

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 88
5580463

BETWEEN AROHA KAPA, TUPOU
 UELE, ELIZABETH ASHBY,
 MAKELETA MAAKE,
 JENNIFER KAA AND
 CHRISTOPHER SEXTON
 Applicants

AND BIOGIENE LIMITED
 First Respondent

AND A M HOSPITALITY LIMITED
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell, Counsel for the Applicants
 Russell Drake, Advocate for the Respondents

Investigation Meeting: 18 December 2015 and 17 March 2016

Determination: 18 March 2016

DETERMINATION OF THE AUTHORITY

- A. The terms and conditions of employment applicable to the applicants at the time their employment transferred to A M Hospitality Limited (AMHL) on 29 September 2014 were those applicable to them at the time of the transfer of their employment from Silver Fern Farms Limited to ISS Facility Services Limited on 1 July 2013.**
- B. Within 56 days of the date of this determination AMHL must calculate any shortfalls in payments made to each applicant for annual holidays, minimum ordinary hours of work, call outs, overtime for weekend work, and long service leave and then pay to each applicant amounts due to her or him for those shortfalls.**

C. Leave is reserved for the parties to seek further directions in respect of the calculation of payments due, after first attempting to resolve any differences with mediation assistance.

D. Costs are reserved, with a timetable for memoranda to be lodged and served if necessary.

Employment Relationship Problem

[1] This determination concerns the application of s 69I(2)(b) of the Employment Relations Act 2000 (the Act) to the terms and conditions of cleaners working at a meat works operated by Silver Fern Farms Limited (SFF) in Dargaville.

[2] The applicants were cleaners directly employed by SFF until their work was contracted out. On 1 July 2013 their employment transferred to ISS Facilities Services Limited (ISS). That was the first transfer. On 29 September 2014 their employment transferred again, this time to A M Hospitality Limited (AMHL). That was the second transfer.

[3] Biogene Limited (BL) and AMHL are companies related through a common directorship. BL is party to a commercial contract with SFF to provide cleaning services at its Dargaville plant. AMHL is the employer of the workers who do the work to provide those services to SFF. Some of the transfer and employment documentation initially given to the applicants referred to BL as the employer but printed employment agreements signed by them identified AMHL as the employer. In submissions to the Authority AMHL confirmed it was the employer and bore the burden of whatever duties and obligations were owed to the applicants. For the purposes of this determination I have accepted AMHL is the employer.

[4] In a case brought with the assistance of the Meat Workers Union (the Union), the applicants argued their terms and conditions should have remained the same at the time of the first transfer and then again at the time of the second transfer. They said those terms and conditions were largely as set out in a collective agreement between the Union and SFF for the Dargaville plant. The agreement's term had expired in January 2013 but the applicants said its provisions remained the basis on which they were employed. The applicants who were not union members were employed on the

same terms and conditions as in the collective agreement. The applicants said ISS had not honoured all of those provisions after the first transfer but they had not agreed to any such reduction or change to the terms and conditions. Following the second transfer the applicants said further changes were imposed. AMHL paid them only for five-and-a-half hours on the days they were required to work between Monday and Friday, rather than the six hour minimum they were paid by ISS and SFF for work on those days. Call outs were no longer paid at a four hour minimum. Again the applicants argued they had not agreed to any such changes and so remained entitled to be paid on the same terms as they had been immediately prior to the first transfer.

[5] The applicants sought a compliance order to make AMHL pay them for at least six hours on each week day they were required to work, holiday pay at the rate of ten per cent rather than eight per cent, overtime rates for weekend work, at least four hours for call outs, and for long service leave. Each element of the order sought related to a term in the expired collective agreement.

[6] In reply AMHL denied it failed to observe the requirements of Part 6A of the Employment Relations Act 2000 (the Act) relating to the continuity of employment for workers affected by contracting out and subsequent contracting. Its defence focussed on the question of whether terms and conditions said to derive from a collective agreement between SFF and the Union had any ongoing application to the cleaners who AMHL understood were then employed on individual employment agreements with ISS by the time of the second transfer. AMHL also identified problems it experienced in getting information from ISS at the time of the second transfer about the terms and conditions of the cleaners. In the absence of necessary information AMHL had the transferring cleaners sign individual employment agreements that set out terms and conditions that the company thought were consistent with the cleaners' existing entitlements.

The Authority's investigation

[7] At an investigation meeting on 18 December 2015 I heard evidence from BL's national technical manager Jeremy Gregory, BL's New Zealand office manager Eileen Hartman, BL and AMHL's national sales and development manager James McAllister and one of the applicants, Christopher Sexton. The meeting was

adjourned to 17 March 2016 with arrangements made to allow the parties to gather more relevant information from ISS and SFF.

