work:

…

(e) cleaning services or food catering services in relation to any airport facility or for the aviation sector:

[40] Section 237A allows for the Governor General, by Order in Council, to amend Schedule 1A to add to, omit from, or vary the categories of employees, on the recommendation of the Minister. The criteria for the Minister to make a recommendation after consultation are as follows:

(4) The criteria are—

(a) whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently:

(b) whether the restructuring of employers' businesses in the sector concerned has tended to undermine the employees' terms and conditions of employment.

(c) whether the employees concerned have little bargaining power.

[41] Section 69G required PRI to provide its employees who would be affected by the restructuring information sufficient to enable them to make an informed decision whether to exercise the right to make an election under s 69I. That section deals with the right of an employee to elect to transfer to the new employer. Under s 69J(1), the employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

The submissions and discussion

[42] Mr Towner noted that in *Matsuoka* I had rejected Mr Pollak's submissions that, because of the provisions of s 237A(4) and what the Court said in both *Gibbs v Crest Commercial Cleaning Ltd*[6] and *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd (No 2),*[7] Part 6A was intended to cover "vulnerable workers" and those words should form part of the test to determine whether an employee is to have the protection of subpart 1. I stated:[8]

> …In the absence of such words appearing anywhere within the relevant parts of the Act, the sections under consideration cannot be limited to such persons. There would be also be a difficult issue as to what, precisely, the word meant. On the facts of this particular case, the plaintiff, with his substantial salary package and protection in the event of redundancy, might not have been regarded as 'vulnerable', should that word have appeared.

[43] Since I decided *Matsuoka* and heard the present case, the Supreme Court in *OCS Ltd*[9] has stated:

> [10] We reach this conclusion while fully recognising, as Mr Cranney emphasised, by reference to s 237A, that subpart 1 is designed to protect vulnerable employees. ...

[44] I issued a minute to the parties on 10 August 2012 in which I asked:

> 5. Although the Supreme Court, at the point of the judgment from which I have taken the quotation, was dealing with the interpretation of s 69N(1)(c), does the Supreme Court's finding that subpart 1 was designed to protect vulnerable employees, also shall imply that it is only vulnerable

[6] [2005] ERNZ 399.
[7] [2010] NZEmpC 113, [2010] ERNZ 331.
[8] At [52].
[9] *OCS Ltd*, above n 4.

> employees who are protected by Part 6A? In other words is the Supreme Court effectively saying, for the circumstances in the present case, that the criteria in s 237A must apply to the categories of employees already contained in Schedule 1A?

[45] I noted that the word "vulnerable" does not appear in Schedule 1A nor in Part 6A, as I had concluded in *Matsuoka*, and invited counsel, if they required further clarification, to deal with the matter by way of a telephone conference call. I invited the defendant to respond first.

[46] Mr Pollak did so and submitted that it was LSG's contention in the *Matsuoka* litigation that Part 6A not only was intended to, but that it did, only protect "vulnerable employees". He referred to the material provided to the Court in that case, including transcripts and parliamentary select committee reports, and submitted that the intention of passing, and then amending Part 6A, was in the context of employees who were termed by all contributors to the parliamentary debate as "vulnerable employees". In support of that proposition he provided a reference to the parliamentary select committee's consideration, in changing the phrase "food services" to "food catering services" in Schedule 1A, to specifically exclude "chefs". The committee considered that chefs should not be "vulnerable employees" and therefore protected.[10]

[47] Based on the Supreme Court's statement in *OCS*, Mr Pollak submitted that this made it clear that Part 6A was designed to only protect vulnerable employees. Therefore the Court must consider whether Mr Tan could be described as vulnerable, as well as focussing on his duties. Mr Pollak submitted that any consideration now requires a two part approach, firstly as to whether or not the employee is undertaking protected work; and second whether or not such an employee is, or is not, vulnerable. He submitted the Court should take into account the criteria for amending Schedule 1A in s 237A(4) and apply that to the categories of employees already set out in that Schedule. He submitted there was no evidence that Mr Tan was employed in a sector in which the restructuring of his employer's business occurred frequently. He submitted that the best evidence of this was that he had

[10] Employment Relations Law Reform Bill 2004 (92-2) (select committee report) at 12.

worked for P&O and PRI/PFC for some two decades and there had been no evidence that the restructuring of any employer's business had occurred frequently.

[48] Mr Pollak also submitted that Mr Tan was remunerated in a way that would be more commensurate with his being a mid/senior level manager under an individual employment agreement. He submitted there was no evidence that any restructuring in this particular business or commercial sector undermined or was likely to have undermined Mr Tan's terms and conditions of employment. Finally, he contended that as Mr Tan was employed as a mid/senior level manager, as a logical consequence, it was difficult to say that he had "little bargaining power". Mr Pollak concluded that even if Mr Tan's duties fell within the meaning of the words in the Schedule, which was denied, he was not a vulnerable employee, and therefore Schedule 1A should not apply to him.

[49] Mr Tower responded and submitted that the Supreme Court's finding in *OCS Ltd* that subpart 1 of Part 6A was designed to protect vulnerable employees, did not also imply that it is only vulnerable employees who are protected by Part 6A. He submitted that the Supreme Court was not effectively saying, for the circumstances in the present case, that the criteria in s 237A must apply to the categories of employees already contained in Schedule 1A. He observed that the Supreme Court in the *OCS Ltd* case was concerned with the issue of whether certain employees were entitled to bargain for redundancy entitlements pursuant to s 69N of subpart 1. He submitted that the Supreme Court's judgment did not address the issue which was before the Employment Court in the present case, namely whether the plaintiff was entitled, pursuant to s 69I, to transfer to the employment of the defendant.

[50] Mr Towner also submitted that the ratio decidendi of the Supreme Court's decision was to be found in paragraphs [8]-[9] and [11] of its decision and that its comments in relation to s 237A were not an essential aspect of the Court's reasoning in relation to whether the employees concerned were entitled to bargain for redundancy entitlements with their new employer.

[51] Mr Towner also submitted that the Supreme Court was referring to the word "vulnerable" in paragraphs [10]-[11] of its decision in the same sense that it is used

in s 237A(4)(c), namely whether any of the employees concerned have "little bargaining power". He submitted that this was a different sense of vulnerability from that which was in front of the select committee in relation to the original Bill adding Part 6A, which was whether employees were employed, firstly, in a labour intensive sector, and, secondly, in low paid work. He then submitted that the Supreme Court suggests, in the final sentence of paragraph [11] of its decision that vulnerability, in the sense of little bargaining power, is not a requirement for subpart 1 to apply, because it uses the words "likely to be vulnerable". The Court stated:

> [11] … Mr Cranney invited us to read down the terms of s 69A(b). But we can see no proper basis for doing so, even giving full credence to the fact that employees of the kind with which the legislation deals are likely to be vulnerable and possess little bargaining power both originally and in the face of the restructuring.

[52] Mr Towner submitted, in adopting a purposive approach to the interpretation of s 69I, that it is difficult to see any compelling reason why an employee, in order to attract the protection of subpart 1, would need to be an employee who had little bargaining power. He submitted that all employees of a transferor company would have little bargaining power in relation to a transferee company or generally and it would be difficult, and at the end of the day, a futile exercise, to attempt to determine which employees were protected by subpart 1 and which employees had sufficient bargaining power so as not to require statutory protection. Mr Towner submitted, on the facts of this case, it could be readily said that the plaintiff had little bargaining power either generally or in relation to the defendant because, among other considerations, he was elderly and Asian and had been an employee of PRI for many years. In fact, there was no evidence before the Court of Mr Tan's age or ethnicity.

[53] Mr Towner submitted that there was no inconsistency between the *OCS* decision and my approach in the *Matsuoka* case. He also said it was consistent with a decision of this Court in *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd,*[11] where the Court recognised, in his submission, that the criteria in s 237A that the Minister is obliged to apply in determining whether to provide statutory coverage to a new group of employees, is a separate issue from the proper interpretation of the existing protection afforded by subpart 1.

[11] [2012] NZEmpC 86.

[54] Mr Towner also took issue with Mr Pollak's submission that the plaintiff was employed as a mid/senior level manager and contended that he was entitled to the right of election in s 69I because he provided, whilst an employee of PRI, food catering services for the airline sector. He submitted the plaintiff's protection derived from the nature of his job duties, not his job title. He submitted the definition of who was a "vulnerable employee" was the wrong question to be asked. The correct question was which employees are entitled to the protection of subpart 1 by reference to Schedule 1A and the services they provided? He submitted there was therefore no need for a two part approach and no difficulty for the Court in trying to ascertain what the words "vulnerable employee" meant. He submitted that s 237A does not envisage that "Schedule 1A categories already meet the Subsection (4) criteria".

[55] Mr Pollak did not elect to file any submissions in reply.

