Determination Number: WA 69/05
File Number: WEA 68/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Anne Newall (first applicant)
AND	Service & Food Workers Union (second applicant)
AND	McKellar Property Services Limited (respondent)
REPRESENTATIVES	Luci Highfield for the applicants Graeme Ogilvie for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	14 & 22 April 2005
DATE OF DETERMINATION	28 April 2005

DETERMINATION OF AUTHORITY: Application for Removal to the Court

Employment Relationship Problem

1. The applicants say the Company has breached part 6A, subpart 1 (ss 69A – 69J) of the Act, clause 25.4 of a relevant collective employment agreement and a deed of agreement signed with the second applicant on 9 December 2003 – statement of

problem received on 9 March 2005. In a subsequent application received on 12 April the applicants say there is an important question of law and ask that it be referred to the Employment Court. The question is whether Part 6A of the Act applies in a situation where an employer, who has a cleaning contract with another person, loses that cleaning service contract and another employer takes over the contract.

2. The Company denies breaching part 6A of the Act and clause 25.4 of the collective agreement. It says the Deed of Agreement had expired – statement in reply received on 17 March. It opposes the subsequent application for referral to the Employment Court.

Applicants' Position

3. The applicants say three questions arise, arising out of the original application:

   a. Did subpart 1 of Part 6A of the Act apply to the circumstances of the change of cleaning company, to the respondent?

   b. If it did then was it applied by the respondent? And,

   c. If it was not applied, what are the appropriate remedies?

4. The applicants understand the respondent's position in relation to 3.a. above is that subpart 1 of Part 6a did not apply. As a result, 3.a. is the important question of law to be referred to the Employment Court. It follows from the above that question 3.c. is also important, not only for the applicants but to others to whom the legislation applies.

5. The important question of law arises other than incidentally because judicial consideration is required of a new part of the Act. The question has general importance to many thousands of employees, to unions and a number of employers in New Zealand. There is a significant public interest.

6. The applicants also understand that a similar case (CEA 56/05 – Gary Gibbs & Ors v Crest Commercial Cleaning Ltd)) has been granted an application for removal.

Respondent's Position

7. In respect of the application for removal, the respondent confirms that it does not agree that Part 6A applies but otherwise elects to make no submissions.

Discussion and Findings

8. Part 6A of the Act was effected by the Employment Relations Amendment Act (No. 2). The purpose of the amendment is to amend *"… the provisions of the principal Act, particularly in relation to … protection to employees in situations where business undertakings are sold, transferred, or contracted out"* (s. 3 of the Amendment Act (No. 2) 2004.

9. Part 6A of the Amendment Act is headed ***"Continuity of employment if employer's business restructured"***. The object of Subpart 1 is defined as providing *"protection to specified categories of employees, if their employer proposes to restructure its business so that their work is to be performed for a new employer and, to this end, to give employees a right … to elect to transfer to the new employer, etc"*.

10. In their original application (filed on 9 March 2005) the applicants say the respondent failed or refused to employ the first applicant, when a cleaning contract was lost in late 2004 by her then employer, having been won by the respondent.

11. In *Gibbs & Ors* v *Crest Commercial Cleaning Limited* (CA 49/05, 12 April 2005), my colleague Helen Doyle ordered the removal of that employment relationship problem in its entirety to the Employment Court. A reading of that determination indicates similarities of fact with this application. Ms Doyle found that an important question of law arose, i.e. whether Part 6A is applicable in a situation where one independent contract has ended and another has commenced (par. 7). Ms Doyle was also satisfied that the question of law affected large numbers of employers and employees and was of significance generally (par. 9).

12. I am satisfied that an important question of law arising other than incidentally exists. That is because Part 6A is a new, significant and untested amendment to the Act. The Employment Court also has before it proceedings which involve the same or

similar or related issues. In all the circumstances I am of the opinion the Employment Court should determine the matter in its entirety: s. 178 of the Act applied.

Determination

13. For the reasons set out above I find in favour of Anne Newall's and the Service & Food Workers Union Inc.'s application that this matter be removed to the Employment Court for hearing and determination.

14. The parties are to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher
Member of Employment Relations Authority