

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 309
3072472

BETWEEN SOPHIE BEGLEY
Applicant

AND TECH MAHINDRA LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Duncan Allan, counsel for the Applicant
Simon Rees-Thomas, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 14 February, 3 April and 23 June 2020 from the Applicant
13 March and 23 June 2020 from the Respondent

Date of Determination: 10 August 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A A prospective employee can be considered an employee for the purposes of s 63A of the Employment Relations Act 2000.**
- B A prospective employee cannot be considered an employee for the purposes of s 68 of the Act.**
- C By agreement there are no issues as to costs.**

Employment Relationship Problem

[1] Counsel for the applicant and respondent have asked the Authority by way of joint memorandum to determine two preliminary issues:

- (a) Whether a prospective employee can be considered an employee for the purposes of s 63A and 68 of the Employment Relations Act 2000 (the Act); or in the alternative;
- (b) Whether s 63A and 68 of the Act are applicable to prospective employees in any event.

[2] The Authority was provided with an agreed statement of background facts and submissions.

The Agreed Facts

[3] The applicant was an employee of Vodafone New Zealand Limited (Vodafone).

[4] The respondent is a global communications company.

[5] The respondent entered into an agreement to provide a range of services to Vodafone.

[6] On or about 13 March 2019, Vodafone proposed a restructure at the Christchurch Contact Centre where the applicant worked.

[7] As part of the restructure, Vodafone intended to outsource work to the respondent. The respondent would create new roles for a limited number of workers.

[8] On 15 April 2019, the applicant was informed by Vodafone that her role had been disestablished and that her last day of employment would be 27 September 2019.

[9] On 16 April 2019, the applicant was informed by Vodafone that she had been selected for a role with the respondent and that her last day of work would now be 12 May 2019.

[10] The applicant received a written offer of employment from the respondent on 29 April 2019. The offer stated that it was conditional on the following:

- (a) The respondent and Vodafone finalising the commercial arrangement; and

- (b) The applicant agreeing that the offer satisfied the employment protection provisions in her Vodafone employment agreement and waiving any claim or right to redundancy compensation.

[11] On 30 April 2019, the applicant wrote to Vodafone stating that the offer from the respondent amounted to less income per annum and she was being disadvantaged.

[12] Vodafone forwarded the email to the respondent and told the applicant that further queries regarding the offer of employment should be sent directly to the respondent.

[13] On 1 May 2019, the respondent emailed the applicant and told her that her base salary and commission would remain the same as at Vodafone and the respondent would provide similar benefits to Vodafone.

[14] On 1 May 2019 the applicant emailed the respondent and stated that she had not received enough information about the offer and noted that the respondent's base salary and commission were more than \$2,000 less per annum than her Vodafone employment agreement.

[15] On 3 May 2019 the applicant's representative provided detailed concerns about the proposed agreement to the respondent and noted the applicant (and other union members) wished to enter into negotiations. The email stated that the proposed employment agreement contained a number of clauses that differed from the Vodafone employment agreement and alleged that a number of clauses were unlawful.

[16] The respondent provided a new proposed employment agreement on 4 May 2019 with an acceptance deadline of 10 May 2019.

[17] The applicant's representative noted concern at unfair and potentially unlawful clauses, requested a template copy of the proposed agreement in order to make detailed tracked changes and requested an extension to the deadline for acceptance due to the number of clauses still requiring negotiations.

[18] On 7 May 2019 the respondent provided a template employment agreement, but refused to extend the 10 May acceptance deadline.

[19] The applicant's representative sent through the proposed changes to the respondent on 8 May 2019.

[20] The respondent did not reply to the applicant.

[21] On 10 May 2019, the applicant had still not received a reply from the respondent. The applicant's representative sent the following email to the respondent:

Hi Shruti,

It has been 2 days and we have still not had a response to the proposed changes we sent to you on Wednesday.

If you intend to reply with an offer that is any different to the one we sent on Wednesday, it is unlikely our members will have time to take independent advice on the offer by 5pm today, as per their legal right and your legal obligation, in which case the timeline will obviously have to be extended.

If the employment agreement is to remain as proposed by our members on Wednesday then we can advise them to sign before the end of the day.

Please respond urgently.

[22] The applicant did not receive a reply. On the afternoon on 10 May 2019, at 4.33pm, the applicant emailed the respondent and turned down the proposed offer of employment on the grounds that it was not substantially similar to her Vodafone terms and conditions of employment and that she had not heard back from the respondent regarding her proposed changes.

[23] Later the same day at 4.44pm, the respondent sent through a new proposed employment agreement, with a number of changes and stated that it must be accepted by 5pm.

[24] By return email, the applicant's representative noted that 16 minutes was not enough time to consider the proposed changes and seek independent advice and sought an extension to the acceptance deadline.

[25] The respondent refused to extend the acceptance deadline.

[26] The applicant wrote to the respondent on 10 June 2019 raising issues of unfair bargaining.

[27] The respondent replied on 19 June 2019 and denied liability.

The applicant's submissions

[28] Mr Allan submits that the applicant was a prospective employee and for the purposes of ss. 63A and 68 of the Act can be considered an employee with standing to bring a claim for unfair bargaining against the respondent.

The respondent's submissions

[29] Mr Rees-Thomas submits that a prospective employee can only be considered an employee for the purposes of sections 63A and 68 of the Act if that person has subsequently become employed by the respondent. He submits that a "prospective employee" is not a stand-alone term used in s 63A(7) of the Act but rather a sub-set of the definition of employee found in s 6 of the Act. As the applicant has never been employed by the respondent he submits that there is no ground for relief under either section.

Additional submissions

[30] Additional submissions were provided after the Authority referred counsel to the Employment Court judgment in *The Salad Bowl Limited v Howe Thornley*.¹

Remedies claimed

[31] The remedies claimed by the applicant are a penalty for breach of s 63A(2) of the Act with an order for payment of some or all of the penalty to the applicant and a determination that the respondent bargained unfairly under s 68 of the Act and compensation under s 69(1)(a) of the Act.

Whether a prospective employee can be considered an employee for the purposes of ss 63A and 68 of the Employment Relations Act 2000 (the Act)?

Statutory Interpretation

[32] Mr Rees-Thomas referred the Authority to the Supreme Court judgment in *Commerce Commission v Fonterra Co-operative Group Limited* and the reference in that judgment to text and purpose being the "key drivers" of statutory interpretation from s 5 of the

¹ *The Salad Bowl Limited v Howe Thornley* [2013] NZEmpC 152.

Interpretation Act 1999.² It was stated in the judgment that even if the text appears plain in isolation of purpose that meaning should be cross checked against purpose to satisfy the dual requirements of s 5.³

[33] The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment. Examples of these are preambles, the analysis, a table of contents, headings to parts and sections and the organisation and format of the enactment.⁴

Section 63A

[34] Section 63A and 68 are in Part 6 of the Act. The title of Part 6 of the Act is “Individual employees’ terms and conditions of employment.”

[35] The title to s 63A is “Bargaining for individual employment agreement or individual terms and conditions in employment agreement.”

[36] Subsection (1) sets out the situations when the section applies to bargaining for terms and conditions of employment. These include bargaining with employees and prospective employees. Subsection 7 provides “In this section, **employee** includes a prospective employee.”

[37] Mr Allan provided an Oxford dictionary definition of “prospect” and “prospective”.⁵

Prospect n.

2 a person regarded as a potential customer or as likely to be successful.

Prospective adj

Expected or likely to happen or be in the future.

[38] Materially for current purposes subsection (1)(e) includes the situation of bargaining for terms and conditions of an individual employment agreement (including any variation) if no collective agreement covers the work done, or to be done by the employee. The applicant was in that situation.

² *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36.

³ At [22].

⁴ Section 5 (2) and (3) of the Interpretation Act 1999.

⁵ Concise Oxford English Dictionary (12th ed, Oxford University Press, NY, 2011) at 1152.

[39] Subsection (2) sets out what the employer must do when bargaining and requires they do at least the following things:

- (a) provide to the employee a copy of the intended agreement under discussion; and
- (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
- (c) give the employee a reasonable opportunity to seek that advice; and
- (d) consider any issues that the employee raises and respond to them.

[40] Subsection (3) sets out that every employer who fails to comply with the section is liable to a penalty imposed by the Authority.

[41] Subsection (4) provides that failure to comply with the section does not affect the validity of the employment agreement between the employer and the employee.

[42] Subsection (5) states that the requirements in the section are additional to any requirement that may be imposed under any provision in the Act.

[43] Subsection (6) sets out the requirement for subsection (1)(e) about coverage in collective agreements.

[44] Mr Allan submits that Parliament has deemed it necessary to include the separate term “prospective employee” which is distinct from a “person intending to work”. He submits that shows a wider definition of employee was intended.

[45] Mr Rees-Thomas submits that the addition of the words “prospective employee” in s 63A(7) is required in order to address “timing and syntax issues” that would arise if the word employee as defined in s 6 of the Act was used. Whilst the person seeking relief is now an employee; when negotiating they may only have been a prospective employee. He submits it is clear from the requirements of s 63A and in particular subs (4) that an employment relationship must have been formed at some stage in order for the applicant to bring a claim for relief under that section. Mr Rees-Thomas suggests a word such as “any” employment agreement would have been used if it was intended that relief was available to other than an employee who was subsequently employed.

[46] Section 63A(4) was discussed in the Employment Court judgment in *Blackmore v Honick Properties Ltd* in relation to whether the reference to the validity of the agreement necessarily confined remedies for a breach of s 63A(2) to a penalty.⁶ It was stated in *Blackmore* that the purpose of subs (4) read with subs (2) is that an employer cannot evade liability for other wrongs for employment that “ensued despite unfair bargaining” and that the employment agreement is not therefore negated.⁷ The statements are not directed to whether an employment relationship must be formed for relief under s 63A and do not make it clear that a penalty is only available to those who enter into an employment relationship.

[47] The predecessor section to s 63A was considered by the Court of Appeal in *Warwick Henderson Gallery Ltd v Weston* in relation to a question whether an individual employment agreement entered into that is not in writing in breach of s 65(1)(a) is unenforceable and invalid.⁸ The Court of Appeal found the answer in the then s 64 (4) that stated “Failure to comply with subsection (2) does not affect the validity of the individual employment agreement concerned.”⁹ It was stated materially as follows:

It would be an extraordinary result if, while breach of s 64(2) does not affect the validity of the individual employment agreement, a result explicitly stated by the section, that very agreement should somehow by implication from s 65(1)(a) become unenforceable as not being in writing.¹⁰

[48] The Court of Appeal held that the fact the agreement was not in writing did not render it unenforceable.¹¹

[49] It can be seen with reference to the two cases that the language in subs (4) is important to ensure an agreement resulting from unfair bargaining is not negated by a breach of subs (2) for example if it is not in writing. It is not plain or clear that it limits any relief under s 63A to those who do enter into employment agreements.

Jurisdiction with respect to penalties

[50] The Authority has jurisdiction to make determinations about actions for recovery of penalties for breaches of any provision of the Act in s 161(m)(ii) as below:

⁶ *Blackmore v Honick Properties Ltd* [2011] ERNZ 455 at [93] and [94]

⁷ At [94]

⁸ *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145.

⁹ At [23]

¹⁰ At [23]

¹¹ At [16], [23], [30] and [40].

Under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the Authority).

[51] Section 63A provides for a penalty to be recovered if there is a failure to comply with its provisions.

[52] Section 135 is directed to the recovery of penalties. It provides that an action for recovery of a penalty may be brought,-

(b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or

[53] Section 135 does not limit the ability to recover a penalty in the case of a breach of a provision of the Act to those in employment relationships but it is at the “suit of any person in relation to whom the breach is alleged to have taken place.”

[54] It is not plain from the words in s 63A themselves that only those who enter into an employment agreement have standing to bring a claim for a penalty.

Section 68

[55] Section 68 is directed to unfair bargaining in individual employment agreements. Subsection (1)(a) provides that bargaining for an individual employment agreement is unfair if paragraph (a) to (d) of subs (2) apply to a party to the agreement and subs 1(b) that the other party to the agreement or a person acting on their behalf know of the circumstances that apply or ought to know.

[56] Section 68 refers to s 63A in subs (2)(d) where person A at the time of bargaining for or on entering into the agreement “did not have the information or the opportunity to seek advice as required by that section.”¹² For that purpose it includes the extended meaning of “employee” in s 63A.

[57] The language in the remainder of s 68 supports an employment agreement is entered into. Section 68(1)(a) provides that bargaining for an agreement is unfair if “1 or more of

¹² Where s 63A applies to a bargaining situation.

paragraphs (a) to (d) of subsection (2) apply to a party to the agreement.” Section 68(1)(b) refers to “the other party to the agreement.” Section 68(4) provides that except as provided in s 68 “a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.”

[58] Section 69 provides for remedies for unfair bargaining and reinforces these are available to parties to an agreement by the words - “If a party to an individual employment agreement is found to have bargained unfairly under section 68.....” The words and remedies available under s 69 include not only an order for compensation but an order cancelling or varying the employment agreement.

Jurisdiction with respect to bargaining

[59] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. Under s 161(d) this includes matters alleged to arise under s 68 because a party to an individual employment agreement has bargained unfairly. Section 161(2) provides that except as provided in subsections (1)(ca), (cb), (d), (da) and (f) the Authority does to have jurisdiction to make a determination about any matter relating to –

- (a) bargaining; or
- (b) the fixing of new terms and condition of employment.¹³

[60] Section 161(d) provides for matters alleged to have arisen under s 68 “because a party to an individual employment agreement has bargained unfairly.” That supports that the employee must be a party to an individual employment agreement for matters arising under s 68.

Object section of Part 6 and the Act

[61] Section 63A is within Part 6 of the Act. The title to Part 6 is “Individual employees’ terms and conditions of employment.” The object of Part 6 is set out in s 60. It is to specify the rules for determining terms and conditions of an employee’s employment and requires new employees be given sufficient information and an opportunity to seek advice before

¹³ Facilitating bargaining, fixing the provision of a collective employment agreement, alleged unfair bargaining under s 68, investigating bargaining under s 69O and matters about whether good faith obligations have been complied with.

entering into an individual employment agreement. To recognise this in relation to individual employees and their employers, good faith behaviour is described as:

- (i) promoted by providing protection against unfair bargaining; and
- (ii) required when entering into and varying individual employment agreements; and
- (iii) consistent with, but not limited to, the implied term of mutual trust and confidence in the relationship between employee and employer.

[62] Section 3 contains the object of the Act as follows:

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship-
 - (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour, and

[63] The meaning of s 63A must be assessed in light of the Act's purpose and the objects in s 60. The language used in the object section of Part 6 confirms good faith behaviour is required and that a new employee is to be given sufficient information and an opportunity to seek advice before entering into an individual employment agreement. Although the good faith obligations in s 4 apply to those in employment relationships they are reinforced in the object section of Part 6 of the Act in relation to bargaining for individual employment agreements. The language in the object section is clear that it specifies rules for determining new terms and conditions of employment and requires behaviour that protects against unfair bargaining. If the rules are not complied with there is liability for a penalty in s 63A(3).