[56] I do not accept Mr Towner's submission that the statement in *OCS Ltd* is to be regarded as obiter dicta and therefore not binding. I consider the distinction between obiter dicta and ratio decidendi at the level of our Supreme Court is very fine and I consider myself bound to apply what the Supreme Court has said in interpreting subpart 1 of Part 6A.

[57] The difficulty, in endeavouring to apply Schedule 1A only to vulnerable employees, as both counsel have pointed out, is that the criteria specified in s 237A apply only to amendments to Schedule 1A not to employees already listed. As I previously observed in the *Matsuoka* case,[12] the word "vulnerable" does not appear anywhere in relation to Part 6A, even though it is clear from the parliamentary material that this appeared to be the type of employee to whom protection was going to be extended. Further, the criteria in s 237A do not use the word "vulnerable", but refer to sectors in which restructuring occurs frequently that has undermined the employees' terms and conditions of employment and where the employees concerned have little bargaining power.

[12] At [40].

[58] Applying the purposive approach to Schedule 1A on the basis, that, as the Supreme Court said, subpart 1 is designed to protect vulnerable employees, I am forced to conclude that the schedule as presently drafted without any limitations that could have addressed aspects of vulnerability may well have been intended to occasionally overprotect in order to ensure adequate protection of those the legislature considered were vulnerable. I therefore accept Mr Towner's submissions and decline to graft the criteria in s 237A onto those employees already listed in Schedule 1A. If the legislature had intended that it could easily have been achieved. Regard may still be had to the purpose defined by the Supreme Court in determining whether a particular employee's duties fall within the Schedule.

[59] If I am wrong in those conclusions and the criteria can be grafted onto Schedule 1A, the question arises as to who has the onus of satisfying those criteria. I preferred Mr Pollak's submissions on this point and consider it is for the employee electing to transfer under s 69I to show that he or she comes within that criteria. There is an absence of evidence which would assist the Court in determining whether the criteria had been met. I accept Mr Pollak's submission that the evidence before the Court shows that Mr Tan has been a long serving employee in the sector and there is no suggestion that there has been frequent restructuring. The terms and conditions of his employment which he is seeking to establish, show a substantial hourly rate, the right to penalty provisions for overtime, allegedly five weeks' leave and the use of his own office. It does not appear that his terms and conditions of employment have tended to be undermined by restructuring nor that he has little bargaining power.

[60] If the Supreme Court decision requires me to apply the s 237A criteria in Schedule 1A, then I hold that Mr Tan has not satisfied the criteria.

[61] I now move on to consider both counsel's submissions as to whether Mr Tan's duties brought him within the terms of Schedule 1A.

[62] Mr Towner submitted, based on my adoption of his submissions in the *Matsuoka* case,[13] that food catering services involved not just the cooking and

[13] *Matsuoka*, above n 5, at [65].

handling of food but also delivering food and drink to aircraft with the necessary implements to enable it to be consumed by the passengers. This included all the services necessary to get the food to the passengers in a form in which they would be able to consume it and included the provision of plates, cutlery, glasses etc.

[63] Mr Towner also cited a passage from *Matsuoka* in which I stated that I agreed entirely with the Authority's reasoning in *Hughes v Upper Hutt Cosmopolitan Club Inc*.[14] I said:

> [68] I agree entirely with the Authority's reasoning and find that the work performed by the plaintiff for the SQ and the CP contracts and the additional work he did in organising stock and performing deliveries to organise food supplies clearly amounted to the provision of food catering services for the aviation sector in terms of cl (e) of sch 1A.

[64] As I observed in *Matsuoka*,[15] Mr and Mrs Hughes owned and operated a catering company that had a contract with the Cosmopolitan Club (the club). When the club terminated the catering contract, Mr and Mrs Hughes sought to require the club to employ them directly as they both had been employees and their catering jobs had been lost once the club contracted the work in. The club had refused to employ them partly because Mr and Mrs Hughes were both 50 percent shareholders in their company and its only directors. The club also alleged that the employment agreements the Hughes's had with their company were a sham. Mr Hughes was in charge of the food side of the operation and Mrs Hughes was in charge of front of house management as well as accounting and finance functions. Both were paid substantially more compensation than their other employees.

[65] In *Matsuoka*,[16] I found that Mr Matsuoka had performed ground steward duties in relation to the Singapore Airlines (SQ) contract which had been lost to LSG for no more than one hour a day and one hour on other aircraft. In addition, he spent on average two to three hours a day arranging stock, water, and beverages and dry ice for SQ and for other airlines. He also arranged for trucks and the running of messages which I held may have contributed to the servicing of SQ and other

[14] WA 120/08, 17 September 2008.
[15] At [66].
[16] At [83].

airlines for PRI and PFC. I found that he provided a wide range of duties in relation to food catering services, notwithstanding his seniority and employment conditions.

[66] Mr Towner submitted that Mr Tan similarly had a wide range of duties, and like Mr Matsuoka, both worked in the stores area and organised supplies, both had some supervisory responsibility but neither worked in the kitchens. Mr Towner submitted that, unlike Mr Matsuoka, Mr Tan had no managerial responsibilities but Mr Tan had daily contact with the airlines about their catering requirements.

[67] Mr Pollak sought to distinguish the work performed by Mr Hughes and Mr Matsuoka in their respective cases because Mr Hughes was involved in the managing and organising of the kitchen and the preparation of food and Mr Matsuoka in the delivery of food to planes. However, he submitted that each, because of the individual duties they performed, provided food to third parties and therefore were food catering service employees in the preparation and delivery or serving of food.

[68] Mr Pollak submitted that, by comparison, Mr Tan's duties did not involve work in the kitchen or any part of the food handling process. Therefore he could not be described as a food worker in the actual preparation or organisation of the kitchen and its production and took no part in the delivery of that production. He submitted that the nature of Mr Tan's duties was stores management, which did not involve food stores. Whilst it was accepted by LSG that Mr Tan's role was important to the contractual arrangements between PRC and SQ, it was no different to that of other roles in PFC such as human resources, personnel, administration, finance, security, maintenance and trade related activities. These were administrative roles. Mr Pollak submitted that if Mr Tan can elect to transfer there would be nothing to prevent, as a matter of logic, employees in all the other types of categories electing to transfer as well. He advanced the floodgates argument and submitted that such a conclusion would be a considerable extension of the legislative intent.

[69] Mr Pollak submitted that there was little or no authority on the definition of a "food catering services employee". He endeavoured to draw an analogy between Schedule 1A of the Act and Schedule 1, which lists the essential services for the

purposes of notices in strikes and lockouts, covered by ss 90 and 91. The essential services, listed in Schedule 1, he submitted, refer to only to the business or industry in which the employee works. By contrast, he submitted, Schedule 1A relates to the actual work performed by the employee in the specified sectors, facilities or places of work. This, he submitted, was clear from s 69A, the objects provision for subpart 1 of Part 6A, which opens with the words:

> … the object of this subpart is to provide protection to specified categories of employees …

[70] Mr Pollak submitted this was also supported by s 237A(1) which refers to "categories of employees". Mr Pollak endeavoured to argue that the employees employed in essential services can cover anybody employed in the service, whereas, in Schedule 1A, it is specified categories of employees who are covered.

[71] Mr Pollak submitted that the distinction allowed one to conclude that all the employees of LSG or PFC could not be described as food catering services employees, whereas for the purposes of an essential service being provided by the enterprises listed in Schedule 1, all of the employees, without distinction, who go on strike or who are locked out are subject to the notice requirements. He submitted that if the definition of food catering employees is extended to Mr Tan, then the distinction between Schedule 1 and Schedule 1A would be blurred because any employee who elected to transfer would therefore be regarded as a food catering services employee, rather than considering the nature of the duties that the employee is required to perform.

[72] Mr Pollak cited *Dickson's Service Centre Ltd v Noel*,[17] which had considered whether "Mr Whippy" ice cream drivers who were on strike were involved in withholding essential services. Although on a literal reading, it appeared that the soft serve ice cream they provided to customers fell within the definition (processing or sale of dairy products) in cl 15 of the Third Schedule to the Employment Contracts Act 1991, which is also echoed in the current Schedule 1, the Court

[17] [1998] 3 ERNZ 841.

concluded that as, a matter of fact and degree, the work of the employees was not properly described as a service essential to the community.[18]

[73] Mr Pollak also cited *Cunningham Construction (1987) Ltd v NZ Labourers Union and ors,*[19] in which the issue was whether scaffolders engaged to work on the maintenance of an oil and gas production station were engaged in an essential service as defined in the Eighth Schedule to the Labour Relations Act 1987, as being involved in:

> … the production, processing, or supply of manufactured gas or natural gas (including liquefied natural gas).

[74] Cunningham Construction employed the scaffolders and provided their services to Robt Stone and Co Ltd which was engaged by Shell BP and Todd Oil Services Ltd (Shell) to perform maintenance work on that joint venture's production station. Chief Judge Goddard found that Shell was engaged in an essential service, but because the scaffolders, on the occasion in question, were not bringing gas into existence or generating it or applying any process to the raw materials and were not furnishing or providing it to anyone else, they did not fall within the definition of an essential service. The Chief Judge observed that if Parliament had wanted to extend the definition of an essential service to supporting work, it could easily have done so.[20] The matter then went to the Court of Appeal.[21] The Court of Appeal stated what it regarded as the correct test:[22]

> Is the worker employed to perform work which can properly be described as part of the essential service? Whether the test is satisfied in a given case will necessarily be a question of fact and may involve some factual enquiry.

[75] The Court of Appeal found the Chief Judge had applied too narrow a test:[23]

> It would not allow for the many components that go to make up a service such as that performed by Shell BP Todd. It would admit only those workers directly engaged in the basic activity and would exclude all involved in associated activities no matter how essential to the performance of the basic activity they may be. It is true, as the Judge noted, that in some

[18] At 867.
[19] [1990] 3 NZILR 573.
[20] At 575.
[21] *Cunningham Construction (1987) Ltd v New Zealand Labourers' Union* [1991] 2 NZLR 12 (CA).
[22] At 14.
[23] At 14-15.

> instances the schedule refers specifically to supporting work. But this only emphasises the work. Supporting work may or may not be part of the provision of the service. Whether it is, must necessarily be a matter of fact and degree. In determining where the line should be drawn, regard must be had to the plain statutory purpose, which is to minimise disruption caused by industrial action. The action of those providing certain kinds of supporting work may be just as disruptive as those immediately employed.
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> These workers were employed by a contractor to provide a particular service from time to time. Whilst the Judge accepted that maintenance work by Robt. Stone and Co Ltd was an essential part of the production, processing and supply of gas, he did not consider that the scaffolders' work was an essential part of that maintenance work, and on that basis properly came within the statutory criterion of employment in an essential service. That question, being one of fact, is not within the province of this Court. It is within the exclusive jurisdiction of the Labour Court. In those circumstances, we think the proper course is that instead of determining the appeal we should refer the matter back to the Labour Court for reconsideration pursuant to s 313 of the act; and we so direct.

[76] Mr Pollak referred to the consideration of these judgments in a later case decided by Chief Judge Goddard, *New Zealand Rail Ltd v National Union of Railway Workers of New Zealand Inc (No 2).*[24] There a strike took place in the plaintiffs' marshalling yards, at a time when the provision of rail services, other than on the Cook Strait ferry, was not defined as an essential industry. The plaintiff alleged that the distribution of dairy products, natural gas, bulk petroleum and dialysis fluids, by rail, brought the service within the scope of the Third Schedule of the Employment Contracts Act 1991 and, as some goods were destined for ships, the railway was part of "all necessary services", in connection with the loading or unloading of ships also covered by the Third Schedule. Counsel for the union, Mr Ford, had submitted that the employees of the plaintiff were involved in an entirely discrete enterprise of transportation which was not integral to the production and supply or distribution of the list of goods in the Third Schedule, or related to the arrival, berthing, loading or unloading and departure of ships.

[77] Chief Judge Goddard referred to the matters that he had in mind in *Cunningham* in favouring a narrower rather than a broader test, one of which was that the Third Schedule was written so as to be understood by practical people engaged in the practical conduct of industry.[25] Chief Judge Goddard concluded, applying the Court of Appeal decision in *Cunningham*, that if parties to employment

[24] [1992] 3 ERNZ 966.
[25] At 973.

contracts in the railways industry were found to be working in an essential service on the day of a strike or lockout, notice would be required. He noted that in the *Cunningham* case, if on the day that they struck the scaffolders had been working on erecting scaffolding necessary to repair a major break in an overhead natural gas pipeline, if there was such a thing, they would have been engaged in an unlawful strike if they had failed to meet the requirements as to notice in an essential industry. But that was not what they were doing. Chief Judge Goddard looked to the evidence to determine whether at the time of the strike and foreseeably in the immediate future, if it was allowed to continue, the plaintiff railway would be able to meet its contractual obligations to customers clearly engaged in an essential service. If those obligations involved part of the provision of the essential service, or of supporting such services in their own right, then they would be providing an essential service. He found that the supply of gas, petroleum, dialysis solution and dairy products all fell within that category. In addition, on the particular facts, at the time the particular workers went on strike it affected arrangements in place relating to the loading or unloading of ships and therefore, that also meant the railway workers were employed in the provision of essential services.[26]

