

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 109
5337748

BETWEEN WILLIAM TAN
 Applicant

AND LSG SKY CHEFS NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Rob Towner, Counsel for Applicant
 Garry Pollak, Counsel for Respondent

Statements Filed: 15 March by Applicant
 16 March by Respondent

Determination: 23 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties have made an application for the matter to be removed to the Employment Court in its entirety pursuant to s 178 (2) (a), (b) and (d) Employment Relations Act 2000.

[2] The questions of law are:

1. The identity of the applicant's employer and whether or not it is a contracting party for the purposes of Part 6(A) of the Employment Relations Act 2000.
2. Is the applicant an employee who is entitled to elect to transfer?
3. Whether an employee to whom Schedule 1A of the Employment Relations Act 2000 applies can be an employee affected by a "restructuring" (as defined in s69B) and must be provided with an

opportunity to exercise the right to make an election under ss69F and 69G, regardless of whether their employer and “person B” in the definition of “subsequent contracting” (as defined in s69C(4)) are the same legal entity;

4. If the applicant is entitled by law to elect to transfer then what are the terms of his transfer?

Background

[3] The applicant, Mr William Tan, was an employee of PRI Flight Catering Limited (“PRI”) trading as Pacific Flight Catering Ltd (“PFC”) until 22 February 2011.

[4] The applicant is claiming to be entitled to be transferred to LSG Sky Chefs NZ Limited (“LSG”), the respondent.

[5] LSG is a duly incorporated company also carrying on business as an airline caterer.

[6] PFC’s contract to provide catering services to Singapore Airlines (“SQ”) ended on 22 February 2011, and LSG commenced a superseding contract with SQ on 23 February 2011. PFC undertook a restructuring as a result of losing SQ’s catering contract.

[7] The applicant was advised by PFC that he had the right to elect to transfer to LSG pursuant to subpart 1 of Part 6 Employment Relations Act 2000.

[8] On 29 December 2010 the applicant told PFC that he elected to transfer to LSG on 23 February 2011 and he contends he is a protected employee pursuant to paragraph (e) of Schedule 1A Employment Relations Act 2000.

[9] LSG and PFC disagreed on a number of matters which were heard in the High Court under urgency in Auckland on 14 February 2011 and an oral judgment was issued on 14 February 2011 and a written judgment was subsequently released.

[10] An interim injunction was sought by LSG against PFC. The High Court rejected the argument that LSG was only obliged to accept a transfer of employees from PFC to the extent/proportion of their time spent on catering work for SQ.

[11] A significant number of employees who would normally be referred to as flight catering workers elected to transfer according to the provisions of the Employment Relations Act 2000, and following the oral judgment in the High Court on 14 February 2011, LSG was informed that the applicant had elected to transfer on 23 February 2011.

[12] The applicant contends he was involved in providing food catering services for the aviation sector and for SQ. He performed duties for PFC as an equipment and supply supervisor. His employment agreement described his duties as *Airline Equipment Supervisor*.

[13] The applicant contends he was not a manager at PFC.

[14] LSG has had approximately 40 employees who transferred, many of whom are members of a union, and all those employment relationships are between the individuals concerned and PFC. This is the same employer contracting party that successfully defended the application for an interim injunction in the High Court on 14 February 2011.

[15] The applicant's employer, PRI Flight Catering Limited, was not the contracting party that lost the SQ contract, nor was it a party in the High Court proceedings.

[16] The applicant says that on 23 February 2011 he became an employee of LSG pursuant to subpart 1 of Part 6A.

[17] LSG does not accept that the applicant is entitled to transfer.

[18] LSG has offered the applicant conditional employment, which he has accepted. That employment is conditional on the Authority or Court determining whether or not the applicant is an employee entitled to transfer pursuant to s 69 (A) Employment Relations Act.

Decision

[19] None of the previous cases in either the Authority or the Court regarding s69 (A) have dealt with the above issues.

[20] It is in the public interest that the matters be referred to the Employment Court and that the issues of the application, operation and interpretation of Part (6) be considered by the Employment Court.

[21] The legal issues referred to do not arise incidentally but are intrinsic elements of the alleged personal grievance.

[22] In all the circumstances the Employment Court should determine this matter.

[23] Accordingly I order that the entire matter be removed to the Court.

Costs

[24] Costs are reserved. If either party seeks an order for costs, the party seeking the order shall have 28 days from the date of this determination in which to file and serve a memorandum in this matter. The other party shall have a further 14 days in which to file and serve a reply.

Dzintra King

Member of the Employment Relations Authority