IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 44
ARC 19/11

	IN THE MATTER OF	proceedings removed
	BETWEEN	JOHN MATSUOKA Plaintiff
	AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant
	AND	SERVICE AND FOOD WORKERS UNION Intervener
Hearing:	11-14 April 2011 (Heard at Auckland)	
Counsel:	Rob Towner, counsel for plaintiff Garry Pollak, counsel for defendant Timothy Oldfield, counsel for intervener	
Judgment:	18 May 2011	

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff claims to be legally entitled to transfer from his previous employment to new employment with the defendant (LSG) which has recently obtained a catering contract to service Singapore Airlines (SQ) at the expense of a previous contractor. The plaintiff claims to be so entitled by virtue of the provisions of subpart 1 of Part 6A of the Employment Relations Act 2000 (the Act) which have not yet been the subject of authoritative determination by the Court.[1]

[2] LSG and the intervener, the Service and Food Workers Union Nga Ringa Tota Inc (SFWU), both assert that subpart 1 was intended to provide protection for

[1] The Chief Judge has dealt with the meaning of "redundancy entitlements" in s 69N in *Service and Food Workers Union Nga Ringa Tota Inc and ors v OCS Ltd* [2010] NZEmpC 113 but this provision is not relevant to the current matter.

vulnerable employees employed in a labour intensive sector in low paid work. The defendant contends that by virtue of the plaintiff's management responsibilities, the nature of his work and his substantial remuneration package, he was not a vulnerable employee intended to be afforded the protection of subpart 1 of the Act.

The proceedings

[3] The matter was removed to the Court by the Employment Relations Authority on 11 March 2011[2] on the basis of seven questions of law which had not previously been before either the Authority or the Court. The matter was accorded urgency by the Chief Judge and was heard over four days on the basis of the pleadings filed in the Authority which disclose the following.

[4] The plaintiff claims that LSG has breached s 69I of the Act by refusing to accept him as its employee in the position he was employed in prior to the loss of the SQ contract. He also claims that he was unjustifiably disadvantaged by the actions of LSG and seeks a declaration, compliance orders, compensation in relation to his alleged personal grievance, damages, penalties for LSG's alleged breaches of contract and an order that LSG pays arrears of wages, interest and costs.

[5] LSG's reply alleges: the plaintiff has an entirely different type of employment agreement to those employees who have transferred to LSG; the plaintiff's employer was not the contracting party that lost the SQ contract; the plaintiff's conditions of employment were commensurate with a manager's employment terms and not those of a senior ground steward or a ground steward and, therefore, the plaintiff is not an employee entitled to elect to transfer to LSG. It also alleges that as a result of a particular shareholding that the plaintiff held and his personal relationships with the directors, he is and would remain, a direct competitor of LSG and would have a serious and obvious conflict of interest should he be able, by law, to transfer to LSG. It also alleges that the plaintiff in communications with it, misrepresented his role, that LSG has lost trust and confidence in him as a prospective employee and is not willing to employ him. Not all of these matters were pursued by LSG in its final submissions and it has been agreed by counsel that the issues of misrepresentation

[2] [2011] NZERA Auckland 97.

and conflict of interest will not be dealt with in this judgment. As the case developed LSG also claimed that ground stewards and senior ground stewards were not within the class of persons afforded protection by subpart 1.

[6] It was agreed by counsel that the Court in this judgment would determine whether the plaintiff had a statutory right to transfer to LSG and, if there was such a right, whether this was to be full time or part time employment. The other remedies sought by the plaintiff and the defendant's claims to be able to decline to employ the plaintiff or justifiably dismiss him on grounds independent of subpart 1, are reserved for further consideration if necessary.

Factual findings

[7] The hearing proceeded by way of cross-examination of deponents of affidavits although not all the deponents were required for cross-examination and not all of their evidence was subjected to questioning. As Mr Towner submitted, the commentary to High Court Rule 9.73 states that where the evidence of deponents has not been challenged generally it is to be accepted, particularly where bad faith or untruthfulness are alleged.[3] My factual findings proceed on that basis.

[8] There are a number of corporate entities with which the plaintiff and other witnesses in this hearing were involved. At the time of the hearing the plaintiff held 27,730 shares in a company called Pacific Rim Investments Ltd (Pacific Rim). The major shareholders were Terry Hay (322,600 shares), David Lawrence Nathan (285,740 shares) and William Drake (147,525). The total shareholding was 1,057,500 and I was informed that the plaintiff's shareholding amounted to 2.6 percent. A subsequent affidavit from the plaintiff states he has now sold his shareholding in Pacific Rim.

[9] Pacific Rim was an investment company which initially invested in the rights to distribute American brands of food and then provided the negotiation of the purchase of P&O Catering which was involved in food catering for airlines at Auckland Airport. This was done through a company called PRI Flight Catering

[3] McGechan on Procedure HR 9.74.02 cross-examination.

Ltd, (PRI) which was incorporated on 21 December 1995. Of a total shareholding of 102,600 shares in PRI, Pacific Rim held 88,353 shares. The plaintiff's evidence was that as PRI stands for "Pacific Rim Investments" it might have been seen as a short term investor in food catering services so the principal backing shareholders, Messrs Hay, Nathan and Hill incorporated Pacific Flight Catering Ltd (PFC) on 22 May 1996. This company has one share which is held by PRI.

[10] The plaintiff produced an individual employment contract dated 29 April 1996 which showed that he was employed by PRI as a projects manager based at Auckland. The plaintiff had a gross annual salary of $60,000 and other benefits.

[11] Under the 1996 agreement the plaintiff's line of responsibility was to Mr Hay as managing director. Mr Hay was married to the plaintiff's wife's sister. Mr Hay had been a friend of the plaintiff since the early 1980s when they were both living in Hawaii, where the plaintiff grew up. Mr Hay's wife died in 2001 but the plaintiff and Mr Hay have remained friends to the present day.

[12] The plaintiff's evidence was that he initially had a wide range of responsibilities in relation to vehicles and the maintenance of equipment as the project manager. He would obtain quotations, talk to contractors over the phone, arrange for the sale of equipment, look after the trucks and do all the extra jobs that needed to be done in relation to the equipment and materials necessary to service the airlines.

[13] The evidence satisfies me that the contractual arrangements to provide food catering services to SQ, Cathay Pacific (CP), Malaysian Airlines, Thai Airways, Air Tahiti Niu, Air Pacific and China Airlines were entered into by PFC, not PRI. The SQ contract with PFC ran from 1 October 2005 until 22 February 2011. It was by far the largest contract involving approximately 40 percent of PFC's resources.

[14] PRI is the company which operates the business of providing flight catering services and PFC is merely the trademark name of the business which appears on all signage and is how the business was referred to in the trade. PFC is not registered for GST nor for PAYE purposes. PRI is so registered and the invoices that were sent

to SQ, in the name of PFC, show PRI's GST number. Although not independently supported by documentation it appears that PRI has the relevant bank accounts, pays all the employees involved in the flight catering business and PFC is merely there for name protection purposes. According to the uncontested evidence of Gerda Gorgner, the human resources manager and acting general manager at PFC, SQ, because it was not aware of the existence of PRI, put PFC's name in the catering contract. I find that PRI operated the catering business for the PFC contracts and issued the invoices and accounted for GST and PAYE.

[15] The plaintiff entered into a written employment agreement with PRI on 1 October 2005. The plaintiff was said to be employed "as Senior Ground Steward" with "special duties at PRI Flight Catering LTD, Auckland, subject to the terms and conditions expressed in this Agreement". The plaintiff's main line of responsibility was again to the managing director and his key responsibilities were set out as follows:

- Advise Duty managers on truck usage patterns
- Assist with training staff
- Ensure standards of service delivery are always maintained with all airlines, but especially with Singapore Airlines
- Report non compliance issues of crew serving Singapore Airlines to the Managing Director (this will be treated confidentially)
- Ensure safety of operations working environment and instruct staff on safety procedures as required
- Identify strengths and weaknesses in staff and recommend specific training requirements. Help to conduct staff evaluations.
- Provide colleague support at all times
- Monitor work practices to ensure that correct procedures are followed at all times

[16] The plaintiff's rate of pay was $87,360 per annum, with a Southern Cross Ultra 400 Plan for the plaintiff and his family and a fuel card with a limit of $600 per month. He was entitled to 200 hours of annual holidays per year and could accumulate 600 hours. His redundancy compensation was to be 6 weeks pay for the first year or part thereof and 4 weeks pay for each subsequent year or part thereof, with his service deemed to have begun on 10 March 1992. The pay for the purposes of redundancy compensation was to include all bonuses, benefit and allowances as well as his base rate of pay.

[17] It appeared to be common ground that the plaintiff's duties were not correctly described in the 2005 agreement as being those of a "senior ground steward". Senior ground stewards at PRI were responsible for the checking of all the meals that were produced in the catering kitchens that are then packed into metal carts to be transported to the aircraft for each flight. They must check any special meal requirements of the passengers before the carts are packed and driven to the aircraft. They answer questions from airline staff, in the aircraft oversee the process of packing the carts with the dirty dishes and the like, checking with the cabin crew as to what has been unloaded and staying with the aircraft until the doors are shut for the flight in case any other issues are raised. The plaintiff did not perform those duties.

[18] The main duties of ground stewards, including the plaintiff, were placing all necessary equipment such as cutlery and glasses on the metal carts containing the food, loading and driving the trucks, unloading the carts and off-loading the empty carts from the aircraft and returning them to the base.

[19] The plaintiff's previous role as a project manager was described as being a "jack of all trades". It evolved into his performance of ground steward's duties in respect of the SQ first class galley on his own and occasionally helping out at the business class galley, servicing the CP contracts and occasionally helping out the ground stewards on other airlines serviced by PFC. His ground steward duties on both SQ and CP took up approximately two hours a day. Over and above the duties of other ground stewards the plaintiff also ensured that the trucks were at the correct loading docks and he ran errands off base when required to supplement food and equipment supplies. When he was not unloading or driving trucks the plaintiff would organise beverages for the aircraft that were being serviced, in particular juices and soft drinks, was in charge of the supply of dry ice to the aircraft and would help with stores. When working on stores he would drive a forklift. The stores and beverage work took an average of between two and three hours a day.

[20] Unlike the other ground stewards the plaintiff was not a shift worker and therefore did not appear on the duty roster. He did however, appear on the duty list

which showed that he was allocated to service SQ and CP aircraft and, where necessary because of staff shortages, he would work evenings and weekends.

[21] The plaintiff was constantly making suggestions and seeking improvements and brought matters to the attention of the managing director. Mr Hay departed for Hawaii some time in 2008. I find the plaintiff continued to report to Mr Hay right through until February 2011 and that Mr Hay was in daily contact with PRI. It is the plaintiff's continuing relationship with Mr Hay and the plaintiff's shareholding, that has given rise to the defendant's concerns about confidentiality and an alleged conflict of interest.

[22] The plaintiff's role was a unique one with in PRI. He had cheque signing power on behalf of PRI although he does not appear to have performed that role frequently. Two signatures were required on PRI cheques. Unlike any other staff performing ground steward's duties, he had his own office.

[23] On 22 December 2009 the plaintiff signed a document described as an "addendum" to the 2005 agreement which gave him the sole option to become an instructor or auditor for the operations department. The evidence was that this option was never taken up. The list of duties in that addendum are therefore irrelevant as to the work the plaintiff was performing as at 22 February 2001.

[24] In spite of the plaintiff's reporting line to the managing director and the plaintiff's responsibilities to instruct staff on safety procedures, conduct staff evaluations and report issues of non-compliance directly to the managing director, the plaintiff and his witnesses asserted that he was not a manager. I find that the plaintiff had a wide range of responsibilities and, as he stated, was the "eyes and ears" of the managing director. The plaintiff also maintained an involvement in the maintenance of equipment as he had when he was the project manager although this is not reflected in the wording of the 2005 agreement. Those duties were reduced when PRI appointed a full time maintenance manager, although the plaintiff continued to assist with some contractual aspects of the maintenance. The plaintiff's continuing managerial or at least supervisory role was also reflected in his pay rate

which averaged in excess of $42.00 per hour. The other senior ground stewards earned up to a maximum of $20 per hour.

[25] The evidence establishes that PFC engaged employees, although they were paid by PRI. However, some of the contractual arrangements that PFC had with employees demonstrate a substantial degree of confusion as to the true identity of the employer. The Pacific Flight Catering Ltd Catering Assistants Collective Employment Agreement Auckland, covering the period 2 December 2009 until 1 December 2010, for example, states that the employer is PFC but the document purports to be "Signed on behalf of PRI FLIGHT CATERING LTD". A number of the individual employment agreements for ground stewards were similarly described and signed. Four deponents of affidavits filed on behalf of LSG by former employees of PFC were not subjected to cross-examination and did not annex copies of the relevant individual employment agreements.

[26] Without having to resolve the difficult question of the identity of the employer of a number of the witnesses who were cross-examined, I conclude from the unchallenged evidence of four deponents, Messrs Tuiti, Ngkau, Parker and Sale that they were all employees of PFC. This is a finding which is relevant to the statutory framework. At all material times the plaintiff was employed by PRI.

[27] PFC's contract to provide catering services to SQ ended on 22 February 2011 and LSG commenced a superseding contract with SQ on 23 February 2011. As a result of the impending loss of the SQ contract, PFC undertook a restructuring. The details were not provided to the Court. As a result of the restructuring the plaintiff was advised by PFC that he was an employee affected by the restructuring and had a right to elect to transfer to LSG's employment. On 21 December 2010, on a form headed up "Pacific Flight Catering", the plaintiff notified PFC that he elected to transfer to LSG.

[28] The plaintiff was interviewed by Marie Park, the human resources manager of LSG on 23 February 2011. The plaintiff's name had appeared on a list of persons who had elected to transfer to LSG which was given to LSG on or about 15 February. At that stage the plaintiff and three other employees of either PFC or PRI

were represented by Eddie Mann, who advised Ms Park that he was being paid by PFC to represent the plaintiff. At the time of the meeting, Ms Park had the plaintiff's individual employment agreement but had not had the chance to have a detailed look at it and had not noted that the plaintiff had a different employer to the other transferred staff or significant differences in his role and terms and conditions. By this stage she had met with several ground stewards and senior ground stewards of PFC and had asked them about their duties.

[29] It became immediately apparent to Ms Park at the beginning of the 23 February meeting that the plaintiff's description of his duties as a ground steward was quite different to those of the other ground stewards and that he could not properly describe his duties. He claimed that he was a senior ground steward, that he took care of SQ and he was put into areas to make sure everything went well from start to finish. I find that he told Ms Park that he trained new staff, assigned trucks, undertook stock movements and checked stock levels and, from time to time, but not recently, had done dish washing duties, although he did not now work in the kitchen and had no one reporting to him.

[30] The plaintiff told Ms Park that he reported to Mr Hay. The plaintiff also said he reported to Ms Gorgner and to Mr Nathan, the other managing director, and that he was "independent" from the other employees. He stated that he was not a duty manager and that no one had a role similar to him and that he worked mostly in transport. After questioning from Mr Mann, the plaintiff said he was like a duty manager but without any reports. Ms Park asked him what role he saw himself having at LSG and the plaintiff replied that his role was already covered by two good people employed by LSG that he knew, and that he was used to small companies. LSG has approximately 700 employees in New Zealand, has companies around the world that operate independently and its head office is in Frankfurt.

[31] Ms Park found the plaintiff to be very personable and that his role was different to every other employee from PFC. He worked Mondays to Fridays, normal office hours and received $42 per hour and that his wage rate had not increased for some time. He claimed his wage rate reflected that he had been around a long time and that he had known the directors for 30-odd years. He was asked if

there was a potential conflict of interest and he responded that he did not think there was a conflict as he was friends with everyone and had just spoken to Raymond Wong, who works for LSG's regional office in Hong Kong. He claimed that he did not take leave and was owed "heaps" of annual leave and had booked a holiday to go to Hawaii in April 2011.

[32] The plaintiff confirmed to Ms Park that he was a minority shareholder of PRI and said that he had lots of shares in lots of companies and that he particularly liked to have shareholding where he had some control over the company. He confirmed that he was no longer related to Mr Hay due to the death of his sister-in-law. Mr Mann confirmed to Ms Park that the plaintiff's situation was very problematic. Mr Mann, who remained after the plaintiff left the meeting, told Ms Park that she had three options. She could employ the plaintiff, dismiss him or she could settle and the plaintiff was due a large redundancy payment which could be settled for $75,000 as a net payment, which did not include holiday pay which would be considerably in excess of that figure.

[33] I accept Ms Park's evidence. It was not greatly in conflict with the plaintiff's account of the meeting. I do not find that the plaintiff intentionally misrepresented his role at PRI, although he did not describe all his duties to Ms Park, and he was quite frank about his shareholding and his relationship with the managing directors.

[34] After correspondence with Mr Mann and an agreement to hold another meeting, Mr Mann advised Ms Park on 25 February that the plaintiff would turn up to work on the morning of 28 February. Ms Park responded that it was not appropriate for the plaintiff to be at work until a decision had been reached by LSG. That provoked a response from Mr Towner, whose firm was PFC's solicitors and who had been involved in High Court proceedings between LSG and PFC which had resulted in an oral judgment of Woolford J on 14 February 2011.[4]

[35] The plaintiff arrived at LSG on the morning of 28 February and there was a brief discussion regarding his wages. The plaintiff claimed that as PFC had lost the

[4] CIV-2011-404-000277.

High Court proceedings, he was an employee of LSG. It was an amicable meeting. The plaintiff then left LSG's premises and has not been back since.

[36] Ms Park and LSG's General Manager, Jacob Roest, gave evidence of their concerns about the plaintiff as an employee of LSG and whether he was legally entitled to be transferred. As these are matters which were addressed in the submissions, I will not summarise their evidence. LSG has continued to decline to recognise the plaintiff as one of its employees as from 23 February 2011 and the present state of uncertainty was the reason that urgency has been accorded to these proceedings.

Statutory provisions

[37] All counsel made submissions on the legislative history of Part 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*[5] in relation to s 5 of the Interpretation Act 1999[6]:

> It is necessary to bear in mind that s 6 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment[7] 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 the 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.

[38] To similar effect the full Court in *Gibbs v Crest Commercial Cleaning Ltd*[8] 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

[5] [2007] 3 NZLR 767.
[6] At [22].
[7] "Enactment" means "the whole or a portion of an Act or regulations" (see s 29 of the Interpretation Act).
[8] [2005] ERNZ 399 at [72].

> 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.

[39] In *Gibbs* the Court was dealing with the provisions of the Employment Relations Amendment Act 2004 and concluded that the main difference between employees covered by the original subparts 1 and 2 was that those designated as "vulnerable" under subpart 1 were intended to have explicit statutory protection, irrespective of the terms and conditions of their employment or other arrangements made by the persons affecting that employment. By contrast other employees under the former subpart 2 must have relevant provisions placed in their employment agreements, the form of which can be determined by negotiation.

[40] The word "vulnerable" does not appear in Part 6A but in the explanatory note to the introduction of the Employment Relations Law Reform Bill (No 2) 2003 it was stated:[9]

> The Bill also contains provisions designed to provide a higher level of statutory protection to groups of employees that are considered particularly vulnerable to and disadvantaged by change of employer.

[41] I adopt the full Court's analysis in *Gibbs* of the provisions introduced by the 2004 Amendment Act as Part 6A, insofar as those provisions still remain unamended As was noted in *Gibbs,* Part 6A is entitled "Continuity of employment if employees' work affected by restructuring" and subpart 1 "Specified categories of employees".

[42] In *Gibbs* the full Court found that the 2004 Amendment Act did not cover the situation described as "succession to contract" or "second generation contracting". The situation in *Gibbs* was seen to be one of those examples. The plaintiffs were employed by company A as cleaners. Company A had a cleaning contract with another company, the "Principal", under which company A's employees cleaned kindergartens for the Principal. Company A lost the cleaning contract. The Principal, which did not employ cleaners itself, gave the contract to the defendant (Crest). Crest did not employ any staff but appointed franchisees to perform the work for the Principal.

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[9] At 10.

[43] The Court found that the definition of "restructuring" as a result of the 2004 amendment did not cover the circumstances of the plaintiffs and concluded:

> [152] Although we are confident that the proponents of the Bill as introduced into the House intended "restructuring" to include the circumstances of the applicants (loosely called "succession to contract" or "second generation contracting") we cannot be confident that Parliament, when enacting the legislation after it had been significantly altered upon the recommendation of the Select Committee, itself intended such restructurings to be included. To attribute that to Parliament by reference to the words and phrases it used, would be to adopt a tortured, fragile and untenable meaning that they cannot reasonably bear.

[44] To use the language of the old rule of statutory interpretation, this "mischief" was addressed in the 2006 amendment. In the explanatory note to the introduction of the 2006 Bill, it was stated that the Government had introduced amendments to the Act in 2004 to provide a two-tiered framework of employment protection in situations where an employer's business was restructured and the employees' work was undertaken by a new employer. It was stated that those amendments aimed to ensure that the employment conditions of certain categories of employees, described as "specified employees", who worked in sectors such as cleaning and food services, were not undermined in specified restructuring situations. It went on to state:

> Further amendments to the Act are now necessary because of the recent decision of the Employment Court in *Gibbs (and others) v Crest Commercial Cleaning Ltd* (CC 10/05, 18 July 2005), which found that subpart 1 of Part 6A of the Act does not provide specified employees with the protection that the Government originally intended in a subsequent contracting situation. The Court's decision meant that the Government's policy intent in introducing the amendments to the Act was not met, and that the specified employees may have their employment conditions undermined in subsequent contracting situations.
>
> The Bill addresses the problems with the Act identified in the *Gibbs* case, and clarifies other issues, to ensure that the Government's original policy intent of protecting the employment conditions of specified employees is met.

[45] In addition to the situation where the specified employees had the right to transfer because of a sale of a business, the contracting out of work, or work being performed in house, it was said that the Bill was intended to provide the right to transfer to a new employer where:

- a contract between a principal and an independent contractor, who has employees performing the work, ends and is awarded to a new contractor (this will apply to all situations when a contract ends and is awarded to a new contractor).

[46] The introductory note stated that an employee can elect to transfer to a new employer only where there is a causal link between employment ending and the work moving to a new employer. Thus if the employment ended for reasons other than a restructuring, there would be no right to transfer. The amendments were said to have the effect of ensuring there was a right to transfer to a new contractor which never intended to be an employer at all (as was the case with *Crest*). It went on to state:

> The Bill clarifies that if only part of the employee's work is to be performed by a new employer, that employee is entitled to remain with his or her current employer for the part of the work that is not being performed by the new employer, and to transfer to the new employer for the part of the work that the employer will be performing. Similarly, where the work that the employee is performing is to be performed by more than 1 employer, an employee is entitled to transfer to each employer for the portion of the work that the employer will be performing. This means that following a restructuring situation an employee may have more than 1 employer.

[47] The 2006 amendment addressed the issues dealt with in *Crest* by including a definition of "subsequent contracting" in s 69C, a definition of a "new employer" in s 69D and by providing examples of "contracting in", "contracting out" and subsequent contracting", in s 69E.

Does the plaintiff have a right to transfer?

[48] In order for the plaintiff to have the right to transfer to LSG pursuant to Part 6A he must satisfy the Court that he comes within the provisions of s 69F which provides:

> **69F Application of this subpart**
>
> (1) This subpart applies to an employee if—
>
> (a) Schedule 1A applies to the employee; and
>
> (b) as a result of a proposed restructuring,—

(i) the employee will no longer be required by his or her employer to perform the work performed by the employee; and

(ii) the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person.

(2) To avoid doubt, this subpart applies even though the performance of the work by or on behalf of the other person does not begin immediately after an employee ceases to perform the work for his or her employer.

[49] This section must be interpreted in light of the objects of the Act. I accept Mr Towner's submission that the object of subpart 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.[10]

[51] In addition to the explanatory note to the introduction of the 2003 Bill referred to above Mr Oldfield also invited me to have regard to the reason why particular occupations were included in Schedule 1A. The explanatory note says:

> The Bill also identifies specific groups of employees who require special protection in restructuring situations, due to their particular vulnerability and lack of bargaining power.

[52] In spite of those indicators I cannot accept Mr Pollak's submission that, because this Court said in both the *Gibbs* and *SFWU* cases that Part 6A is intended to

[10] [2010] NZEmpC 113 at [17].

cover "vulnerable workers", that should form part of the test to determine whether an employee is to have the protection of subpart 1. 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.

The requirements of s 69F

[53] The first issue under s 69F was whether Schedule 1A applied to the plaintiff. This schedule, which was inserted by the 2004 amendment, provides, insofar as it is relevant:

> **Schedule 1A**
>
> **Employees to whom subpart 1 of Part 6A applies**
>
> 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.
>
> (f) cleaning services or food catering services in relation to any other place of work (within the meaning of the Health and Safety in Employment Act 1992).

[54] Clause (f) of Schedule 1A contains a wide description of all places of work other than those specified in paragraphs (a)-(e) inclusive and clearly covered the food catering services provided to a cosmopolitan club: see *Hughes v Upper Hutt Cosmopolitan Club Inc.*[11] There was also no issue in the present case that the food catering services were being provided to the aviation sector in terms of clause (e). The issue was whether the plaintiff fell within the description of an employee who

[11] WA 120/08, 17 September 2008.

provided "food catering services", there being no guidance in the Act as to the meaning of those words.

[55] Mr Pollak made the following submissions. The plaintiff for a short period of the day, engaged in the work of a ground steward, namely that of a loader driver, and thus, like other ground stewards, could not be described as a food catering employee. The plaintiff had no connection with the preparation or handling of the food: he did not check it, inspect it, pack it, but delivered it by truck to the aircraft, unloaded it and drove back used equipment. This took, at the most, 2 hours a day for SQ and CP. The majority of the plaintiff's time was taken upon other unrelated duties. Senior ground stewards, insofar as they checked what food was being placed in the containers for transport to the aircraft, might have had a tangential involvement in food catering services and thus be eligible for transfer in the event of a restructuring.

[56] Not surprisingly, Messrs Oldfield and Towner took a wider view of what was involved in food catering services. Counsel referred me to the legislative history and noted that the 2003 Amendment Bill originally did not refer to "food catering services" but merely to "food services". When the Bill was reported back from the Select Committee it was stated:

> **Groups of employees**
>
> The majority recommends an amendment to the list contained in Schedule 1A, as inserted by clause 67, to clarify that those working in the "food catering services" are to be included. The majority considers that the term "food services" included in the bill as introduced is too broad and should be deleted. The term "food services" could potentially include those working in more general food services such as restaurant chefs who would not be considered vulnerable employees, while "food catering services" restricts the scope to those involved in the preparation and delivery or serving of food to third parties for consumption in a catering situation.

[57] Messrs Towner and Oldfield both submitted that ground stewards' work involved the delivery or serving of food to third parties for consumption in a catering situation. Mr Towner supported this by reference to the following dictionary definitions:

the Concise Oxford Dictionary, Sixth Edition provides:

> ***cater*** ... Purvey food; provide meals *for*; …
>
> ... one whose trade is to supply food for social events, …
>
> ***purvey*** ... Provide or supply (articles of food) as one's business. ...

the Oxford English Dictionary, Second Edition, Volume II:

> ***cater ...***
>
> 1. … To act as 'cater', caterer, or purveyor of provisions; to provide a supply of food *for.* …
>
> 2. … To occupy oneself in procuring or providing (requisites, things desired, etc) *for.* …

the NZ Oxford Dictionary:

> ***cater*** … 1… (foll. by *for*) provide with food and drink, typically at social events and in a professional capacity. **2** … provide (food and drink) in this way (*catered a dinner for 20 people*). …
>
> ***caterer*** … a person who supplies food for social events, esp. professionally.
>
> ***catering*** … the profession or work of a caterer.

[58] Mr Towner submitted that Schedule 1A could have referred to food preparation or food handling alone, if that had been the intention. He submitted that food catering for aircraft necessarily involves the delivery of the food and related equipment to the aircraft and the loading of the carts onto the aircraft and the removal of the carts with the dirty trays and equipment.

[59] Mr Towner also cited *TranzRail Ltd (T/A InterIsland Line) v New Zealand Seafarers' Union*,[12] which dealt with the issue of whether an employer was required to provide food without charge to seafarers, in which Judge Colgan stated:[13]

> Ms Dyhberg submitted that to "provide" is to provide the opportunity of having the appropriate supplies of food and water. I find however that in this context the natural and ordinary meaning of the word "provide" in relation to food and water on ships is to supply without cost to the recipient seafarer.

[12] [1996] 1 ERNZ 216, at 227.
[13] At 227.

[60] Mr Oldfield adopted Mr Towner's submissions and contended that employment in food catering services involved not just the cooking and handling of the food but also delivering it to the aircraft where it could be ultimately consumed by the passengers. He submitted that the proper approach was to look at all the services necessary to get the food and drink to those passengers in a form in which they would be able to consume it. This included the provision of plates, cutlery, glasses etc. He also relied on the report of the Select Committee in support of this approach. He submitted that the ground stewards who were members of the union and whose role essentially involved driving food and drink to the planes for consumption in a catering situation would be covered by Schedule 1A.

[61] Perhaps more contentiously, in the context of the plaintiff's remuneration package and relationship to the managing director of PRI, Mr Oldfield also sought to construct, as part of the test of whether an employee would be covered by Schedule 1A, that employees providing food catering services must be employees who require special protection in a restructuring situation due to their particular vulnerability and lack of bargaining power. He acquired those words from the Select Committee report on the 2003 Bill where it was stated:

> Proposed new Schedule 1A, as inserted by clause 67, specifies the groups of employees to which subpart 1 of the new Part 6A applies. The groups included in the schedule are considered to be at risk because of factors such as a lack of bargaining power and whether they are employed in sectors that are frequently undergoing restructuring.

[62] Mr Oldfield observed that changes to Schedule 1A can be made by the Minister of Labour by Order in Council after considering certain criteria set out in s 237A of the Act. That section requires a recommendation from the Minister after a process of consultation and the application of the following criteria:

> **Section 237A**
>
> (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.

(5) In this section, restructuring has the same meaning as in subpart 1 of Part 6A.

[63] Mr Oldfield observed that the original Bill was altered after the Select Committee stage by the removal of an additional requirement in the proposed s 237A(4)(c) for employees to be "employed in a labour intensive sector in low paid work". The majority considered that this requirement did not "recognise that some employees may not meet this test, yet should still be considered vulnerable".[14]

[64] Had those words still been present in s 237(4)(c) it might have provided a basis for contending that, notwithstanding the plaintiff's involvement as an employee who provided food catering services for the aviation sector, he was not engaged in labour intensive and low paid work because of his particular contractual terms.