[8] Additional documents lodged included:

- transfer forms signed by the applicants in June 2013, electing to transfer their employment to ISS; and
- the last pay slips provided to the applicants by SFF, for the period ending 23 June 2013; and
- a signed statement from ISS human resources manager Craig Ryan setting out some information about what ISS said was the basis on which it employed the cleaners at the time of the first transfer; and
- an SFF notice dated 8 March 2013 advising the cleaners that its contract with ISS would “have the same terms and conditions that you are currently on now”; and
- An email exchange between an ISS manager and an ISS payroll adviser in August 2013 that corroborated evidence from the applicant witnesses that soon after the first transfer they raised the issue of their ongoing entitlement to annual leave payments at the rate of ten per cent and to long service leave.

[9] On 17 March 2016 Mr Sexton, Mr McAllister, Tupou Uele and Makeleta Maake provided additional oral evidence. Mr Sexton, Ms Uele and Ms Maake described what had happened prior to and between the first and second transfers. Importantly each of those latter three witnesses confirmed they gave no written or oral agreement to vary their terms and conditions of employment while employed by ISS.

[10] The investigation closed with concise submissions from the representatives. AMHL accepted that, due to problems in getting accurate information from ISS at the time of the second transfer, the applicants may not have been paid the correct terms and conditions since then. It submitted this situation arose despite its best endeavours at the time.

[11] At the end of the investigation meeting I gave an oral indication of preliminary findings, now confirmed by this written determination.¹ As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on

¹ Employment Relations Act 2000, s 174 and 174B.

issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What the Act requires

[12] Section 69I makes it clear a worker within the protected categories must transfer to the new employer on the same terms and conditions:

(1) An employee to whom this subpart applies may, before the date provided to the employee ..., elect to transfer to the new employer.

...

(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 as applied to the employee immediately before the specified date**, including terms and conditions relating to whether the employee is employed full-time or part-time; and

...

...

(4) In this section, specified date means the date on which the restructuring takes effect.

[13] Restructuring is defined to include contracting out, contracting in and subsequent contracting. It applied to the situation here where SFF had first contracted to have ISS provide cleaning services and then contracted with BL or AMHL to provide those services.

[14] Section 238 prohibits contracting out of provisions of the Act:

The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[15] The Court of Appeal has described the intention of Part 6A of the Act, which includes s 69I, as preserving the entitlements of transferring workers in a “seamless” way as they change employers due to restructuring:²

Standing back and looking at Part 6A as a whole, it is clear that the intention is to preserve the ongoing employment of vulnerable employees at the time of a restructuring if that is at all possible, and to do so in a way that is seamless from the employees' point of view. That involves preserving all entitlements and allowing the transferring employees to treat their period of employment with the old employer and the new employer as if they had been employed throughout by the same employer. That regime places responsibility on the new employer so that the transferring employee now looks to the new employer for his or her entitlements.

[16] The Employment Court has also considered the application of s 69I of the Act in the context of a departing contractor not co-operating with an incoming contractor

² *Pacific Flight Catering Limited v LSG Sky Chefs New Zealand Limited* [2013] NZCA 386 at [32].

and the resulting difficulties that may result for a new employer in corroborating the correct terms and conditions applicable to transferring employees.³ The Court confirmed the obligation under s 69I(2)(b) required an enquiry into the totality of actual terms and conditions at the time of the transfer. It also confirmed that the phrase, “the same terms and conditions” used in the section referred to all rights, benefits and obligations arising from the employment relationship at that time. The concept was necessarily wider than the terms of the employment agreement. It includes customary benefits and reasonable expectations of the employment. Those terms and conditions may be partly written, partly oral and partly established by a pattern of evolving conduct over time.⁴

[17] A further point relevant to the interpretation of s 69I(2)(b) was touched on in answers Mr McAllister gave during questions at the Authority investigation. He accepted that the reference to what terms and conditions “applied” must be read as what lawfully applied. In a hypothetical example of an employer paying below the minimum wage, a subsequent contractor could not argue that those were the terms at the date of transfer and it was then entitled to pay less than otherwise required by the law. Similarly, and relevant to the applicants’ claim, if what ISS was paying them immediately before the second transfer did not properly reflect the terms and conditions to which they were entitled, AMHL could not insist those were then the terms and conditions that lawfully applied to those workers at the time. In short an objective assessment was needed of the terms that properly and lawfully applied to the workers immediately before the date specified for the transfer. Unlawfully reduced or inadequate terms could not be relied or insisted upon as the appropriate terms in a subsequent transfer, even if AMHL was not directly responsible for that situation having arisen.

The applicable terms and conditions

[18] In that light, and on the civil standard of proof as to what was more likely than not to have been the case, the following findings arose from the evidence.

[19] Prior to the first transfer each applicant was employed on the basis of the terms and conditions set in the SFF Dargaville collective agreement, either directly or

³ *Nisha v LSG Sky Chefs New Zealand Limited* [2015] NZEmpC 171.

