

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 95
5352899

BETWEEN JOHN MATSUOKA
 Applicant

A N D LSG SKY CHEFS NEW
 ZEALAND LTD
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Anthony Drake and Rosemary Childs, counsel for
 Applicant
 Garry Pollak, counsel for Respondent

Investigation Meeting: 7 March 2012

Date of Determination: 14 March 2012

DETERMINATION OF THE AUTHORITY

Application for removal

[1] At the beginning of the investigation meeting on 7 March an application was made under s 178 of the Employment Relations Act 2000 for an order removing the matter before the Authority to the Employment Court.

[2] That matter was the personal grievance claims of unjustified disadvantage and unjustified dismissal Mr John Matsuoka has raised with LSG Sky Chefs New Zealand Ltd (LSG).

[3] Removal was sought on behalf of Mr Matsuoka and not opposed by LSG.

[4] Mr Drake, counsel for Mr Matsuoka, addressed two of the grounds under s 178 of the Employment Relations Act 2000 relied upon in support of the application:

- (a) an important question of law is likely to arise in the matter other than incidentally,
- (b) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[5] Legal issues between Mr Matsuoka and LSG arising from an employment relationship between them, have in the past 12 months or so been before the Employment Court. After a hearing in April 2011 a judgment was given from the proceedings – *Matsuoka v. LSG Sky Chefs New Zealand Limited & another* [2011] NZEmpC 44 – with the Court reserving a number of issues for further hearing or consideration.

[6] The employment relationship problems of Mr Matsuoka arose out of an election he made to transfer from the business in which he had been employed for some years, Pacific Flight Catering Ltd (PFC) to LSG. That election was available to Mr Matsuoka under Part 6A of the Employment Relations Act, the subtitle of which is “Continuity of Employment if Employees’ Work Affected by Restructuring”. PFC, in conducting its business of providing food catering services, had been unsuccessful in tendering to renew a contract with an international airline. Its competitor LSG had been awarded the work instead.

[7] Provisions of Part 6A of the Act allow for employees who provide work in specified categories (which include food catering services) and who are affected by restructuring, to transfer their employment to the new employer performing the work.

[8] Mr Matsuoka exercised a right of election under Part 6A to transfer and by doing so became eligible for employment by LSG on the same terms and conditions as he had had in his employment with PFC. The new employment was also to be treated as continuous with regard to service-related entitlements such as paid annual holidays and other forms of leave.

[9] Initially LSG had disputed Mr Matsuoka’s claim that he was entitled to the protection of Part 6A of the Act. When Mr Matsuoka applied to the Authority to have that issue resolved the matter was removed to the Court under s 178 of the Act, on the basis that the matter gave rise to a number of important questions of law.

[10] The Court in its judgment of 18 May 2011 held that Mr Matsuoka was an employee who was entitled to elect a transfer to LSG and was entitled to be employed by that company on the same terms and conditions of employment that had applied to him immediately before the transfer, when working in the PFC business.

[11] The matters that remain before the Court and which are expected to be decided in a further judgment awaited by the parties, relate to a phase between February 2011 when Mr Matsuoka elected transfer and May 2011 when the Court declared that he was entitled under Part 6A of the Act to do that. Those matters are grievance claims made about the alleged actions of LSG during that phase.

[12] The matters for which removal is now sought relate to a second phase between the issue of the Court's judgment in May 2011 and Mr Matsuoka's dismissal by LSG on 11 July 2011. He claims the dismissal was unjustified and that prior to it actions of the employer LSG were also unjustified and affected him to his disadvantage in his employment.

[13] The dismissal was the outcome of disciplinary proceedings LSG commenced against Mr Matsuoka after the Court upheld his entitlement to transfer and when he had sought to take up a position on transfer with LSG. A disciplinary process was invoked with regard to LSG's concerns that Mr Matsuoka had a conflict of interest arising from his former employment in the PFC business and from various relationships and associations held and retained with PFC and its owner, a company called PRI Flight Catering Ltd (PRI) and with some of PRI's directors, officers, employees or agents including shareholders of that company.

[14] A further concern LSG sought to address with the disciplinary process was in respect of lost trust and confidence in Mr Matsuoka. This issue arose out of attempts by LSG to verify information provided by or for Mr Matsuoka as to his entitlement to wages and holiday pay and other benefits while employed by PRI/PFC immediately prior to transfer in February 2011. LSG was concerned about whether Mr Matsuoka had knowingly misrepresented or mis-stated his entitlements.

[15] The disciplinary process was concluded when LSG gave Mr Matsuoka the following advice:

LSG, given the evident conflict and misrepresentation has lost trust and confidence and cannot realistically see any alternative other than dismissal.

[16] Mr Matsuoka was offered the option of resigning, to assist him in the future, but he declined that and raised grievances for unjustified dismissal and unjustified disadvantage.

[17] On behalf of Mr Matsuoka it was denied that there had been any real conflict of interest or that he had made any representations for which he could have been punished by summary dismissal. Extensive remedies were sought but not including reinstatement. Mr Matsuoka has apparently since July 2011 returned to work for PRI/PFC.

Grounds

(a) *An important question of law*

[18] I accept that there is one or more important question of law arising from the unprecedented circumstances of this case. Although mixed with questions of fact they are nevertheless distinctive questions of law. In particular, there is a question as to whether in the circumstances of an employee transferring from one employer to another by operation of law under Part 6A of the Act, *conflict of interest* can be grounds for dismissal and if so what degree of conflict must be present.

[19] The question broadly is whether employers of employees transferring under the entitlement of Part 6A of the Act, must take the employees as they find them. Is the right to transfer an unrestricted or absolute one, or does the employer have a retroactive ability to 'select' its employees, with or without limitation? In this case LSG, purportedly, would not have selected Mr Matsuoka for employment had he been an applicant for a position, because of a conflict of interest arising from his perceived affiliation and allegiance with PRI/PFC, a business competitor.

(b) *Proceedings are before the Court which are between the same parties and involve the same or similar or related issues*

[20] I find this test too is satisfied, as the case taken last year to the Court by Mr Matsuoka against LSG has not been fully determined but, as the judgment indicates, there are further issues possibly requiring further evidence still to be heard and considered.

[21] Although the case taken to the Court and the one presently before the Authority involved two different phases, those were consecutive periods which were part of a continuum beginning when Mr Matsuoka elected to transfer and ending when he was dismissed some five months later. The issues arising from those two phases are very closely related.

(c) *The Authority is of the opinion that in all the circumstances the Court should determine the matter*

[22] This ground is also present I find. Even if grounds (a) and (c) above relied on in support of the removal application were thought to be not precisely or exactly made out to the standard required, there is enough in those grounds and in the unique circumstances of this case to warrant removal to the Court, in the opinion of the Authority.

[23] Further, both parties through their counsel Mr Drake and Mr Pollak are confident that whatever outcome may be achieved through a determination given by the Authority it will be challenged and the matter will need to begin all over again, with more expense and more time taken up. Removal is likely to allow this matter to be more economically and speedily resolved.

Determination

[24] For the above reasons the application for removal is granted. The claim brought to the Authority by Mr Matsuoka under Authority File No.5352899 is to be transferred to the Court in its entirety, for hearing and determination without the Authority investigating it.

Costs

[25] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority