

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 307  
5378267

BETWEEN	AISEA FOTU First Applicant
A N D	MANU FOTU Second Applicant
A N D	CREST COMMERCIAL CLEANING LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Tim Oldfield, counsel for Applicants  
Mere King, counsel for Respondent

Investigation meeting: 29 August 2012

Date of Determination: 5 September 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. Aisea Fotu and Manu Fotu each have a personal grievance because, (1) they were unjustifiably dismissed by Crest Commercial Cleaning Ltd (Crest) and (2) Crest failed to comply with Part 6A of the Employment Relations Act 2000.**
- B. Crest must pay Aisea Fotu \$2,193.75 in reimbursement of lost wages and \$4,500 as compensation under s 123(1)(c)(i) of the Act.**
- C. Crest must pay Manu Fotu \$3,071.25 in reimbursement of lost wages and \$4,500 as compensation under s 123(1)(c)(i) of the Act.**
- D. Interest at 5% per annum is to be paid by Crest on the Fotus' lost wages from the date of this determination.**

**E. Costs of \$1,000 and filing fee of \$71.56 are to be paid by Crest to the Service & Food Workers Union.**

**Employment relationship problem**

[1] The Authority has investigated claims brought by Mr Aisea Fotu and Mrs Manu Fotu that they were unjustifiably dismissed by Crest Commercial Cleaning Ltd and that the company also acted in breach of Part 6A of the Employment Relations Act 2000.

[2] Unjustifiable dismissal and a failure to comply with Part 6A are among several types of the personal grievance claim able to be brought under the Act.

[3] Until 16 March 2012 Mr and Mrs Fotu were employed by Professional Property and Cleaning Services Limited (PPCS) to perform cleaning work at Taylors College. When the cleaning contract was awarded to Crest the Fotus were advised that they could transfer their employment to that company if they wished. They signed a form on 5 March 2012, stating that they opted to transfer to Crest the employment and “all information necessary to complete this transfer.”

[4] The following day an email was sent by the Operations Manager of PPCS to the Sales Manager of Crest giving the following advice:

*I now have the election forms back from our cleaners at Taylors College. All 3 have elected to transfer over to Crest. I would like to set up a meeting with you, ourselves and our cleaners to start the ball rolling.*

*The cleaners start at 5.30pm daily, so could I suggest we meet on Thursday 8th March at 5pm, meeting to be held at Taylors College. If this is not convenient please suggest an alternative day. I would like to keep the time however the same.*

[5] There is no dispute in this case that the change of cleaning contractor for Taylors College brought about a Part 6A situation for the Fotus and other employees who had been working for PPCS at the college.

[6] The stated object of Part 6A of the Act 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 (Crest in this case). Protection is provided by giving to employees a right to transfer their employment to the other person on the same terms

and conditions. Workers such as the Fotus who provide cleaning services are within the categories of employee protected by Part 6A.

[7] On 6 March the Managing Director of Crest, Mr Grant McLauchlan, emailed to PPCS the following request:

*As any employee transfers on the same terms and conditions I ask that you in accordance with the legislation furnish to me:*

1. *A signed employment agreement for the affected employee.*
2. *A duly executed and signed election to transfer and an undertaking from you that you have complied with section 69G(c) of the legislation.*
3. *A copy of the cleaning specification for the school.*

[8] PPCS declined to provide the requested information, advising Mr McLauchlan that the affected workers had elected to transfer to Crest, that their employment agreement was confidential and that the cleaning specifications were obtainable from Taylors College. PPCS also advised:

*This information was readily available when our initial request for a meeting was sent on 6/3/12, to which we had received no response.*

[9] Mr McLauchlan advised on 15 March that in his view the election to transfer of the Fotus and another employee was invalid as “required documentation” had not accompanied a copy of the election advice, and he said:

*In your email received on the 8th March you have succinctly refused to supply the base information required to facilitate a transfer under the Part 6A legislation.*

*In the absence of receiving valid elections Crest Clean has now made other arrangements to resource this contract which starts this Monday 19th March!*

[10] PPCS again approached Crest to set up a meeting with staff who were transferring. Again there was no response from Crest.

[11] On 16 March, the day the transfer of the cleaning contract took place from PPCS to Crest, the Fotus went to Taylors College at the usual time in the expectation of meeting a Crest representative there and of commencing work for that company, as was their wish. The Fotus were unable to find anyone from Crest on 16 March or on Monday 19 March when they again returned to their usual work site at the normal work start time. Upon asking PPCS what was happening, the Fotus were advised that

Crest would not be engaging them and they then realised their cleaning jobs at Taylors College had been lost.

[12] On their behalf the Fotus' union, the Service & Food Workers' Union (SFWU), wrote on 30 March to Mr McLauchlan raising personal grievances for unjustified dismissal and for breaches of Part 6A of the Act. On 10 April a response was received from Mr McLauchlan who advised that the Fotus "are not and have never been employees of Crest".

### **Employment of the Fotus by Crest**

[13] Since giving its response Crest has acknowledged that the Fotus, having elected to transfer their employment under Part 6A of the Act, had become, or had been able to become, the employees of Crest. This occurred by operation of s 69I of the Act, which provides that if an employee elects to transfer to the new employer, as the Fotus had done, the employee becomes an employee of the new employer on and from the date of the restructuring, 16 March 2012 in this case.

[14] Mr McLauchlan's understanding of how Part 6A of the Act operates has been improved since March 2012 by the issue on 21 June of an Employment Court judgment in an earlier case brought against Crest; *Doran v. Crest Commercial Cleaning Ltd* [2012] NZEmpC 97. It concerned an employee who had elected to work for Crest in a Part 6A situation but whose right to do so had been rejected by the company and consequently the employee had not been permitted to perform the employment relationship. The Court held that by refusing to recognise and implement the employment relationship created under Part 6A, Crest had dismissed the employee and that the dismissal was unjustifiable.

### **Conditions of transfer**

[15] In the present case Crest has argued strongly that because the company did not receive the information it had sought from PPCS about the Fotus' terms and conditions of employment, and also the specification for the cleaning work they had been doing, the transfer of their employment was incomplete or ineffective.

[16] There is only one condition of transfer expressed under Section 69I of the Act; that an employee has made an election to transfer. The Fotus met that condition on 5 March.

[17] I reject the argument that another requirement is necessarily to be implied into the Act, that the kind of information sought by Mr McLauchlan about the Fotus must be provided before the election is complete or becomes effective. As was held by the Court in the *Doran* case, there is no proper or recognised basis for implying into the Act provisions which Parliament has not seen fit to enact and which are not necessary to give effect to the purpose of the legislation.

[18] I find that in the circumstances of this case there was nothing to make the transfer unworkable or prevent Crest from employing the Fotus. Crest could reasonably have taken a practicable step to obtain the information sought by simply meeting with the Fotus. This was suggested or requested by PPCS on 5 March and again on 8 and 13 March. If a meeting had taken place it would almost certainly have provided Crest with the knowledge that the Fotus were members of the SFWU and that were therefore to be employed by Crest under the terms and conditions of the NZ Cleaning Contractors Multi-Employer Collective Agreement. This was by operation of s 69M of the Act, which provides that a new employer becomes party to a collective agreement binding an employee electing to transfer. The Fotus had been employed by PPCS under the Cleaning Contractors MECA.

[19] As confirmed by the Court in *Doran*, in that case Crest had no basis for insisting on the provision of the executed employment contracts or the site specifications and other information sought from PPCS by Mr McLauchlan. He was held to have had no legal right to make the provision of that information a prerequisite to Crest complying with its statutory obligation to employ Mr Doran upon his electing to transfer.

[20] Mr McLauchlan has stated in evidence that he had no contact details for the Fotus, but that is a very weak explanation for failing to meet them when they were available at the Taylors College work site on the day of the transfer of their employment, at the usual time work commenced, and were also there on the next working day as well, 19 March, the start date Mr McLauchlan had confirmed. It appears that Crest or its representatives having disavowed on 15 March the transfer of the Fotus employment, simply wished to avoid them. There was therefore a failure by the employer to comply with its good faith obligations under s 4 of the Act to be responsive and communicative.

[21] It is fortunate that penalties have not been claimed against Crest in this case, as the breach was serious enough to undermine totally the employment relationships Crest was required by law to have with the Fotus.

### **Section 64 requirements**

[22] In responding to this claim, Crest in its statement in reply raised the requirements of s 64(1) of the Act as having been an obstacle to the employment of the Fotus. The company contended that without the information it had requested from PPCS, including copies of the employment agreements of the Fotus, there had been a legal “checkmate” as follows:

1. *If Crest did not employ the Fotus Crest was in breach of Part 6A or*
2. *If Crest did employ the Fotus without retaining copies of their employment agreements or terms and conditions it would be in breach of section 64(1) rendering Crest exposed to a \$20,000 penalty.*

[23] Section 64(1) of the Act requires an employer to retain a signed copy of the employee’s individual employment agreement or current terms and conditions of employment that make up the employee’s individual terms and conditions of employment, as the case may be.

[24] The introductory words of s 64(1) are “when section 63A applies.” The latter provision is about bargaining for individual employment agreements or individual terms and conditions in an employment agreement, which was not the situation with Crest and the Fotus. In any event the Fotus were, as Crest could easily have discovered, employed under a *collective* employment agreement which, by operation of the Act, was the employment agreement that Crest was to become party to upon transfer of the employment.

### **Justification for dismissal and breach of Part 6A**

[25] The Fotus, on both counts of unjustified dismissal and breach of Part 6A, I find each have a personal grievance. Whether they were persons employed or were persons intending to be employed, their employment ended at the initiative of Crest which effectively sent them away by rejecting the employment relationship that had been formed with them. Applying the test of justification at s 103A of the Act, I find

the actions of Crest and how the company acted were not what a fair and reasonable employer could have done in all the circumstances.

[26] An objection to Part 6A and the way that it operates cannot justify a failure to comply with the law as enacted. Mr McLauchlan regards PPCS as having caused the situation but also appears sensitive to the fact that Crest's response to PPCS when it did not provide the information requested, cost the Fotus their jobs intended to be protected by the Act.

[27] Mr McLauchlan is also aware that protest against the Act needs to be aimed at those who make the law rather than workers whom he regards as having been pawns in a movement to have the legislation amended or repealed. He may consider that the facts of this case do not make it a suitable one for highlighting defects he claims exist with Part 6A of the Act. Crest was not tripped up by the law but by its own failure to take the very simple and easy step of meeting the Fotus and talking to them. Having done so Crest would have realised quickly there was no basis for being concerned about s 64 of the Act and its operation in the circumstances.

### **Remedies for the personal grievances**

[28] I accept the evidence of the Fotus as to the attempts they made to find other employment once they realised they had been dismissed. I accept the calculation of lost wages for a period of three months following their dismissal. The calculation takes into account other employment the Fotus had but at different times of the day in other cleaning work they organised their time around each week.

[29] I award Mr Aisea Fotu the sum of \$2,193.75 for 13 weeks lost wages in relation to the 12½ hour a week position he was dismissed from by Crest. I award Mrs Manu Fotu the sum of \$3,071.25 on the same basis.

[30] The Fotus gave evidence of the humiliation, loss of dignity and injury to feelings they suffered. Half their family income was lost, causing them to be stretched financially, and they also felt embarrassment through having to borrow money from family members to pay for financial commitments which had been undertaken on the basis of their ongoing employment. I award each of the Fotus \$4,500 under s 123(1)(c)(i) of the Act.

[31] The circumstances of this case do not require any reduction in the remedies on account of contribution, as the Fetus were entirely blameless for the situation they found themselves in when they were dismissed unjustifiably and when Crest failed to comply with Part 6A of the Act.

[32] Interest calculated from the date of this determination is to be paid on the lost wages at 5% per annum, the current rate prescribed.

**Costs**

[33] I award costs of \$1,000 which are to be paid to the applicant's representative, the Service & Food Workers' Union. The filing fee of \$71.56 is also to be reimbursed to the Union.

A Dumbleton  
**Member of the Employment Relations Authority**