⁴ *Nisha*, above n 3, at paragraphs 86, 88, 90 and 95.

through an individual agreement with the same terms and conditions. The following provisions were among the terms and conditions applicable to them immediately before the first transfer:

- Annual leave was paid at the rate of 10 per cent on gross earnings, or an extra week's leave a year – Section A clause 19(b).
- A minimum of six hours was paid for week days they were required to work – Section B clause 3(c).
- Weekend work was paid at the rate of time and a half – Section A clause 10(a).
- A minimum of four hours was paid when “called out” to work – Section A clause 15(d).
- Long service leave was provided – Section A clause 20(a).

[20] After the first transfer ISS paid the cleaners at the same base rate they were paid by SFF. ISS continued to pay them for a minimum of six hours on each weekday worked and a minimum of four hours for call outs but it did not pay them holiday pay at the ten per cent rate. Whether ISS paid for weekend work at the overtime rate was not clearly established. No long service leave entitlements appeared to have fallen due during the ISS period of employment.

[21] No written or verbal variations to the applicable terms were agreed to by the applicants during their employment by ISS. They had questioned an ISS supervisor and an ISS manager about reductions imposed on their terms and conditions but no changes were made by ISS as a result. In the absence of any lawfully agreed change, the applicable terms and conditions at the time of the second transfer were those that applied immediately before the first transfer. As a result AMHL was liable to pay the cleaners on the relevant rates and for the required minimum hours set out in the clauses from the Dargaville collective agreement.

[22] The liability of AMHL was not negated by the problems getting accurate information from ISS. The Act provides a disclosure regime with the apparent purpose of enabling a new employer to get all the necessary information from the previous employer about the entitlements of transferring employees: sections 69OA – 69OG. BL and AMHL did not use those provisions to seek information from ISS. From the evidence of Mr McAllister and Ms Hartman I got the impression those

statutory disclosure provisions were not regarded as practical or realistic in the competitive commercial environment.

[23] While BL and AMHL could have sought information from SFF directly about what it understood the terms and conditions of the cleaners were, Ms Hartman frankly acknowledged in her evidence that it was not something they had thought of doing when they had difficulty getting information from ISS.

[24] Mr Ryan of ISS, in his written statement, suggested the cleaners were covered by a multi-employer collective agreement (MECA) for the commercial cleaning industry after the first transfer. It was an unconvincing proposition. There was no evidence any of the cleaners were members of the union with which that MECA was negotiated. Rather, those workers who were union members remained members of the Meat Workers Union. Even if that cleaning industry MECA did apply, it could not automatically override the applicable terms and conditions of the applicants transferred under s 69I of the Act. To negate s 69I in that way would breach the s 238 prohibition on contracting out of the Act. It could not occur unless there was some express agreement from the workers for such changes. I was satisfied from the evidence of Mr Sexton, Ms Uele and Ms Maake that they had not agreed to any such changes during their employment with ISS.

[25] The employment agreements signed by each applicant either shortly before or when their employment transferred to AMHL did not negate the terms and conditions automatically transferred under s 69I(2)(b). To do so would also have breached s 238 of the Act. The employees were only asked to sign those agreements because of the supposed difficulty in establishing from ISS what terms and conditions they were to transfer their employment. The agreements were not necessary to establish their employment with AMHL. The employment occurred by their election to transfer. Their applicable terms and conditions also transferred. Any other interpretation would defeat Parliament's intention in enacting Part 6A of the Act and the 'seamless' continuity of employment it provides for the specified categories of protected workers.

Orders

[26] For the reasons given the applicants were entitled to an order requiring AMHL to pay them on the basis of the terms and conditions that lawfully applied at the time of the second transfer. To comply with this order AMHL must:

- (i) Henceforth, and unless different terms and conditions are lawfully negotiated and agreed, pay those applicants who still remain employed by AMHL on the basis of the terms and conditions found applicable in this determination; and
- (ii) calculate the difference between what has been paid to the applicants since the time of the second transfer and what they were entitled to under those terms and conditions and then pay each applicant an amount equal to any shortfall identified; and
- (iii) complete the calculation and payment required in subparagraph (ii) by no later than 56 days from the date of this determination.

[27] Leave is reserved to either party to revert to the Authority for further directions if necessary to resolve any aspect of compliance with these orders. They should not do so without first attempting to resolve any differences by mediation.

Costs

[28] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. As indicated at the close of the investigation meeting, assessing an appropriate award of costs would likely start from the Authority's usual daily tariff for a single day (conflating the two part days taken for the investigation). If the parties do not resolve costs themselves and an Authority determination on costs is needed counsel for the applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum BL and AMHL would then have 14 days to lodge memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur
Member of the Employment Relations Authority