

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 97  
5336538

BETWEEN

JOHN MATSUOKA  
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

Telephone Conference: 10 March 2011

Determination: 11 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**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) Employment Relations Act 2000 on the grounds that an important question of law is likely to arise other than incidentally.

[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. The applicant is a significant shareholder of a small private company (Pacific Rim Investments Ltd) that is the investment owner of the contracting party and is in effect the "employer"

which gives rise to a conflict of interest and whether on this basis alone LSG is obliged by law to employ the applicant.

3. Is the applicant, given his employment conditions, his seniority, his relationship with his legal employer, and with the other shareholders, an employee who is entitled to elect to transfer irrespective of the above issues?
4. 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;
5. Whether an employee to whom Schedule 1A applies and having been identified by their employer as an employee affected by a restructuring is entitled pursuant to s69G to elect to transfer to the new employer, regardless of any of the sorts of matters referred to in 1, 2 and 3 above; and
6. Whether an employee who is entitled to elect to transfer to the new employer and having elected to do so pursuant to s69I(1), becomes an employee of the new employer by operation of (1)(a) and regardless of any of the sort of matters referred to in 2 and 3 above.
7. If the applicant is entitled by law to elect to transfer then what are the terms of his transfer?

## **Background**

[3] The applicant, Mr John Matsuoka, is an employee of PRI Flight Catering Limited (“PRI”) trading as Pacific Flight Catering Ltd (“PFC”). The applicant is one of a small number of shareholders in Pacific Rim Investments Limited, which is the major shareholder of PRI Flight Catering Limited. PRI Flight Catering Limited is the major shareholder of Pacific Flight Catering Limited.

[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 21 December 2010 the applicant told PFC that he elected to transfer to LSG 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. LSG had not heard of the applicant until after the High Court hearing on 14 February 2011.

[12] The applicant contends he is a *senior ground steward* and PFC forwarded a written individual employment agreement to LSG. The duties carried out by the applicant are in dispute.

[13] 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.

[14] The applicant has a different type of employment agreement from the employees of PFC who have transferred. 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.

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

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

[17] There is disagreement between the parties as to the nature of the applicant's duties and that he is not a *ground steward* although he does undertake some ground steward duties.

## **Decision**

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

[19] 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.

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

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

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

**Costs**

[23] 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