[64] The Act is concerned with employment relationships and that is consistent with its title. I accept as Mr Rees-Thomas submits the cornerstone of the Act is the employment relationship but provisions of the Act can go beyond that if clearly worded.

Employee, person intending to work and employer

[65] Section 6 of the Act provides:

- (1) In this Act, unless the context otherwise requires, **employee-**
- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes-
 - (i) a homemaker; or
 - (ii) a person intending to work;...

[66] Section 5 of the Act defines a person intending to work:

means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning.

[67] Section 5 of the Act defines an employer:

means a person employing any employee or employees; ...

[68] Mr Rees-Thomas submits that the definition of “employer” in the Act is a party who is employing people which expression incorporates both the past and future tense and one or many people. He submits it is an expression both prospective and retrospective. I accept that submission.

[69] Mr Rees-Thomas says that the inclusion in s 63A of prospective employee is to capture behaviour by an employer that occurred before an employment relationship is formed but in order to be actionable an employment relationship must subsequently have been formed. Further that s 68 only applies to parties to an employment agreement.

[70] *The Salad Bowl* judgment involved consideration of a very short work trial. The issue for the Employment Court was the plaintiff and defendant were employee and employer when the work trial ended and the defendant was asked not to return to work.¹⁴

[71] In considering work trial periods and s 66 (fixed term agreements) in the judgment the then Chief Judge of the Employment Court, Chief Judge Colgan, referred to s 63A as a relevant legislative provision in that case.

¹⁴ *The Salad Bowl Ltd v Howe-Thornley* above n 1

[72] Mr Allan submits it is not stated by the Chief Judge that in order to have standing to claim a penalty for a breach an employment agreement must have been entered into. Mr Rees-Thomas submits that the Chief Judge emphasised the requirement for an employment relationship to be ultimately formed as a fundamental prerequisite to any right of action under s 63A.

[73] The Court stated about s 63A:

There is another relevant legislative provision. Section 63A provides an exception to the generally received wisdom that, with some exceptions, the Employment Relations Act does not govern the relationship of prospective employer and prospective employee. Section 63A addresses minimum standards of bargaining for individual employment agreements or other individual terms and conditions in an employment agreement. Subsection (1) includes, amongst the circumstances of its applicability: “(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee...”. Subsection (1)(f) confirms that the section also applies “where a fixed term or employment, or probationary or trial period of employment, is proposed...”.¹⁵

[74] Mr Rees-Thomas places weight in his submission on paragraphs that follow to support the respondent’s position.

If the parties in this case agreed to “employment”, s 63A applies to such work trial periods by virtue of subs (7) which defines “employee” to include “a prospective employee”.¹⁶

[75] The judgment was focussed on whether there was employment and the statement has to be seen in that light.

[76] Mr Rees-Thomas submits that paragraph [48] is one in which the Court explains that s 63A sensibly had to refer to “prospective” employers and employees as a matter of logic and law at the time they are negotiating.¹⁷ There is reference in that paragraph to bargaining being pre-contractual and a need for an extended definition than in s 6 of “employee” or in s 5 of “person intending to work.”

¹⁵ At [46]

¹⁶ Above n 1 at [47].

¹⁷ At [48].

[77] I agree that the language of s 63A is directed both to those who are prospecting for employment and to existing employees such as those bargaining for additional terms and conditions to an applicable collective agreement and variations. Obligations in subs (2) may apply to those bargaining who could not be described as an “employee” at that time. The definition of “person intending to work” would be inadequate for those people.

[78] Mr Rees-Thomas places weight on the last sentence in paragraph [49] of the judgment to support his submission that there should be the existence of an employment agreement where any action is taken.

Failure to comply with these requirements does not alone render an employment agreement subsequently entered into ineffective, but does make a prospective employer liable to a penalty under s 63A (3).¹⁸

[79] That sentence is not sufficiently clear to conclude that the Chief Judge was stating that there must be an employment agreement before any penalty action could be commenced under s 63A particularly when read with [46].

[80] Further reliance was placed on paragraph [50] as follows:

It follows from this analysis that a prospective employer such as the plaintiff in this case must comply with s 63A of the Employment Relations Act if bargaining with a prospective employee about the proposed terms and conditions of an employment agreement, including a fixed term agreement under s 66, if the work trial amounts to employment.¹⁹

[81] Mr Rees-Thomas in his submission stated that the Court is making the point in the above paragraph that it is only if the parties subsequently enter into an employment relationship that the prospective employer must have first complied with s 63A(2) of the Act. He submits that this supports if there is no subsequently formed employment relationship then there is no duty to comply. The Court had been considering whether the work trial was a fixed term agreement under s 66 so as to amount to employment. This was in circumstances where the plaintiff denied ever having offered the defendant employment at all for a fixed term or otherwise saying that she was in effect a volunteer. I conclude it more likely that statement was directed to that.

¹⁸ At [49].

¹⁹ Above n 1 at [50].

[82] Mr Rees-Thomas also referred to the statement made by Judge Shaw in the Employment Court judgment in *Hayden v Wellington Free Ambulance Service*.²⁰ This was referred to with approval in *The Salad Bowl*.²¹

Section 5 [of the Employment Relations Act 2000] which defines employment relationship problems excludes any problem concerning the fixing of new terms and conditions of employment. Similarly in s 5, a person intending to work is expressly defined to exclude applicants for jobs. Both of these provisions show that it is intended that relief available under the Act is only available where a person has actually been employed on settled terms and conditions. Under s 103 the plaintiff may bring a personal grievance either for unjustifiable dismissal (s 103 (1)(a)) or alleging that his employment is or was affected to his disadvantage. The Act does not contemplate grievances about unsuccessful job applications.

[83] In *Hayden* it was found that the plaintiff could not have a legitimate expectation that he would be appointed to a position that he had not accepted. It confirmed that good faith obligations apply to those in employment relationships and not to applicants for positions. I accept that the Act does not contemplate grievances about unsuccessful job applications. The *Hayden* judgment concerned an alleged unjustified dismissal. It is distinguishable on that basis to relief under s 63A.

Section 6 - unless the context requires otherwise

[84] Mr Allan places weight in submissions on the words “unless the context otherwise requires” in s 6. He referred to the judgment in the Supreme Court in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Incorporated*.²² The Supreme Court heard an appeal from the Court of Appeal whether workers who presented for work at the beginning of the 2015/2016 seasons at meat slaughtering and processing plants in the North Island were “employees” within the meaning of s 82(1)(b) of the Act. Two issues were considered. The first was whether the workers were “employees” as defined in s 6 of the Act. The second issue if the workers did not fall within the s 6 definition was whether in those circumstances the word “employees” in s 82(1)(b) bears the defined meaning or whether the context requires that some broader meaning be given to it and if so whether the broader meaning covers the workers.²³

²⁰ *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399 at [28].

²¹ Above n 1 at [58].

²² *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* (2017) 10 NZELC paras 79-083, [2017] NZSC 135.

²³ Above n 8 at [5].

[85] The Supreme Court agreed with the Court of Appeal that the employment was not continuous and did not agree with the Employment Court that the workers were “employees” in terms of s 6 at the relevant time. The alternative analysis of the Employment Court that employees in s 82(1)(b) of the Act had a broader meaning than the definition of “employee” was upheld by both the Court of Appeal and Supreme Court. There was agreement that AFFCO locked out the workers unlawfully.

[86] The Court stated about the approach where a defined meaning of a statutory term is subject to a context qualification.

Summarising what we consider to be the correct approach, where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court’s consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context and that it is legitimate to test the competing interpretations against the statute’s purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. Whilst we accept Mr Jagose’s point that the context must relate to the statute rather than something extraneous we do not see the concept as otherwise restrained.²⁴

[87] In *AFFCO* the Supreme Court considered that the word employee is used in s 82(1)(a) in different senses one of which did not fall within the s 6 definition. It was considered that the context indicates that “employees” in s 82(1)(b) carries a “broader meaning than simply existing employees (including persons who have been offered and have accepted work as employees)”. It was stated that as written the language “is apt to include persons seeking employment.”²⁵ That was qualified as set out below:

We must make explicit a limitation that is implicit in what we have said in the preceding paragraphs. It is not the case that an employer who refuses to hire a new employee because the two are unable to agree new terms of employment will, for that reason alone, have locked out the potential hire. As we have emphasised, the second respondents in this case were not, in contractual terms, strangers to the employer. Rather they were people who had previously worked for AFFCO and to whom AFFCO owed contractual obligations, including as to re-hiring even though their employment had terminated at the end of the previous season and they were seeking to be re-engaged for the new season. That feature of termination plus re-engagement under the umbrella of a number of continuing obligations distinguishes this

²⁴ At [65].

²⁵ At [75].

case. Like the Court of Appeal, we consider that the relationship between AFFCO and the second respondents was sufficiently close to being the latter within the scope of the word “employees” in s 82(1)(b).²⁶

[88] There are some similarities between this matter and that in AFFCO although it is not completely analogous. The respondent had more knowledge of the applicant by virtue of her employment with Vodafone than would be the case with a process to hire a complete stranger. That is because the applicant was offered employment with the respondent in circumstances where her employment with Vodafone was affected by a restructuring and it was intended to outsource work to the respondent. She was advised that she had been selected for a role with the respondent and her last day of work with Vodafone was accordingly brought forward some months as a result. The applicant was provided with a written offer of employment from the respondent and although there was some negotiation ultimately the offer of employment was not accepted. The applicant says that this was in circumstances where the bargaining was unfair which is denied. The offer made to the applicant by the respondent was part of a process designed to provide her with some protection in the event of a restructuring.

[89] That protection is offered by way of the employee protection provisions in subpart 3 of Part 6A the Act. These provisions provide protection for the employment of employees affected by a restructuring if as a result of a restructuring their work is to be performed on behalf of another person.²⁷ To that end employment agreements are required to contain employee protection provisions relating to negotiations between the employer and the other persons about the transfer of affected employees to the other person.

[90] Whilst Mr Rees-Thomas correctly submits the applicant was free to choose not to transfer to the respondent her claim is that transfer did not occur because there was alleged unfair bargaining. Mr Rees-Thomas submits that aside from the vulnerable employee provisions of the Act a new employer purchasing/acquiring part of another employer’s business may make any offer of employment it likes to the employees of the vendor. Further that the employee is entitled to accept or reject the offer with reference to s 69OK. He submits that if the offer is not acceptable to a particular employee then that person may have

²⁶ At [78].

²⁷ Subpart 1 of Part 6A provides protection to specified categories of employees if as a result of a proposed restructuring their work is to be performed by another person. The applicant was not one of these employees.

grounds for redundancy or other compensation from their old employer but not grounds under the Act to seek relief from the prospective new employer.

[91] For completeness the contractual arrangement between Vodafone and the respondent were not part of the applicant's claim before the Authority.

[92] The full Court of the Employment Court in *Olsen v Carter Holt Harvey IT Ltd* considered amongst other matters including an alleged dismissal the interpretation and application of the provisions of Part 6A of the Act.²⁸ This involved consideration about the then sections 69K to 69O of the Act, now sections 69OH to 69OK in subpart 3 of Part 6A. It concluded that there were obligations on the new employers in those circumstances and rights for the affected employees.