[65] I accept Mr Towner's submissions. Such guidance as may be obtained from the Select Committee report clearly contemplated the inclusion of both the preparation and the delivery of food to third parties for consumption in a catering situation. That in my view, would include the work of ground stewards in taking the food from the catering kitchen to the aircraft for consumption by passengers. The New Zealand dictionary definition and the common usage of the word "cater" would also include the provision of "drink" as well as "food" and the necessary implements for the third parties to be able to consume the items supplied to them.

[66] As I have already observed, nowhere in subpart 1 of Part 6A are the words "vulnerable employees", or any synonym used. I adopt the Employment Relations Authority's conclusion in the *Hughes* case cited by Mr Towner. Mr and Mrs Hughes owned and operated a catering company that had a contract with the club. When the club terminated the catering contract Mr and Mrs Hughes sought to require the club to employ them directly as they had both 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 the company, and its only directors, and they alleged the employment agreements the

[14] At 13.

Hughes had with their company were a sham. Mr Hughes was in charge of the food side of the operation. Mrs Hughes was in charge of the front-of-house management as well as the accounting and finance functions. They were both paid substantially more compensation than the other employees of their catering company. It was argued on behalf of the club that they were not vulnerable employees and should not be covered by Schedule 1A. The Authority concluded:

> [19] I do not accept that there is any necessity for employees covered in the Schedule to be *vulnerable employees*. Parliament has chosen through a considered process to cover certain categories of work, not certain categories of employees. The fact that prospective amendments to the Schedule must take into account certain issues is relevant primarily to such amendments. Parliament could have chosen to restrict the categories in a way that directly targeted Mr Quigg's category of *vulnerable employees*, but it has clearly chosen not to do so and the Authority can not ignore this.

[67] Fortuitously for the club in that case the Authority was able to hold that under s 6 of the Act the real nature of the relationship between Mr and Mrs Hughes and their company was not a contract of service and they were therefore not employees covered by Schedule 1A. Had the real nature of the employment been that of contracts for service, they would have been held to have been covered notwithstanding their shareholding and the other work they performed for their own company.

[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 clause (e) of Schedule 1A.

Has there been "a proposed restructuring" for the purpose of s 69F

[69] Before subpart 1 applies to a Schedule 1A employee, the consequences set out in s 69F(1)(b)(i) and (ii) must be as a result of a restructuring, as defined. It was common ground that the only relevant definition in the circumstances was "subsequent contracting" and example E in s69E(5). The relevant parts of the definition sections read as follows:

69C Meaning of contracting in, contracting out, and subsequent contracting

…

(4) In this subpart, unless the context otherwise requires,

subsequent contracting means a situation where—

(a) a person (person A) has an agreement with another person (person B) under which person B performs work as an independent contractor for person A; and

(b) the work or some of the work is actually performed by employees of person B or of a subcontractor; and

(c) the agreement or that part of the agreement under which person B performs the work expires or is terminated; and

(d) person A enters into an agreement with another person (person C) under which person C is to perform the work as an independent contractor for person A.

(5) The definition of "subsequent contracting" applies whether or not—

(a) the work concerned has previously been the subject of a subsequent contracting:

(b) the engagement of person B as an independent contractor constituted a contracting out:

(c) the work is to be performed by—

(i) person C or employees (if any) of person C; or

(ii) a subcontractor or employees (if any) of a subcontractor.

(6) To avoid doubt, in the definitions of "contracting in", "contracting out", and "subsequent contracting", references to work in relation to person A—

(a) mean work that person A is doing or would otherwise do in person A's own right; and

(b) include work that person A is doing or would otherwise do as an independent contractor or as a subcontractor.

69D Meaning of new employer

(1) In section 69I, new employer,—

…

(c) in relation to subsequent contracting,—

(i) means person C in the definition of that term; but

(ii) if, instead of person C or employees (if any) of person C performing the work concerned, person C subcontracts the work (whether before or at the same time as the subsequent contracting), means the subcontractor:

…

(2) In the rest of this subpart, **new employer** means the person to whom an employee—

(a) may elect or has elected to transfer under section 69I; or

(b) has transferred under that section.

69E Examples of contracting in, contracting out, and subsequent contracting

(1) This section contains examples of contracting in, contracting out, and subsequent contracting.

(2) Whether, in the following examples, an employee comes within the protection provided by this subpart depends on whether section 69F applies to the employee. …

…

(5) This subsection sets out examples of subsequent contracting.

Example E

An airport operator enters into an agreement with an independent contractor to provide food catering services at the airport.

Some time later, the agreement under which the independent contractor provides those services expires or is terminated.

The airport operator then enters into an agreement with a second independent contractor to provide food catering services at the airport.

Employees of the first independent contractor to whom section 69F applies may elect to transfer to the second independent contractor.

Note

In example E, it does not matter whether the agreement between the airport operator and the first independent contractor constitutes a contracting out.

In example E, the persons relate to the definition of subsequent contracting as follows:

- the airport operator is person A:
- the first independent contractor is person B:
- the second independent contractor is person C.

Example F

The circumstances in this example are the same as in example E, except that the first independent contractor engages a subcontractor to do the work or some of the work.

Later on, the agreement under which the subcontractor provides the work expires or is terminated and the first independent contractor engages a second subcontractor to provide food catering services at the airport.

The employees of the first subcontractor to whom section 69F applies may elect to transfer to the second subcontractor.

Note

In example F, the subsequent contracting occurs at the subcontracting level.

In example F, the persons relate to the definition of subsequent contracting as follows:

- the independent contractor is person A:
- the first subcontractor is person B:
- the second subcontractor is person C.

[70] Translating example E to the present facts, it would read as follows. An airline operator SQ (**person A**), enters into an agreement with an independent contractor PFC (**person B**) to provide food catering services to its passengers at

Auckland Airport. The agreement between SQ and PFC to provide food catering services to SQ at the airport then terminates on 22 February 2011.

[71] SQ had by then entered into an agreement with LSG (**person C**), a second independent contractor, to provide food catering services to its passengers at the airport.

[72] Employees of PFC to whom s 69F applies may elect to transfer to LSG. I have found as a fact that PFC did have employees but that the plaintiff was not one of them. He was, at all material times, employed by PRI.

