IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 158
5379875

	BETWEEN	LEND LEASE INFRASTRUCTURE SERVICES (NZ) LIMITED Joint Applicant
	AND	RECREATIONAL SERVICES LIMITED Joint Applicant

Member of Authority:	R A Monaghan
Representatives:	A Drake and R Childs, counsel for first applicant G Pollak, counsel for second applicant
Investigation Meeting:	On the papers
Determination:	9 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lend Lease Infrastructure Services (NZ) Limited (Lend Lease) and Recreational Services Limited (Recreational Services) have lodged a joint application under s 178 of the Employment Relations Act 2000 (the Act) for removal of a matter to the Employment Court.

[2] The application was lodged and has been determined under urgency.

[3] The grounds for the application are that:

(i) an important issue of law is likely to arise in the matter other than incidentally; and

(ii) the matter is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.

The matter before the Authority

[4] Lend Lease has a contract with the Auckland Council (formerly through the North Shore City Council) to provide various services in the maintenance of public parks. These services include a number of key cleaning components identified in the North Shore City Council's Community Parks – Contract Specifications document.

[5] The contract will terminate on 30 June 2012. Recreational Services will commence a superseding contract on 1 July 2012.

[6] Lend Lease is undergoing a restructuring process with employees affected by the pending termination of the contract. It believes certain employees are in potentially vulnerable positions, and may have a right to elect to transfer to employment with Recreational Services pursuant to Part 6A subpart 1 of the Act.

[7] In the interests of achieving certainty for all parties, Lend Lease and Recreational Services jointly have sought a declaration regarding whether the employees are 'vulnerable' – or, in words reflecting those in the Act, whether Part 6A subpart 1 applies to any of the employees in that a restructuring is proposed, and the employees provide the services set out in Schedule 1A.

[8] Such services include in particular:

> *(d) cleaning services or food catering services in the public service ... or local government 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)*

[9] The employees concerned hold positions with the titles:

- Labourer – Gardener;
- Labourer – Mowing;
- Labourer – Edging;
- Labourer – Maintenance Fixtures; and
- Horticultural Labourer.

[10] The duties associated with these positions are:

(i) Labourer – Gardener

Lend Lease says that, as well as the gardening duties listed in the position description in the employment agreement, labourer-gardeners perform cleaning duties such as removing litter from gardens, hedges, trees and adjacent areas, reporting dumped rubbish, and reporting failures to empty rubbish bins.

(ii) Labourer – Mowing

Lend Lease says that, in addition to the mowing duties listed in the position description in the employment agreement, labourer-mowers perform cleaning duties such as picking up loose litter and debris prior to mowing.

(iii) Labourer – Edging

Lend Lease says the duties of the sole employee in this category include cleaning duties such as picking up loose litter and debris prior to mowing or edging.

(iv) Labourer – Maintenance Fixtures

Lend Lease says that, in addition to the maintenance duties listed in the position description in the employment agreement, labourer-maintenance fixture employees carry out cleaning duties including: removing graffiti and bill posters; removing and disposing of litter; cleaning and removing animal and bird droppings and spider webs; wiping down and water blasting structures when required; cleaning BBQ areas and footpaths; and cleaning vehicles and keeping them free of litter. It says further that the majority of these employees' time is spent on cleaning duties.

(v) Horticultural Labourer

Lend Lease says that the cleaning duties carried out by horticultural labourers include the removal of litter and the cleaning of vehicles.

[11] The extent of the cleaning duties carried out by the employees is in dispute.

[12] None of the positions has a managerial or supervisory component.

[13] Some of the employees in each of the groups have indicated a wish to transfer to Recreational Services, while some have indicated that they are undecided. The labourer-edging employee is undecided. Other employees do not seek employment with Recreational Services.

Grounds for removal

1. Issue of law arising other than incidentally

[14] The parties have framed the issues of law arising as follows:

(a) whether the employees described in the five categories set out above are carrying out 'cleaning services' within the meaning of Schedule 1A;
(b) whether the employees' cleaning duties must be more than incidental in order to fall within Schedule 1A, and if so to what extent must a cleaning component be present in order to constitute 'cleaning services' under the schedule;
(c) whether the employees are eligible to transfer to the new employer under Part 6A;
(d) if the employees do provide 'cleaning services', to what extent do their positions transfer to the new employer;
(e) are the employees affected by the decision of the Employment Court in *Matsuoka v LSG Sky Chefs NZ Limited*[1], a decision yet to be issued in *Tan v LSG Sky Chefs*

[1] [2011] NZ EmpC 44

NZ Limited, and *LSG Sky Chefs NZ Limited v Pacific Flight Catering*[2]*;* and

(f) the extent to which the applicants need to or can reorganise their business affairs at or before the point of transfer.

[15] Points (a) and (b) reflect one of the issues in *Matsuoka.* There the services in question under Schedule 1A were food catering services. Mr Matsuoka was not directly engaged in the preparation or handling of food, rather he was engaged in its delivery and unloading. Even those duties took up less than half of his time, and the remainder of his time was spent on unrelated duties. The court accepted that 'food catering duties' extended to the delivery of food to third parties for consumption.

[16] Similarly here, to varying degrees, the employees concerned are not engaged either directly or full time in carrying out cleaning duties. The Employment Court indicated a wider rather than a narrower view of what is involved in providing food catering services was appropriate,[3] and there is a question of the extent to which a similar approach should be taken to the interpretation of 'cleaning services.' I regard that matter as turning primarily on the facts, with *Matsuoka* providing assistance as to the parameters of the approach. I do not accept that in isolation (a) and (b) raise issues of law which meet the test for removal.

[17] However the question in (c) is related to (a) and (b) if the phrase 'eligibility to transfer' was intended to be a reference to s 69F. In particular, s 69F(1)(a) provides that subpart 1 applies to employees to whom Schedule 1A applies. Although the parties have not further specified what issue of law arises, they may have a difficulty with s 69F(1)(b), which reads in part:

> *(1) This subpart applies to an employee if –*
> *(a)…; 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] The reference provided by the parties was High Court, 14 April 2011.
[3] *Matsuoka* at [65]

[18] I have no information about whether the application for removal incorporates any issue arising out of the words 'as a result of a proposed restructuring', or any issue arising out of s 69B-E which deal with aspects of the definition of restructuring. However the parties may have a difficulty with the meaning of 'the work performed by the employee' where the work in question comprises partly 'cleaning services' and partly unrelated duties.

[19] Question (d) may also refer to that point, as well as to further difficulties arising under s 69I.

[20] There was a discussion in *Matsuoka* of the application of s 69I(2), which reads in part:

> *(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 …*
> *(c) is not entitled to any redundancy entitlements …*

[21] The discussion concerned whether an employee could transfer only part of his or her work to the new employer if only part of the work was affected, with the employee becoming employed by two employers if that was the case.

[22] There was further discussion of how this possibility was reflected in s 69I(3), which reads in part:

> *(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 …*

[23] Mr Matsuoka was no longer required to perform any work for his old employer, not just the work covered by the new contractual arrangements. The Court concluded that in the circumstances before it the only workable interpretation of

s 69I(2) was that, in electing to transfer to LSG, Mr Matsuoka did so as a full time employee.[4] I accept that, because of Mr Matsuoka's particular circumstances, it is not clear whether the approach taken to those circumstances would apply in the same way to the cleaning services in question here.

[24] Further to (e) in the parties' list of issues, the nature of the difficulties with the application to the present matter of *Matsuoka* and the other proceedings cited was not further identified, although in that respect I have made some of the assumptions set out above.

[25] I am unable to identify what issue of law arises in (f) in the parties' list of issues.

[26] For the above reasons I conclude that issues of law arise in this matter other than incidentally in respect of (c) and (d) in particular.

2. Whether nature and urgency mean removal is in the public interest

[27] I accept that obtaining further clarity regarding the interpretation and application of Part 6A is important, as is facilitating the smooth transfer of the contract in question here without the need for extensive recourse to litigation.

[28] For these reasons I conclude that the nature and urgency of the matter mean removal of it to the Employment Court is in the public interest.

Order for removal

[29] I order that the parties' request for a declaratory judgment be removed in full to the Employment Court under s 178.

Costs

[30] Costs are reserved.

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[4] At [90]

[31] If no further approach has been made to the Authority within 28 days of the date of this determination there will be no order for costs.

R A Monaghan
Member of the Employment Relations Authority