[93] There was reference to the scheme of subpart 2 (now subpart 3) that employment agreements are required to contain employment protection provisions.²⁹ It was stated by the Court that:

...This machinery was clearly aimed at encouraging, without necessarily obliging, employers to negotiate arrangements with new employers for the transfer of affected employees. Where that aim was achieved in the form of such an agreement with the new employer, it would be entirely inconsistent with the object of this part of the ER Act to conclude that the statute imposed no obligations on that new employer and conferred no rights on the affected employees.³⁰

[94] Returning to the dictionary definitions about "prospect" and "prospective" it could be concluded that employment was "expected" and "likely to happen in the future" at the time of bargaining between the applicant and respondent.³¹ The applicant had an employment protection provision in her employment agreement with Vodafone. Vodafone intended to outsource work to the respondent. The applicant was advised she had been selected for a role with the respondent and her last day of work was brought forward as a result. She received an offer from the respondent and bargaining took place. There was no employment agreement entered into because the applicant says bargaining was unfair.³²

²⁸ *Olsen v Carter Holt Harvey IT Ltd* (2008) 6 NZELR at 318.

²⁹ Above n 25 at [85].

³⁰ At [85].

³¹ Above n 4.

³² That is not accepted by the respondent.

[95] The applicant was in her bargaining with the respondent a prospective employee and in the circumstances as set out she was an employee for the purposes of s 63A.

Conclusion

Section 63A

[96] The applicant does not fall within the s 6 definition of “employee” in the Act or the s 5 definition of a “person intending to work”. She was never employed by the respondent. The definition of employee in s 63A includes by virtue of subs (7) a prospective employee. Every employer who fails to comply with the section is liable to a penalty imposed by the Authority in subs (3).

[97] The remedy provided for a breach of s 63A is a penalty. An action for recovery of a penalty may be brought “at the suit of any person in relation to whom the breach of the Act is alleged to have taken place.”³³ It is not an action limited to parties in employment relationships.

[98] In context and in light of its purpose s 63A governs the relationship of prospective employee and employer with the result that the applicant has standing to bring a claim under s 63A of the Act.

[99] I find that the applicant as a prospective employee is an employee for the purpose of s 63A.

Section 68

[100] There is no use of the term “employee” in s 68 prospective or otherwise. There is reference to “party to the agreement” and “person A” and “person B.” Mr Allan submits that it must have been Parliament’s intention in using terms “person A” and “person B” that they do not need to be employer and employee. He submits that “person A” is the employee or prospective employee because s 68(2) only applies to “person A” and s 68(2)(d) refers to s 63A. He submits that the term “party to the agreement” used in ss 68 and 69 has a wider meaning than being party to the completed agreement and must include being party to the bargaining otherwise employer and employee would have been used.

³³ Section 135 of the Act.

[101] The applicant was not a party to an employment agreement with the respondent. That the plain words intend that is reinforced by the words in the remedies section for unfair bargaining. Section 69(1) provides “If a party to an individual employment agreement is found to have bargained unfairly under s 68, the Authority may do 1 or more of the following things.” An “individual employment agreement” is defined in the Act in s 5 as an employment agreement entered into by 1 employer and 1 employee who are not bound by a collective agreement.

[102] The Authority’s jurisdiction under s 161 about unfair bargaining further reinforces that to engage s 68 the applicant must be a party to an employment agreement. The Authority has jurisdiction to make determinations about matters alleged to relate to unfair bargaining under s 68 because “a party to an individual employment agreement” has bargained unfairly.

[103] I find that the plain and ordinary words considered in context and in light of the purpose of the Act require the applicant to be party to an employment agreement before s 68 can be engaged. The applicant was not a party to an agreement with the respondent and does not have standing to bring a claim under that section and is not entitled to remedies under s 69 for unfair bargaining.

The questions answered

Question one

[104] The answer to the first question is that a prospective employee can be considered an employee for the purposes of s 63A of the Act but a prospective employee cannot be considered an employee for the purposes of s 68 of the Act.

Question two

[105] The question in respect of s 63A has already been answered. The question in respect of s 68 is that section is not applicable to prospective employees.

Costs

[106] By agreement there are no issues of costs arising from this preliminary determination.

Helen Doyle
Member of the Employment Relations Authority