[73] I do not consider example F applies. I find that PFC (**person B**), the first independent contractor, did not engage PRI as a sub-contractor to do the work or some of the work. Whatever the arrangements were between PFC or PRI it was not suggested that they were a subcontracting arrangement. To the contrary, the evidence is that PRI was trading as PFC and that PFC was but a shell company to protect the PFC name. Thus example F did not apply to the present facts. Mr Pollak submitted that because of this, LSG did not have to employ the plaintiff.

[74] Mr Towner submitted that the present circumstances still amounted to a restructuring as a result of a subsequent contracting, for the purposes of s 69F(1)(b). This was because persons (**A**), (**B**) and (**C**) in the definition in s 69C(4) all existed. Using that subsection Mr Towner argued:

> (a) SQ (**person A**) had an agreement with PFC (**person B**) under which PFC performed work as an independent contractor for SQ (**person A**); and
>
> (b) the SQ (**person** A) work or some of the work was actually performed by employees of PFC (**person B**) as well as by the plaintiff who was employed by PRI. The fact that employees of PFC (**person B**) and the plaintiff were also involved in providing food catering services for other airlines is not relevant;

(c) the agreement under which PFC (**person B**) performed the work for SQ (**person A**) has been terminated by SQ (**person A**);

(d) SQ (**person A)** has entered into an agreement with LSG (**person C**) under which LSG (**person C**) is to perform the work as an independent contractor for SQ (**person A**).

[75] Mr Towner submitted that as a result of that restructuring, as defined in s 69C(4), the consequences set out in s 69F(1)(b) applied to the plaintiff, an employee to whom schedule 1A applied, as follows, using the numbering from s 69F(1)(b):

(i) the plaintiff is no longer required by his employer, in this case PRI, to perform the work previously performed by him

(ii) the work performed by the plaintiff (or work that is substantially similar), namely SQ (**person** A) flight catering services, is to be performed by or on behalf of another person, namely LSG (**person C**).

[76] Mr Towner submitted that the issue of whether subpart 1 applies to an employee pursuant to s 69F does not depend on whether **person B**, in this case PFC, was the employee's employer. Put another way, whether there is a "subsequent contracting" and therefore a "restructuring" is a separate issue (to be determined by applying the definition of "subsequent contracting") from the issue of whether subpart 1 applies to an employee by virtue of s 69F.

[77] Mr Towner supported that proposition by observing that s 69F(1)(b)(i) states only that "as a result of a proposed restructuring" - "the employee will no longer be required by his or her employer" (in this case PRI) "to perform the work performed by the employee". The subsection does not state that it is a requirement that the employee will no longer be required by **person B**, as a result of **person B's** restructuring. Section 69F could easily have referred expressly to employees of **person B** if that had been the intention, particularly given that **person B** is a defined term in the same subpart 1.

[78] Mr Oldfield somewhat reluctantly supported Mr Towner's submissions contending that should I find that, because the plaintiff was not employed by **person B** (PFC), the subpart did not apply to him, the door should not be shut on other vulnerable employees' ability to access the legislative protections, simply because they may not be employed by **person B**. This was because **person B** in some circumstances, may not employ anyone at all but may use subsidiaries or related companies or other entities to service its contract with **person A**. Mr Oldfield helpfully gave the example that **person B** may be a holding company, perhaps of a rest home group, and that members of the group may be **person B** in their own right who have the contracts to provide cleaning, or food catering services, for **person A** in a wide variety of places of work. The legislation does not expressly include subsidiaries or members of a group of companies but, as Mr Oldfield submitted, neither does it exclude them.

[79] Although not entirely free from difficulty, I accept Mr Towner's submission that the present circumstances do fall within the definition of subsequent contracting in s 69C(4), even though the plaintiff was never employed by PFC (**person B**). The loss of the PFC contract with SQ affected the plaintiff as an employee of PRI because he could no longer perform his work on SQ aircraft. Because PRI engaged in a restructuring as a result of the loss of PFC's SQ contract, the plaintiff was no longer required by his employer PRI to perform the work performed by him. That work (or work that is substantially similar) is now to be performed by or on behalf of another person, LSG.

[80] This follows the express words of s 69F. I find that the requirements of s 69F are satisfied and subpart 1 therefore applies to the plaintiff.

[81] The plaintiff was entitled to elect to transfer to LSG which, subject to any statutory or other exceptions, was required to employ him by virtue of subpart 1, on 23 February 2011.

The terms of the plaintiff's employment

[82] The plaintiff has elected to transfer to LSG. Section s 69I(2) provides:

> (2) If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee—
>
> (a) becomes an employee of the new employer on and from the specified date; and
>
> (b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and
>
> (c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

[83] I have found as a fact that the plaintiff performed ground steward duties in relation to the SQ contract for no more than one hour per day. Another hour was taken up in performing duties on CP aircraft. On average two to three hours per day were involved in arranging stock, water and beverages and dry ice for SQ but also for other airlines. The plaintiff's arranging of the trucks and running of messages may also have contributed to the servicing of SQ and other airlines for PRI and PFC.

[84] The defendant submitted that if the Court was to find, as I have, that the plaintiff became an employee of LSG by operation of law on 23 February 2011, in terms of s 69I(2), his duties for LSG should be restricted to approximately one hour per day, being the work he previously performed for the SQ contract. Mr Pollak submitted all of the plaintiff's other work was not capable of being transferred to LSG as it was not directly referable to his performance of the SQ contract.

[85] Mr Oldfield submitted that it was possible for an employee to transfer only part of his or her work to a new employer if only part of the employee's work was affected by the restructuring. He noted that s 69B states that the definition of "work", in relation to work performed by an employee, includes part of the work performed by the employee. He also observed that under s 69I an employee may be employed by more than one employer if only part of his or her employment was affected by restructuring. He submitted that typically this might occur where a cleaner is employed by an employer to clean multiple sites under different contracts with different clients and where only one of those contracts was lost. It was

therefore also possible, as part of a restructuring, that part of an employee's work would transfer to the new employer and the employee would become employed by two employers. He submitted that should result in a corresponding recognition of only part of that employee's entitlements by the new employer. He noted that in the explanatory note to the 2006 Bill the changes were said to be designed to make it clear that part of an employee's work may be transferred. That is now reflected in s 69I(3) which provides:

> (3) To avoid doubt,—
>
> (a) the election of an employee to transfer to a new employer may result in the employee being employed by more than 1 employer if—
>
> (i) only part of the employee's work is affected by the restructuring; or
>
> (ii) the work performed by the employee will be performed by or on behalf of more than 1 new employer; and
>
> (b) a person becomes the new employer of an employee who elects to transfer to the new employer whether or not the new employer—
>
> (i) has, or intends to have, employees performing the type of work (or work that is substantially similar) to the work performed by the employee who has elected to transfer to the new employer; or
>
> (ii) was an employer before the employee transferred to the new employer.
>
> (c) this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.

[86] Mr Oldfield submitted that the extent to which an employee transfers to a new employer would depend on whether the employee would be no longer required to perform work because of the restructuring, in terms of s 69F(1), and whether the employment is affected by the restructuring.

[87] Mr Towner submitted that LSG's interpretation of the application of subpart 1 would lead to consequences which would be contrary to the object of that subpart to provide protection to employees and in some circumstances would be unworkable. He submitted that LSG's argument would leave protected employees who were previously employed on a full time basis, with one employer, losing that status and becoming part time employees with two or more employers. He accepted

that where there is a clean split of job duties and a clear proportion of duties to different employers, that may result in multiple employment pursuant to s 69I(3). He submitted, however, that it was wrong to focus on the detail of an employee's duties when applying s69I(2) because a new employer might perform one of the services described in schedule 1A in quite a different manner to that of the previous employer. He submitted the correct focus is on the nature of the employee's work which, in the case of the plaintiff, is providing food catering services and not on how the new employer carries on its business. He submitted that if LSG's arguments were correct then the new employer could control the process and deny the employees the protection of subpart 1.

[88] In the present case, as Mr Towner submitted, the plaintiff's work was affected to the extent that his employment with PRI was to be terminated. He was no longer required to perform any work for PRI, not just the SQ work. It is to be noted that the work performed by ground stewards and senior ground stewards at PFC was not specialised to one particular airline but that they all, including the plaintiff, performed tasks for other airlines with which PFC had flight catering contracts. The position may be different with LSG but that is not relevant for present purposes. It may however, give rise to issues of redundancy.

[89] I agree with Mr Towner's submission that the wording of s 69I(2) to "the extent that the employee's work has to be performed by the new employer", are ambiguous and should be construed in light of the purpose of subpart 1 and its object, as expressed in s 69A. I accept his submission that the work in this case is "food catering services". The affected employees provided a wide range of duties in relation to food catering services for a number of different airlines, which fluctuated depending on the day of the week, rostering, the need to be flexible in accommodating air flight schedules and employees' circumstances.

[90] The only workable interpretation of the words in s 69I(2), in such circumstances, is that the plaintiff, in electing to transfer to LSG, did so as a full time employee. As a result of a proposed restructuring by PRI he was no longer going to perform the full time work he performed for PRI. The plaintiff was a full time

employee of PRI, albeit not a shift worker, and a transfer on any other basis would not be on his same terms and conditions, as required by s 69I(2)(b).

[91] The wording in s 69I(2) does not say:

> To the extent that the employee's work on a particular contract held by a business or on a particular aspect of a business is to be performed by the new employer.

But states it is:

> To the extent that the employee's work is to be performed by the new employer.

[92] Further, s 69I(2)(b) not only states that if an eligible employee elects to transfer to a new employer they will become the employee of the new employer on the same terms and conditions that applied on the date of restructuring. It also specifically states that these include the "terms and conditions relating to whether the employee is employed full-time or part-time".

[93] On that basis, as the plaintiff was a full time employee of PRI and, as I have found, eligible to transfer his employment to LSG, the transfer is as a full-time employee.

Impediments to the plaintiff's employment by LSG

[94] The defendant has raised a number of additional reasons for refusing to accept the transfer of the plaintiff's employment. These include misrepresentation, a potential conflict of interest based on the plaintiff's shareholding and relationship with the managing directors and his remuneration package. These are reserved for further consideration, possibly in the context of the plaintiff's personal grievance. Remedies are also reserved.

[95] It is, however, accepted by the defendant that there are no express statutory provisions in subpart 1 of part 6A which would permit a new employer to decline to accept an employee entitled to transfer on grounds such as misrepresentation, fraud, criminal record or the like. Such grounds may provide an employee with

justification for declining the employment to a person who, as a result of the right to transfer would be an "employee" as defined in s 6(1)(b)(ii) as a person intending to work. Such matters may also provide grounds for justification for a subsequent dismissal. These are all matters which would be addressed in terms of s 103A of the Act as part of the general employment law of New Zealand rather than under subpart 1 of part 6A.

The seven questions

[96] For the above reasons I answer the seven questions posed by the parties to the Authority on the removal application, suitably modified in response to counsel's submissions, as follows:

> 1) What was the identity of the plaintiff's employer and was it a contracting party for the purpose of Part 6A of the Employment Relations Act 2000? The term "contracting party" is not used in subpart (1) of Part 6A. PRI is the entity which carried on the business and performed the catering contract that PFC had with SQ. PRI was the plaintiff's employer but it is not necessary that the plaintiff was an employee of PFC for him to be affected by PRI's restructuring.
>
> 2) The applicant at the time of the hearing was a shareholder of a small private company, Pacific Rim, that is the owner of both PRI and PFC and had a close personal relationship with one of the managing directors of PRI. The consequences of this are yet to be determined but as a matter of law it does not prevent LSG being obliged under subpart 1 to employ the plaintiff.
>
> 3) Notwithstanding the plaintiff's employment conditions, his seniority, his relationship with his legal employer, and with other shareholders, he is still an employee who is entitled to elect to transfer irrespective of these issues.
>
> 4) An employee to whom schedule 1A of the Act applies can be an employee affected by a "restructuring", as defined in s 69B, and must be

given an opportunity to exercise that right to make an election, regardless of whether or not that person's employer is **person B** in the definition of "subsequent contracting" in s 69C(4).

5) Questions 5 and 6 related to the grounds a new employer has for declining a transfer and will be reserved for further consideration.

7) The plaintiff was entitled to become an employee of LSG on the same terms and conditions of employment that applied to him immediately before 23 February, including the term that he was a full time employee.

Conclusion

[97] As advised at the outset of this judgment, remedies and grounds of defence are reserved for further consideration, which may include evidence and submissions. Costs are reserved.

B S Travis
Judge

Judgment signed at 12noon on 18 May 2011