

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 233/10  
5316982

BETWEEN                      ROGER TERENCE DORAN  
Applicant

A N D                              CREST              COMMERCIAL  
CLEANING LTD  
Respondent

Member of Authority:        James Crichton

Representatives:              Steven Zindel, Counsel for Applicant  
Peter Kiely, Counsel for Respondent

Investigation Meeting:        On the papers

Submissions Received:        19 November 2010 from respondent

Date of Determination:        15 December 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Doran) is a cleaner. Until 31 July 2009, Mr Doran was employed by a company Hills Cleaning Service Ltd to clean premises belonging to Tonkin and Taylor Ltd at Nelson. Effective 1 August 2009, Tonkin and Taylor Ltd ceased their contractual relationship with Hills Cleaning Service Ltd and engaged the services of a new contract cleaning company, Crest Commercial Cleaning Ltd.

[2]     Mr Doran claims that, pursuant to Part 6A of the Employment Relations Act 2000, he was entitled to continuity of employment and that the respondent (Crest) ought to have maintained his employment in accordance with Part 6A of the Act. In that they did not maintain his employment, Mr Doran says that Crest unjustifiably dismissed him.

## The application for removal

[3] The statement of problem was filed on 26 August 2010 and the statement in reply was provided on 13 September 2010. In a telephone conference convened by the Authority on 18 October 2010, arrangements were put in place for an investigation meeting to take place in Nelson on 8 February 2011. Then, an application for removal to the Court was filed by Crest dated 19 November 2010 and on the same date, Mr Doran's counsel indicated by email that the application was not opposed. The parties helpfully agreed that the matter could be dealt with on the papers and without the necessity to file further submissions, the Authority being satisfied that the issues had already been appropriately canvassed.

[4] Section 178 of the Employment Relations Act 2000 (the Act) sets out the grounds on which the Authority may remove a matter to the Employment Court. This application is framed essentially around the contention that important questions of law are involved other than incidentally.

[5] It follows that reliance is placed on s.178(2)(a) and (d) which are in the following terms:

- (2) *The Authority may order the removal of the matter, or any part of it, to the Court if –*
  - (a) *an important question of law is likely to arise in the matters other than incidentally; or.....*
  - (d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[6] The essence of the issue in contention between the parties is whether Mr Doran was given a *reasonable opportunity* to make his election under s.69G of the Act and, as a corollary whether Crest was provided with *sufficient notice* of such an election. The statement of problem filed by Mr Doran alleges that he made his election on 31 July 2009, the last day of business of the *old* contractor. Crest, the incoming contractor, say in the statement in reply filed in the Authority that for business planning purposes, notice received that late is no notice at all. Crest say they had assembled their team three days before takeover and accordingly when they received Mr Doran's election, they were simply not in a position to act on it.

[7] It follows that the suggested referral is on the following footing:

1. *That the following important questions of law are likely to arise in the matter other than incidentally:*
  - (a) *What is the meaning of 'reasonable opportunity' in s.69G(1)(a) of the Employment Relations Act 2000 (the Act)?*
  - (b) *What is the meaning of 'sufficient notice' in s.69G(3) of the Act?*
  - (c) *Whether the applicant was provided with a 'reasonable opportunity' to exercise the right to make an election under s.69G(1)(a) of the Act?*
  - (d) *Whether applicant's employer was provided with 'sufficient notice' under s.69G(3) of the Act?*
  - (e) *Whether the applicant's conduct amounted to an election to transfer to the respondent under s.69I of the Act?*

[8] Crest argue that if the Court were to be seized of this matter now, it would be the first case to test the interpretation of this new legislation and would have made a significance for employment law generally. Further, it is contended there is a high likelihood that whatever the decision of the Authority, the matter would go on challenge. Thirdly, it is contended that it is in the interests of justice that the application be granted.

[9] I agree. I am satisfied this is a case where the proper course is to remove the matter to the Court under s.178. While the Authority still has a discretion whether or not to order removal even if one of the grounds is made out, it seems to me this is a strong case for removal, particularly considering the significance that the Court's decisions will have on a large number of employees effected or potentially effected, especially by contract changes in the cleaning services industry: *NZEPMU v. Carter Holt Harvey Ltd* [2002] 1ERNZ 74 and *Hanlon v. International Education Foundation (NZ) Inc* [1995] 1ERNZ 1 considered.

### **Determination**

[10] I am satisfied that there are important questions of law to be considered in relation to this matter and that those questions of law are likely to arise other than incidentally. I agree with the formulation provided by counsel for Crest as to those important questions of law. I note that the application for removal is not opposed by Mr Doran.

[11] As I have made clear, I think this is a case where the Authority ought to exercise its discretion to remove and I now direct that the whole of the matter is to be removed to the Court for the Court to hear and determine without the Authority investigating the matter.

**Costs**

[12] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority