

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 325
5375852

BETWEEN NISHA ALIM
Applicant

A N D LSG SKY CHEFS NEW
ZEALAND LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Anthony Drake and Rosemary Childs, counsel for
Applicant
Jo Douglas, counsel for Respondent

Submissions Received 17 and 27 August, 7, 13 and 17 September 2012

Date of Determination: 19 September 2012

DETERMINATION OF THE AUTHORITY

- A. Ms Nisha Alim's application for removal of this matter to the
Employment Court is declined.**
- B. Costs are reserved.**

Application for Removal

[1] In March 2012 the applicant Ms Nisha Alim applied to the Authority for an investigation and determination of employment relationship problems. She described them as:

- (a) a personal grievance for unjustified disadvantage;
- (b) a personal grievance for unjustified constructive dismissal;
- (c) arrears of wages.

[2] The respondent company LSG Sky Chefs New Zealand Ltd (LSG), Ms Alim's employer during the period in which the problems arose, denied that they existed or at least that it could reasonably be held responsible for them.

[3] After trying to resolve the problems with mediation the parties applied to the Authority for orders requiring particular and general disclosure from each other in relation to a wide range of information, sought before any investigation meeting was held.

[4] The parties were advised that the investigation would proceed incrementally, a less usual course but taken for the following reasons. The case involves the transfer of employment, from one employer to another, under Part 6A of the Employment Relations Act 2000. Ms Alim transferred from PRI Flight Catering Ltd (PRI) to LSG. PRI's actions and those of its associated company Pacific Flight Catering Ltd have been examined in other proceedings before the Employment Court and High Court and findings may yet be made by those Courts that could be relevant to the present case before the Authority. The extent to which PRI was involved in the situation leading to Ms Alim's problems with LSG may also need to be investigated by the Authority and this will become clearer as the investigation proceeds. The Authority wishes to confine its investigation to those who strictly ought to be parties or witnesses and keep the investigation focussed on the material issues, which are likely to become clearer as the investigation advances.

[5] The Authority declined to make any orders for disclosure until after Ms Alim had given evidence and been examined on it in the course of an investigation. Directions were given for Ms Alim's written evidence to be provided to the Authority and a date was fixed for her to be questioned by the Authority and counsel.

Grounds on which removal sought

[6] Prior to that meeting Ms Alim applied under s 178 of the Act for removal, relying on the particular grounds provided at s 178(2)(a) and (d) of the Act, which are that:

- (a) *an important question of law is likely to arise in the matter other than incidentally;*
- (d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[7] LSG notified its opposition to removal, for reasons the employer elaborated upon. The Authority deferred its determination of the application and advised that consideration of it and a decision would be given after Ms Alim's evidence had been taken, as had been directed earlier. I also advised the parties that such part of the investigation as remained uncompleted might be removed then by the Authority, after revisiting the removal application. The view the Authority gave was that after hearing from Ms Alim it might be better able to form a view of the contended important questions of law and the claim that they arose other than incidentally in the case, a particular ground put forward for removal. Consideration of any evidentiary basis for the contended questions and an assessment of the chances of them arising, also seemed desirable in this particular case.

[8] After Ms Alim's evidence had been taken as directed on 3 September 2012, an amended application for removal was received on 7 September from her counsel Mr Drake and Ms Childs. LSG notified its continued opposition to removal on 13 September, through counsel Ms Douglas.

Transfer of Ms Alim's employment

[9] It is useful to briefly describe the circumstances that led Ms Alim to complain to the Authority and ask it to investigate and determine her grievances and arrears claim.

[10] She claims her problems arose as a result of the transfer of her employment to LSG under the provisions of Part 6A of the Act, which is intended to protect certain categories of worker whose employment is affected by restructuring of a business or undertaking in which they have been employed. Up until she transferred to LSG in February 2011, Ms Alim had been employed by PRI (trading as Pacific Flight Catering). Her terms and conditions were then to be found in the Pacific Flight Catering Limited Catering Assistants Collective Agreement which was signed on behalf of PRI.

[11] In December 2010, Ms Alim was advised by PRI that the company had been unsuccessful in tendering to provide catering services to Singapore Airlines and that she had become eligible to transfer under Part 6A of the Act to LSG, the successful tenderer. After Ms Alim elected to do she was interviewed on 29 December 2010 by

LSG about her transfer and the terms and conditions of employment she had worked under for PRI.

[12] Part 6A of the Act provides at s 69I(2) that upon electing to transfer, an employee becomes an employee of the new employer on and from the *specified* date, which is the date on which restructuring takes effect, in this case 23 February 2011. Section 69I also provides that upon becoming employed by the new employer the employee is employed on the same terms and conditions as applied *immediately before* the specified date. Under s 69J the employment of an employee who elects to transfer to a new employer is to be treated as continuous for the purpose of service related entitlements, whether legislative or contractual, and a new employer must recognise the transferring employee's entitlement to any sick leave and to annual holidays not taken before the date of transfer.

[13] Ms Alim's transfer was effected from 23 February 2011 and she commenced work with LSG on or shortly after that date. Not long afterwards Ms Alim began complaining that LSG was not providing her with the same terms and conditions and entitlements she had while working for PRI. The complaints included a failure by LSG to recognise that with PRI she had worked and been paid in a more senior position as supervisor, and that she was entitled to a particular level of service allowance and a certain number of days for annual holidays.

[14] Ms Alim claims that despite repeatedly raising her concerns about those matters LSG did not act on them or rectify the problems raised or take action quickly enough. She claims that eventually the situation affected her health and that the actions of LSG, which she claims were unreasonable and in breach of provisions of Part 6A and her employment agreement, forced her to resign. Ms Alim claims that the employer's conduct was unjustified and caused her disadvantage in her employment or conditions of employment, and that eventually she left as she could not put up with it.

