

- (ii) Was Mr Lewis an effected employee pursuant to section 69OK of the Act?

Part 6A – continuity of employment

[3] Part 6A provides a higher level of statutory protection to a specified category of employees who are considered particularly vulnerable to, and disadvantaged by, a proposed change of employer¹. The categories of affected employees are set out in schedule 1A of the Act.

[4] Mr Lewis was employed as a barman/waiter in the Gateway restaurant. Does such a role fall within the definition of food catering services²? No. There was no evidence the restaurant in which Mr Lewis was employed provided food catering services.

Section 69OK – transfer of affected employee

[5] Section 69OK of the Act provides:

Affected employee may choose to transfer to new employer

If an employer, in relation to restructuring, arranges for an affected employee to transfer to the new employer, the affected employee may –

- (a) *choose to transfer to the new employer; or*
- (b) *choose not to transfer to the new employer.*

[6] This section falls within subpart 3 of the Act and applies to employees other than those whose employment falls within the specified categories set out in schedule 1A of the Act.

[7] The Employment Court considered section 69OK in *Olsen v Carter Holt Harvey IT Limited* ARC 4/08 where it observed:

Where an employer who's business is to be restructured reaches a consensus with the new employer which gives rise to an expectation that affected employees were transferred to the new employer, that it is likely to be an arrangement for the purposes of s.69O [subsequently

¹ Brooker's Employment Law ER6A.04

² Schedule 1A(f) Employment Relations Act 2000

amended in 2006 to section 69OK] to provided it arises out of a clear consensus, the arrangement need not be recorded in a legally binding agreement.

[8] Ms Darroch submits section 69OK applies to the facts of Mr Lewis' case:

- there was a sale of a business;
- the sale was a restructuring as defined under section 69OI(a)(ii);
- Mr Lewis was an affected employee per section 69OI(2);
- There was an arrangement and consensus for Mr Lewis' employment to transfer.

[9] Mr Ryan submits there was no arrangement or consensus around transfer of Mr Lewis' employment. This is the central question for the Authority to resolve.

[10] The sale and purchase agreement³ between the vendor and Gateway provides that "*Protected or Vulnerable Employee[s]*" in terms of the *Employment Relations Amendment Act (No 2) 2000* who are involved in cleaning or food catering services shall be separately identified to Gateway and employed on their same terms and conditions from date of possession.

[11] Prior to possession date Gateway representative Sachin Ghadiyar entered email correspondence with Leigh Payne, the vendor's representative, concerning employee transfer.

[12] Ms Payne says based on email and verbal conversations with Mr Ghadiyar she wrote to all staff, including Mr Lewis, that all staff would be transferred to the new employer. Mr Lewis received a letter dated 22 September confirming this understanding:

...
However, your present employer, Gateway Hotel has negotiated with the new owners that your position with the company will remain secure and open to you, should you wish to retain it. This is therefore a technical redundancy in that your present employment agreement will come to an end due to the restructuring but your position will still exist under the new management and ownership should you wish to take it up.
...

[13] Mr Lewis confirmed his intention to transfer his employment to the new employer by signature on a list of such employees.

³ Clause 16.0 Sale and purchase Agreement

[14] I am satisfied there was no attempt by Gateway to delineate vulnerable employees from any other category of employees. All employees were treated the same.

[15] I am satisfied the 22 September letter was sent to Gateway. There is no evidence Gateway raised any objection to this letter.

[16] I am also satisfied a list of transferring employees was sent to Gateway and that Mr Lewis' name was on that list. There is no evidence Gateway raised any objection to Mr Lewis' name being on that list.

[17] I am satisfied on the evidence that the vendor advised Gateway of employees who wished to transfer their employment upon possession and that Gateway raised no objection to that advice. I am satisfied that this list of transferring employees was independent of the provision of the sale and purchase agreement which only applies to statutory vulnerable employees, a category which does not apply to Mr Lewis. Gateway cannot now assert reliance on the sale and purchase agreement when there is no evidence that document informed its detailed discussions with the vendor about transferring employees.

[18] For these reasons I find a consensus was reached between Gateway and the vendor that Mr Lewis' employment would transfer. Gateway has failed to abide by that agreement the consequence of which was Mr Lewis' unjustified dismissal.

Remedies

[19] Mr Lewis has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

[20] Mr Lewis said he was deeply affected by his dismissal and that it has had a negative impact upon him. He felt singled out in having the transfer of his employment blocked by Gateway and has struggled to understand why. He said he was upset by the manner in which he found out his employment had not been transferred – when he saw his name was not on the posted roster he cried.

[21] **Gateway Motel Limited is ordered to pay Jason Lewis \$4000 pursuant to section 123(1)(c)(i) of the Act.**

[22] In relation to his claim for lost wages Mr Lewis said he had difficulty finding alternative employment because he had not yet secured his bar manager's license at time of dismissal and had relied on his continued employment to do so. He also said the fact of his personal grievance had been a barrier to his finding a new position.

[23] Mr Lewis' claim for lost wages was not supported by evidence of positions he had applied for. This has undermined his claim that he has taken reasonable steps to mitigate his loss.

[24] **Gateway Motel Limited is ordered to pay Jason Lewis 4 weeks wages at his usual rate at date of dismissal.**

[25] Mr Lewis did not contribute to the circumstances which gave rise to his dismissal⁴. He participated in good faith in what he understood was a process to transfer his employment to the purchaser of the business in which he was employed. No blame can be apportioned to him for the failure of Gateway to uphold that process and comply with obligations freely entered.

Costs

[26] Costs are reserved. The parties should attempt to resolve this issue themselves. If this is not possible then a timetable for the filing of costs memoranda will be set upon application.

Marija Urlich

Member of the Employment Relations Authority

⁴ Section 124 Employment Relations Act 2000