[78] Mr Pollak submitted that these cases assisted his submissions and that anyone determining what a food catering employee was, would not consider an equipment manager to be such an employee. He also argued for a reasonably strict interpretative approach. He accepted that Mr Tan was involved in supporting the work of food catering services, as would other administrative staff, but as a matter of fact and degree, that did not bring him within Schedule 1A. He submitted that Part 6A is a unique legislative provision requiring an employer to compulsorily employ a stranger in circumstances where the new employer has no choice. Therefore the section needed to be interpreted strictly.

[79] I had some difficulties following the distinction that Mr Pollak was trying to draw between the words used in the two schedules. Although employees are not

[26] At 974-975.

referred to in Schedule 1, ss 90 and 91, which trigger the use of Schedule 1, do refer to employees employed in an essential service.[27]

[80] Further, I did not consider that the cases cited by Mr Pollak assisted him. To the contrary, they suggested that if on a particular day, when the actions of employees were being considered in the context of the requirement to issue strike notices, the employees were engaged in supporting an essential service, then they themselves were so engaged. Thus in the *New Zealand Rail* case, the strike affected the distribution of a range of goods and services relating to the loading and unloading of vessels covered in the Third Schedule and therefore brought the employees into the categories of essential services. If the work being carried out by the striking workers had not been involved with matters listed in the relevant Schedule as essential services, then they in turn would not have been required to have given notice and the strike would not have been held to have been unlawful.

[81] Mr Towner fairly conceded that not all employees of PRI or PFC were protected employees and therefore entitled to elect to transfer to LSG, as not all would have been providing food catering services. The difficulty was in defining the line between those that did and those that did not, for the purposes of Schedule 1A, provide food catering services. I put to counsel the problem of dealing with the manufacturer or outside supplier of items such as plates, knives, forks, glasses, all of which Mr Towner had contended were essential in providing the food catering services supplied by PFC. He accepted that the manufacturers and suppliers of the necessary goods and food and drink would be too distinct, but accepted that it was an arguable and possible interpretation of Schedule 1A that those suppliers were covered, if they had separate divisions which supplied PFC or PRI and those divisions had to close as a result of PFC losing the SQ contract. I consider that the

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[27] See s 90(1): "No employee employed in an essential service may strike …" . And s 91: "No employer engaged in an essential service may lock out any employees who are employed in the essential service …".

test applied by the Court of Appeal in *Cunningham* does provide guidance for determining which employee is covered by Schedule 1A.

[82] To paraphrase that test for present purposes, are employees who provide the services listed in Schedule 1A in the specified sectors, facilities or places of work properly described as providing food catering services in relation to any airport facility or for the aviation sector? Whether the test is satisfied in a given case will necessarily be a question of fact. Thus there may be uncertainty as to whether an employee is covered by Schedule 1A but that is unavoidable given the wording of the section.[28]

[83] With the indications given by the Supreme Court in the *OCS Ltd* case in mind, I accept Mr Pollak's submission that the test should be strict to ensure that it is consistent with the criteria specified in s 237A and the object of s 69A, to provide protection to specified categories of employees as a result of the proposed restructuring. Applying that purposive approach of protecting vulnerable workers to the extent of the support work performed would have brought Mr Matsuoka under the schedule, even though he was not a vulnerable worker as contemplated by s 237A because of the amount of food catering work he personally performed.

[84] All of the employees of PRI or PFC no doubt were employed to support PFC's food catering service. But not all were employed directly in providing food catering services. Mr Matsuoka was, because he delivered the food and drink to the aircraft for the consumption of the passengers.

[85] Mr Tan's duties were not so directly involved in supporting the services. His principal duties were involved in maintaining the necessary stores which in turn were used by those supplying food catering services. I am supported in that conclusion by the decision in the *Lend Lease* case.

[86] Mr Pollak had applied for leave to make submissions on that decision after the hearing and, over the opposition of Mr Towner, leave was granted. Counsel were also given the opportunity to make submissions on the full Court judgment in

[28] See *Cunningham*, above n 21, at 14.

Doran v Crest Commercial Cleaning Ltd[29] which I accept was not relevant to the present proceedings. I have taken these submissions into account.

[87] The issue in the *Lend Lease* case was whether labourers involved in activities such as gardening, mowing and horticulture, who also picked up litter as an incidental preliminary or preparatory task, were labourers who had been employed in providing cleaning services for the purposes of Schedule 1A.

[88] Judge Inglis noted that the term "cleaning services" is not defined in the Act and had not previously been considered by the Court in the context of Schedule 1A.[30] She stated:

> [43] Counsel for the defendant made the point that none of the potentially affected employees were described as cleaners. While a label may be a useful indicator, I accept Mr Drake's submission that the title attached to a particular role is not determinative. It is the nature of the services actually provided by an employee that is relevant for the purposes of Schedule 1A. This requires a factual assessment.
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> …
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> [50] Section 69A provides that the object of subpart 1, Part 6A is to 'provide protection to *specified categories* of employees', whose 'work' is to be performed for a new employer. The specified categories of employees are referred to in Schedule 1A, which relevantly refers to a number of occupational groupings – those providing orderly, caretaking, laundry, food catering and cleaning services. Schedule 1A is focussed on the nature or type of service provided by the potentially affected employee. This suggests a need to consider the overall nature of the employee's role in the context of the total work activity, rather than engaging in a minute dissection of individual components of the employee's work and whether they might be independently described as 'cleaning', 'food catering', 'orderly', 'caretaking' or 'laundry' functions.
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> [51] The point is reinforced by s 237A, which sets out the criteria that the Minister is to apply in recommending to the Governor-General that an amendment be made to Schedule 1A to 'add to, omit from, or vary the categories of employees.' …
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> Again, the focus is on the nature of the work as a whole.
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> …

[29] [2012] NZEmpC 97.
[30] At [42].

> [53] Adopting the wide interpretation advanced on behalf of the plaintiff would broaden the specified categories to a point where their legislative specification was rendered wholly redundant – employees providing food catering services would be covered under the cleaning services category because part of their role involves cleaning up during food preparation, and persons providing laundry services would be covered because their role involves cleaning dirt off clothes.
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> …
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> [56] Counsel for the plaintiff submitted that Mr Matsuoka was, for the purposes of s 69F, only providing food catering services to Singapore Airlines (the relevant contracting party) and that it was this component of his work that was relevant because it was this work which was contracted out. This contention supported counsel's claim that *Matsuoka* stood for the proposition that minimal work of the sort specified in Schedule 1A was all that was required. However, the focus of Schedule 1A is on the nature of the services being provided, not on the identity of the party they are being provided to. It is tolerably clear that the bulk of Mr Matsuoka's average day was consumed with the provision of food catering services to a range of airlines. Although not expressly stated, it appears to be this factual finding that underpinned the Judge's conclusion that Schedule 1A applied.
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> …
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> [62] Whether a category of employee can be said to be providing a cleaning service for the purposes of Schedule 1A will readily be answered where, for example, employees are employed as cleaners undertaking traditional office cleaning work. Issues may arise in relation to 'blended' roles. Such a case will require a factual assessment of the real nature of the role undertaken by the employee under their employment agreement and the relationship of the tasks in question to that role.
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> …
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> [81] The effect of Part 6A is to require an employer to engage employees, over which the new employer has no control or choice – effectively strangers. It is, in this sense, an exception to the usual principles regarding the freedom to contract in employment. The position adopted in New Zealand can be contrasted to the legislative framework in the United Kingdom, where all employees – rather than discrete categories of employees – are eligible to transfer. It is clear that Part 6A was intended to provide protection for limited categories of employees providing a particular type of service.

[89] Mr Pollak submitted that in *Lend Lease* the Court correctly held that it had to make a factual assessment as to the nature of the services provided by the employees although each described their work as involving cleaning, this was not decisive and

required analysis.[31] The Court held that the wording of s 69A suggested that there was a need to consider the overall nature of the employee's role in the context of the total work activity, rather than in engaging in a dissection of the employee's work.[32]

[90] Where there are, what the Court in *Lend Lease* described as "blended" roles, factual assessments will be required. Mr Pollak submitted that the plaintiff did not have a blended role and was not involved in any food preparation or delivery of food.

[91] Issue was taken with that by Mr Towner who referred to the unchallenged evidence of Mr Tan that he was responsible for the acquisition of tea, coffee and condiments and the supply of those items, which I accept, on the face of it, are food items for supply to an aircraft serviced by his employer. He also had a brief involvement, if there was alcohol included, in any of the shipments from the airlines and he would arrange for that to be taken into bond by the relevant employees of PFC. I accept that these duties did involve some aspect of food handling, but it is such a minor aspect, as was the cleaning aspect in the *Lend Lease* case that it did not alter the real nature of Mr Tan's duties. He was involved in the maintenance of stores equipment which supported the food catering services of PFC.

[92] Although this is a case which may be seen to be on the border line, I am not persuaded that the plaintiff has been able to show that the nature of his role was to provide food catering services, rather than maintaining equipment stores. While Mr Tan was a support worker, he was not proximate enough to the actual provision of the food services. The real nature of his work was the stores and that is not food catering. The small amount of tea, coffee and condiments he handled did not bring him into the Schedule. Further, he was not a vulnerable employee as envisaged by the criteria in Schedule 1A.

[93] In reaching that conclusion, as the Court did in *Lend Lease*, I note the effect of Part 6A is to require the new employer to employ in effect strangers without any control or choice. It was clear that Part 6A was intended to provide protection for

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[31] *Lend Lease*, above n 12, at [44].
[32] At [50].

limited categories of employees providing a particular type of service and I was not persuaded that Mr Tan fell within that category. It therefore follows that Mr Tan was not an employee who was entitled to elect to transfer from PRI to LSG.

Terms and conditions

[94] In case I should be wrong in those conclusions, I express the following views on the terms and conditions of Mr Tan's employment which he would otherwise have been entitled to transfer to LSG, were it not for my earlier decision.

[95] I accept Mr Towner's submission that terms and conditions of employment has a wide meaning which may even be wider than the terms of the written employment agreement and may include the circumstances and conditions in which a job is performed in practice. He cited in support of that proposition the following cases: *Tranz Rail Ltd v Rail & Maritime Transport Union Inc,*[33] *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v The Christchurch Press, A Division of Fairfax New Zealand Ltd,*[34] *Elston v State Services Commission (No 3),*[35] and *British Broadcasting Corporation v Hearn.*[36]

[96] Mr Towner submitted in reliance on s 69I(2)(a) and (b) that, on 23 February 2011 Mr Tan's existing terms and conditions as at 22 February when he was a full time employee of PRI, by operation of law, became his terms and conditions at LSG.

[97] Mr Towner submitted that Mr Tan's terms and conditions of employment included that he had his own office with a personal computer, that he worked with and alongside other employees and that he was not required to wear a uniform.

[98] Mr Towner conceded that, contrary to what Mr Tan's employment agreement stated, he was not entitled to a fuel card or health insurance, but again, contrary to what was in the agreement, that he received five weeks' annual leave.

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[33] [1999] 1 ERNZ 460 (CA).
[34] [2005] ERNZ 288.
[35] [1979] 1 NZLR 218 (SC).
[36] [1978] 1 All ER 111 (EWCA).

[99] I am not prepared to determine the issue of whether Mr Tan had five weeks' leave entitlement or whether that was unilaterally provided by PRI in anticipation of his transfer to LSG. These are issues that arose in other litigation, including *Matsuoka* and the actions of LSG against PRI and PFC in the High Court. I note also that at the first meeting between Ms Park and Mr Tan, Ms Park claims that Mr Tan confirmed that he had four weeks' leave entitlement, even though Ms Park had noted that was contrary to what was stated in his written agreement.

[100] Should my conclusions that Mr Tan had no right to elect to transfer to LSG be successfully challenged and if the parties are unable to resolve that issue then I reserve leave for them to apply to the Court to have this distinct matter resolved.

[101] As to the issue of whether Mr Tan was entitled to a separate office with a computer, to have contact with relevant employees as he did at PRI and was not required to wear a uniform, I am not persuaded that these were terms and conditions of his employment which he was entitled to seek to have transferred to LSG. Provided that LSG had given him the opportunity to carry out his work in an office, albeit shared with other people, with the necessary computer access and with the appropriate access to the relevant employees at LSG, I find that Mr Tan could have had no complaint. If his former employer at PRI had changed its work practices to include a shared office for Mr Tan and had required all relevant employees to wear uniforms, Mr Tan would not have been able to sustain an unjustifiable disadvantage personal grievance claim against PRI. However, I repeat that Mr Tan was not, in my view, an employee entitled to elect to transfer to LSG.

[102] Costs are reserved. If they cannot be agreed between the parties the first memorandum is to be filed and served by 5 April 2013. Any memorandum in response is to be filed by 19 April 2013.

B S Travis
Judge

Judgment signed at 4.15pm on 14 March 2013