[15] In its response to the claims LSG has denied that it failed to pay Ms Alim correct wages and entitlements throughout her employment and has denied that its conduct in any way coerced her resignation. LSG alleges that Ms Alim and her former employer PRI failed to provide accurate and clear information about her terms and conditions of employment, which prevented LSG from complying with Part 6A. LSG alleges that Ms Alim and PRI thereby breached obligations of good faith.

[16] In relation to Ms Alim's claim that she was entitled to a higher level of annual leave due than the amount that LSG considered she was owed, LSG alleges that accurate leave records were not supplied by Ms Alim or PRI and that PRI appeared to have misstated her annual leave balance on transfer.

[17] There have been other cases involving employees transferring to LSG from PRI or Pacific Flight Catering Ltd in which suggestions were made that shortly before transfer the employees wage and holiday entitlements in particular were *inflated* or adjusted upwards so that the amounts given to LSG were not reflective of the actual terms and conditions under which they had worked for PRI.

An important question of law is likely to arise in the matter other than incidentally

[18] In relation to this ground, it is submitted on behalf of Ms Alim in support of her removal application that there are a number of important questions of law likely to arise in this case other than incidentally. They are:

- (a) What the words *immediately before* mean in s 69I of the Act where used in the phrase *the...terms and conditions as applied...immediately before the specified date*;
- (b) Whether there is any temporal constraint on increasing or enhancing terms and conditions of transferring employees before they transfer to the new employer, and if so what that constraint is;
- (c) Whether the old employer PRI is prevented from granting increased terms and conditions of transferring employees *immediately before* transfer in accordance with s 69I of the Act, either unilaterally or with agreement of the transferring employee;
- (d) Whether the new employer, LSG, is entitled to decline to recognise any *changed* or *increased* terms and conditions given to a transferring employee *immediately before* a transfer;
- (e) Whether a term and condition under s 69I of the Act has to be an agreed term and condition;

- (f) Whether there are any pre-conditions which prevent an outgoing employer from increasing terms and conditions of transferring employees *immediately before* transfer in accordance with s.69I of the Act.

[19] I do not consider there is a question of law about the meaning of the words *immediately before* where used in s 69I of the Act with reference to the specified date. If there is, it arises only incidentally and is not an important one.

[20] In this case over a period of some weeks between December 2010 and 23 February 2011 there was a sequence of events from the time Ms Alim elected to transfer up until the specified or effective date of that transfer. There can be no real question as to where in that sequence the point *immediately before* the specified date is to be found.

[21] It appears that LSG doubted the authenticity or reliability of information given to it by PRI and Ms Alim as to her terms and conditions and entitlements she had immediately before transfer. In my view the real issue in this case is more fundamental than the timing of purported alterations to terms and conditions and entitlements. The real issue is what were the *terms and conditions* that Ms Alim was employed under while at PRI immediately before her transfer? And, what were her *entitlements* to annual holidays immediately before the transfer? And, did she receive increases in pay and annual holiday entitlements as a *reward* under her contract of service?

[22] These are questions about the nature and character or parameters of *terms and conditions* and *entitlements* purportedly provided to Ms Alim under the employment relationship PRI had with her immediately before the transfer.

[23] The following questions may also serve to illustrate the issue in this case:

- If an old employer, immediately before the transfer of an employee to a new employer gratuitously and for one pay period only, or on a one-off basis, increases pay rates or increases the amount of holidays due, do those increases become *entitlements* pursuant to terms and conditions of an employment agreement?

- If an old employer immediately before transfer unilaterally increases the wage rate or enhances a holiday or sick leave entitlement solely to achieve some purpose or objective of its own completely outside of or unrelated to the employment relationship, do the increases or enhancements amount to *entitlements* required to be recognised by a new employer?

[24] The submissions made for LSG point to much the same issue although addressed in a different way, with the new employer contending; “the terms and conditions and leave entitlements were not, in fact, lawfully changed by the applicant’s former employer.” I have taken it that “not ... lawfully” has been used by LSG in the sense of not being in accordance with the principles applying to the formation of binding terms and conditions under a contract of employment, including the creation of entitlements under such a contract.

[25] I agree with counsel Ms Douglas for LSG who submits that the important questions in this case are ones of fact as to what PRI did when it adjusted pay rates and holiday entitlements upwards immediately prior to the transfer of Ms Alim to LSG.

[26] For the above reasons I do not accept that there are grounds for removal under the important question of law test at s 178(2)(a) of the Act.

The Authority’s opinion

[27] Reluctantly no doubt, LSG has by now acquired some experience of hearings in courts such as the Employment Court and High Court in relation to Part 6A cases. From that LSG considers this matter will be dealt with more cost effectively and expeditiously by the Authority. To the extent the Authority has some discretion whether to remove, the views of a party as to the appropriate forum may be taken into account.

[28] To the extent that a question of law may quite possibly arise as to the legal nature or the parameters of entitlements under terms and conditions of employment, the Authority is able to state a case for the opinion of the Employment Court under s 177 of the Act. The factual context in which a question of law for the Court is to be founded can be established from the Authority’s investigation.

[29] The Authority is not of the opinion that in all the circumstances the matter should be removed to the Employment Court without the Authority investigating it. The removal ground under s 178(2)(d) is therefore not present either.

Determination

[30] For the above reasons the Authority declines the removal application.

[31] Before the investigation proceeds further Ms Alim is to advise the Authority whether her application to the Employment Court made on 30 August 2012 for special leave to remove, is being maintained. Judge Travis asked for the same advice in his judgment of 31 August; [2012] NZEmpC 147. If the Court does not order removal the Authority will give directions as to disclosure and make timetabling orders, after consulting counsel in a telephone conference as usual.

Costs

[32] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority