IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 97
CRC 49/10

IN THE MATTER OF	a proceeding removed into the Court by the Employment Relations Authority
BETWEEN	ROGER TERENCE DORAN Plaintiff
AND	CREST COMMERCIAL CLEANING LIMITED Defendant

Hearing: 7, 8 & 20 June 2011
(Heard at Nelson & Wellington)

Court: Judge A A Couch
Judge A D Ford

Appearances: Steven Zindel and Heather Mckinnon, counsel for the plaintiff
Peter Kiely and Mere King, counsel for the defendant

Judgment: 21 June 2012

JUDGMENT OF THE FULL COURT

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[1] Part 6A of the Employment Relations Act 2000 (the Act) came into force on 1 December 2004[1]. Its stated object[2] is to "provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person". To this end, Part 6A gives "the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment".

[1] Note, however, that the sections of the Act dealt with in this decision were substituted as from 14 September 2006.
[2] See s 69A.

[2] This case deals with the interpretation and application of Part 6A in a typical situation. A business decided to change its cleaning contractor. Mr Doran was doing the work for the outgoing contractor. Crest Commercial Cleaning Ltd (Crest) was the incoming contractor. The issue is whether Mr Doran validly elected to transfer to Crest as he was entitled to do under Part 6A. Mr Doran says he made a valid election. Crest says he did not.

[3] The dispute was lodged with the Employment Relations Authority by Mr Doran as a personal grievance. He claimed that, by electing to transfer to Crest, he had become an employee of Crest and that, by refusing to recognise him as an employee and provide him with work, Crest had unjustifiably dismissed him. The Authority determined[3] that important questions of law were involved and, pursuant to s 178 of the Act, removed the matter to the Court to decide it in the first instance.

Background and sequence of events

[4] This case concerns the cleaning of business premises in Nelson occupied by Tonkin & Taylor Limited (Tonkin & Taylor). In June 2004, Tonkin & Taylor engaged Hills Cleaning Service Limited (Hills) to do the cleaning. Hills employed staff to do the actual cleaning work.

[5] During the early part of 2009, the employee doing the work was a woman who need not be named here. She began to have difficulties in carrying out the work and was helped informally by a male friend or relative. This led to complaints by Tonkin & Taylor about the quality of the work. The woman ceased working on 13 May 2009. Subsequently, she had complications with her pregnancy and was taken to Wellington to give birth. All her holiday pay was paid to her in late May 2009. In late June 2009, there was some suggestion that the woman may return to the job but this never eventuated.

[6] Mr Doran was employed by Hills in January 2009, after which he worked at several locations. When difficulties arose at Tonkin & Taylor, Mr Doran was initially sent to thoroughly clean the premises to bring them up to the required

[3] CA 233/10, 15 December 2010.

standard. After that, he became the regular cleaner, working at Tonkin & Taylor on Tuesday and Friday evenings. Tonkin & Taylor were satisfied with Mr Doran's work.

[7] On 7 July 2009, Tonkin & Taylor invited firms in Nelson to provide quotes for carrying out its cleaning work. This process was handled by Helen Robertson, Tonkin & Taylor's Nelson office administrator. Hills submitted a quote to continue doing the work. A quote was also given by Crest.

[8] Crest is a Dunedin based company but seeks and obtains work throughout New Zealand. It is managed and very largely owned by Grant McLauchlan. The company itself employs very few cleaning staff. Almost all of the cleaning work is done by franchisees, of which there are several hundred. When a cleaning contract is obtained by Crest, responsibility for doing the work is passed on to a franchisee. In each geographical area, Crest has a regional manager, whose role is to manage existing contracts, obtain new work and distribute that work amongst the franchisees. In Nelson, the regional manager was Brendon Bailey, who was also a franchisee.

[9] Crest's quote to Tonkin & Taylor was submitted by Mr Bailey. He met with Ms Robertson, inspected the premises and compiled a cleaning specification on which the quote was based. His evidence was that Ms Robertson told him there was no current cleaning specification for the work then being done by Hills.

[10] Tonkin & Taylor decided to accept the quote from Crest. On Friday 17 July 2009, the Nelson Manager for Tonkin & Taylor, Mark Foley, wrote to Tracy Williams, the director of Hills. In that letter, Tonkin & Taylor gave two weeks' notice of cancellation of its cleaning contract with Hills. Mr Foley specified Friday 31 July 2009 as the last day Hills would complete the cleaning but, although he said that a proposal from another contractor would be accepted, he did not say who that new contractor was. The letter was faxed to Hills and received by Ms Williams that day.

[11] Ms Williams faxed a letter back to Mr Foley the same day, Friday 17 July 2009. She acknowledged the cancellation of Tonkin & Taylor's contract with Hills

and said that the cleaning equipment would be removed and the key returned on Monday 3 August 2009. Ms Williams then explained at some length the obligations imposed on Hills by Part 6A of the Act and asked for details of the new contractor to be provided as soon as possible so that Hills could meet those obligations.

[12] Ms Williams spoke to Mr Doran about the change of contractor at Tonkin & Taylor shortly after receiving Mr Foley's letter. There was inconsistent evidence about exactly when this first conversation on the subject occurred. It was either Friday 17 July 2009 or the following day but we find it most likely that it occurred on the Friday. At that stage Ms Williams was unable to tell Mr Doran who the incoming contractor was but he said that he wanted to transfer to that new contractor in any case. He explained that he was anxious to keep the work because he needed the income and was unconcerned who his new employer would be in relation to that work.

[13] On Monday 20 July 2009, Ms Williams spoke to Ms Robertson who told her that the incoming contractor was Crest and gave her Mr Bailey's telephone number. Ms Williams said that Mr Doran wished to transfer to the new contractor and Ms Robertson said she was happy for him to continue cleaning Tonkin & Taylor's premises for Crest. Following that conversation, Ms Williams wrote the following letter to Mr Doran the same day:

> 20th July 2009
>
> Mr Roger Doran
> [address]
>
> ***Take over of Staff under the Employment Relations Amendment Act 2006***
>
> Dear Roger
>
> As discussed with you on Friday 17th July, we have received notice of termination of Hills Cleaning's services from Tonkin & Taylor in relation the office cleaning you have been carrying out in the evenings with our contract ending at the end of business on Friday 31st July 2009.
>
> Cleaning is to be carried out as per normal up to and including Friday 31st July 2009. Helen has advised us in writing that they have been very happy with the work you have done for them, and has stated that she would be happy for you to continue in this position for the new contractor.

> Crest Cleaning will be undertaking the contract for the office cleaning as from 1st August 2009. As part of the take over, under the 2006 Employment Relations Act with regard to staff considered 'Vulnerable Employees' including staff in the cleaning industry, the new contractor is required by law to offer the incumbent staff the positions they currently hold, with the same terms and conditions.
>
> As per our conversation on Friday 18th July, I confirm that you have advised me that you choose to transfer to the new contractor to continue to carry out this work. All holiday pay, time in lieu and other entitlements etc. will be transferred to the new cleaning contractor Crest Cleaning for you. I will also provide them with your contact details and other information I am required to give them in accordance with the Act.
>
> At this time Hills is not in the position of offering you alternative employment to cover the loss of this work, however I am happy to discuss the options with you; I am very keen to continue to employ you will continue to be considered for future additional employment with Hills as it becomes available.
>
> Please do not hesitate to contact me during office hours to discuss the situation and the options open to you. I take this opportunity of thanking you for the work you have done at Tonkin & Taylor and assure you that you have Hills support during this process.
>
> Yours sincerely
>
> Tracy Williams

[14] As a result of her conversation with Ms Williams, Ms Robertson telephoned Mr Bailey to tell him that Mr Doran wanted to transfer to Crest in relation to the work at Tonkin & Taylor. Mr Bailey then passed this information on to Mr McLauchlan who told Mr Bailey to refer any communications about transfer to him. Subsequently, Ms Williams telephoned Mr Bailey and also told him that Mr Doran wished to transfer to Crest. Ms Williams referred to the relevant provisions of the Act but Mr Bailey professed to know nothing about the legislation and insisted Ms Williams contact Mr McLauchlan in Dunedin.

[15] Ms Williams then obtained Crest's Dunedin number from its website and attempted to telephone Mr McLauchlan. Her evidence was that she left several messages for him but that he failed to respond. Mr McLauchlan said in evidence that he did not recall receiving any messages from Ms Williams but later conceded that she may have left them. We find that Ms Williams did make repeated efforts to contact Mr McLauchlan by telephone and that there was no response to the messages she left for Mr McLauchlan.

[16] Ms Williams said that she was eventually able to speak to Mr McLauchlan by telephone on or about Friday 24 July 2009. Mr McLauchlan said in evidence that he had no recollection of such a telephone call but, in response to a question in cross examination, agreed that it may have taken place. We find that it did take place and that its content was as described by Ms Williams. She told Mr McLauchlan that Mr Doran wished to transfer to Crest to do the work at the Tonkin & Taylor premises. Ms Williams asked Mr McLauchlan what information he wanted from her and where she should send it. Mr McLauchlan replied that he was not going to help her and suggested she buy a copy of the Act. We accept Ms Williams' description of Mr McLauchlan's attitude as "stonewalling".

[17] Following that telephone call, Ms Williams sent the following letter to Crest:

> 24th July 2009
>
> Crest Commercial Cleaning Ltd
> PO Box 740
> Dunedin
>
> RE: Transfer of Staff at Tonkin & Taylor, Nelson
>
> Dear Sir
>
> The following details are in relation to the employee elected transfer of staff from Hills Cleaning Service to Crest Commercial Cleaning Ltd as from 1st August 2009, in relation to cleaning at Tonkin & Taylor situated at 43 Halifax Street, Nelson 7010.
>
Employee:	**Roger Doran (Mr)**
Start Date:	**19th January 2009**
Employment Contract:	**Individual**
Days of Work at Tonkin & Taylor:	**Tuesday & Friday evenings weekly**
Hours at Tonkin & Taylor:	**Tuesday weekly - 5.15pm to 6.30pm (1.25hrs)** **Friday weekly – 5.15 to 8.15pm (3hrs)**
Rate of Pay:	**$13.00**
Rate of Holiday Pay:	**8% of Gross Yearly wages <u>NOT</u> Average of 52 weeks gross wages**
Amount of Leave Owed:	**8% due at the end of 12 months employment**
Bereavement Leave Entitlement:	**Yes – Full entitlement**
Special/Sick Leave Entitlement:	**Yes – Full entitlement due as from 19 July 2009**
Time in Lieu Owed:	**Balance Nil**

> Mr Doran has been working for us since 19th January 2009, and has been cleaning at Tonkin & Taylor since 7th July 2009 two evenings a week following the cleaning requirements as per our contract with Tonkin & Taylor. We have been advised by Tonkin & Taylor that the requirements have increased; by supplying us with an updated schedule, and based on this we would have allowed 15 minutes extra cleaning per clean.
>
> I have provided a copy of these details, and this letter, Roger so he is aware of how his entitlements have been calculated and the amount of holiday pay, holiday leave and what information has been provided to you.
>
> Balance to be transferred to Crest Commercial Cleaning Ltd at the change over of employment and after we have received details for how the payment is to be made from Crest Commercial Cleaning Ltd:
>
> - Holiday pay due for hours worked at Tonkin & Taylor 20 hours worked @ $13.00 per hour x 8% = $20.80 Gross
>
> Mr Doran's terms of employment also include provision for a company vehicle to be provided with all equipment, supplies and uniform included at the Employer / Companies expense.
>
> Mr Doran can be contacted by phone [number] or by post at [address], we have advised him of the details we are providing to you and he is keen to hear from you.
>
> Yours faithfully
>
> Tracy Williams
> Director

[18] This letter was posted by Ms Williams on Friday 24 July 2009. Mr McLauchlan said it did not come to his attention until Wednesday 29 July 2009.

[19] In the meantime, Tonkin & Taylor completed an application for an account with Crest on Friday 24 July 2009 and gave it to Mr Bailey. He sent it on to Crest in Dunedin on Monday 27 July 2009 where it was approved by Crest's financial controller on Tuesday 28 July 2009. It was only after the account was approved that Crest regarded Tonkin & Taylor as a client and Mr Bailey took steps to allocate the work to a franchisee.

[20] In response to Ms Williams' letter of 24 July 2009, Mr McLauchlan sent the following letter:

> 29 July 2009
>
> Hills Cleaning Service Limited
> 183 Bridge Street

NELSON 7010

Re: Transfer of undertakings

We are in receipt of your correspondence dated the 24th of July regarding the Tonkin & Taylor contract.

Unfortunately you have not supplied the appropriate documentation as set out in the legislation.

Once we are in receipt of the duly executed employment contracts, site specifications, election notices and an undertaking that you procedurally followed clause 69G of Part 6A of the Employment Relations Act we will be in a position to following our obligations under the Act.

You will also need to advise if Mr Doran will be continuing to work for your company on other sites as this will affect your responsibilities in regard to his entitlements.
'.
Yours faithfully
CREST COMMERCIAL CLEANING LTD

Grant McLauchlan
MANAGING DIRECTOR

[21] This letter was faxed to Ms Williams on the morning of Wednesday 29 July 2009. As Mr McLauchlan had included his email address in the letterhead, Ms Williams very promptly replied later that morning in the following email:

Sent: 29 July 2009 11:38 a.m.
To: Grant McLauchlan Crest
Subject: Transfer Of Employee

RE: Roger Doran - Transfer of Employment

Thank you for your fax today regarding the details for Roger Doran's transfer to your employment for the cleaning work required at Tonkin & Taylor.

In respond to your request for additional information as follows:

- We provide you with a copy of Mr Doran's employment contract with Hills Cleaning is attached.
- Details of Mr Dorans election to transfer have been outlined in the letter you have received dated 24/7/09 and as such you have received contact details for Mr Doran
- Site specifications are to be provided by the client as per the work you quoted to undertake on site for the client
- Mr Doran continues to be employed by Hills Cleaning Service Ltd.

- Mr Doran's entitlements in relation to work he will be undertaking for Crest at Tonkin & Taylor are clearly provided to you in the letter dated 24/7/09

After discussion with my legal representative and the Department of Labour pertaining to your request for further details under clause 69G Part 6A of the Employment Relations Act, all requirements have been met, and procedures have been followed by Hills Cleaning Service Limited in regard to the supply of information.

Yours faithfully

T J Williams
Managing Director

[22] Attached to this email was a computer file containing the employment agreement between Hills and Mr Doran in electronic form. Mr McLauchlan replied immediately to Ms Williams in an email also timed at 11.38 am in which he said only "This agreement is unsigned". A few minutes later, Mr McLauchlan sent another email to Ms Williams saying only "You have also failed to supply a signed "Election to Transfer" so your documentation is deficient."

[23] In response to these emails, Ms Williams sent a further email that afternoon:

Sent: 29 July 2009 1:08 p.m.
To: Grant McLauchlan
Subject: Re: Transfer Of Employee

In the interest of time and that you have not provided myself or the tranferring employee with any information and that you have had to be chased by us, the fasted way to get information to you is via email, I will fax a copy of the agreement to you.

There is no obligation to provide you with a signed 'election to transfer as a verbal agreement was made as per acceptable in the ERA and as confirmed with DOL today, you have been advised in my email that Mr Doran wishes to transfer as has the clent which is acceptable to them also. The responosibility is your to contact the encumbent in an acceptable time frame to allow for information to be exchanged from this point.

It is the opinion of the DOL that you are 'delaying' the process with the intent of non compliance under your responsibilities under the Act, and that your further delaying the process will be detrimantal to Mr Doran.

[24] Ms Williams said in evidence that, after sending this email, she faxed a copy of the signed employment agreement between Hills and Mr Doran to Mr McLauchlan. A copy of that signed agreement was produced and it was apparent that the text of it was identical to the computer file version Ms Williams had sent to

Mr McLauchlan as an email attachment that morning. In his evidence, Mr McLauchlan denied receiving the faxed copy of the signed agreement. We found that denial unconvincing and conclude that it was sent and received. In reaching that conclusion, we note in particular that Mr McLauchlan made no further request for a copy of the signed employment agreement in the email he sent back to Ms Williams some two hours later that afternoon. This was in contrast to his noting "for the record" two other issues he considered outstanding:

> **From:** Grant McLauchlan
> **Sent:** 29 July 2009 3:05 p.m.
> **To:** [Tracy Williams]
> **Subject:** RE: Transfer Of Employee
>
> Thank you for your response
>
> On the basis of your email below Crest disputes you have complied with Part 6A of the Employment Relations Act 2006.
>
> I note for the record that you have failed to furnish a signed "Election to Transfer" notice from the employee and that I have now requested this of you twice.
>
> I am disgusted that you are attempting to use this legislation against your past customers "freedom of association" to look for a new cleaning provider when you have clearly neglected their relationship to date, otherwise they would not have looked to change provider.
>
> I also note for the record that the employee commenced employment with you in January 2009 and would be interested in any industry training he has taken with your organisation.
>
> I look forward to the relevant employment authority reviewing these communications as to the correct outcome.
>
> **Grant McLauchlan**
> Managing Director
> **Crest Commercial Cleaning Ltd**

[25] Throughout the period she was communicating with Tonkin & Taylor and Crest, Ms Williams had kept Mr Doran informed of events. He had been expecting to hear from Mr McLauchlan and, when this did not happen, Mr Doran attempted to initiate a conversation by calling Crest in Dunedin. Mr Doran's evidence was that he left six or so messages for Mr McLauchlan asking him to call and discuss transfer of his employment to Crest but received no reply. Mr Doran was eventually able to speak to Mr McLauchlan on Thursday 30 July 2009. The two men differed in their

evidence about some of what was said but it was common ground that Mr Doran confirmed that he had elected to transfer to Crest and Mr McLauchlan said he did not regard that election as valid because it was not in writing and signed. We prefer the evidence of Mr Doran as to the balance of the conversation. Mr McLauchlan told Mr Doran that he was not sufficiently trained to do the work at Tonkin & Taylor. When Mr Doran then suggested that they attend mediation, Mr McLauchlan refused, saying that Crest owed Mr Doran nothing. The conversation ended with Mr Doran saying that he would pursue his rights through the personal grievance procedure.

[26] The following day, Friday 31 July 2009, Mr Doran sent an email to Mr McLauchlan:

> From: Roger Doran [email address]
> Subject: RE: Election.
> To: grant@crest.co.nz
> Received: Friday, 31 July, 2009, 2:52 PM
>
> Dear Grant,
>
> As requested in writing and i hope an email will surfice.
>
> I Roger Doran elect to be employed by Crest Cleaning to undertake the cleaning of Tonkin & Taylor situated at 43 Halifax Street Nelson.
>
> Starting Tuesday 4th August 2009 at 5.15pm to 7.45pm and Friday 7th August 2009 at 5.15pm to 8.30pm weekly.
>
> Thankyou. I await your reply and confirmation.
>
> Roger Doran.
> Tel.
> [land line number]
> [cell phone number]

[27] Mr McLauchlan did not respond to this email. When he had heard nothing from Mr McLauchlan by 6 August 2009, Mr Doran sent another email to him asking that he attend mediation provided by the Department of Labour. Again, Mr McLauchlan did not respond. Mr McLauchlan said he did not respond because he believed there was no employment relationship between Crest and Mr Doran and therefore nothing to be mediated.

Legislation

[28] Part 6A of the Act is headed "Continuity of employment if employees' work affected by restructuring". Section 69F defines the application of subpart one:

> **69F Application of this subpart**
> (1) This subpart applies to an employee if—
> (a) Schedule 1A applies to the employee; and
> (b) as a result of a proposed restructuring,—
> (i) the employee will no longer be required by his or her employer to perform the work performed by the employee; and
> (ii) the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person.
> (2) To avoid doubt, this subpart applies even though the performance of the work by or on behalf of the other person does not begin immediately after an employee ceases to perform the work for his or her employer.

[29] Schedule 1A to the Act includes employees who provide "cleaning services" in relation to any "place of work". That clearly includes the work done by Mr Doran at Tonkin & Taylor. The other requirements of s 69F are also satisfied in this case. The decision by Tonkin & Taylor to have Crest provide its cleaning services in place of Hills was a "restructuring" as that term is defined in s 69B. More specifically, it was "subsequent contracting" as that term is defined in s 69C. As a result of the restructuring, Hills no longer required Mr Doran to do the work he performed at Tonkin & Taylor and that work was to be performed by or on behalf of Crest.

[30] It follows that Hills, Crest and Mr Doran were bound by subpart one and, relevant to this case, the requirements of ss 69G and 69I in particular. These are set out below. In the context of this case, the "employer" was Hills, the "new employer" was Crest, Mr Doran was an "employee" and Tonkin & Taylor was "person A".

> **69G Notice of right to make election**
> (1) Before a restructuring takes effect, the employer of the employees who will be affected by the restructuring must provide the employees affected with—
> (a) a reasonable opportunity to exercise the right to make an election under section 69I(1); and
> (b) the date by which the right to make an election must be exercised; and

(c) information sufficient for the employees to make an informed decision about whether to exercise the right to make an election.

(2) Without limiting subsection (1)(c), the information provided under that provision must include—

(a) the name of the new employer:

(b) the nature and scope of the restructuring:

(c) the date on which the restructuring is to take effect:

(d) how to make an election, the person to whom an election is to be sent, and the form in which the election is to be sent (for example by post, fax, or email).

(3) If the restructuring is a contracting in or a subsequent contracting, person A in the definition that applies must give the employer sufficient notice of, and information about, the restructuring to enable the employer to comply with subsection (1).

(4) An employer or other person who fails to comply with this section is liable to a penalty imposed by the Authority.

69I Employee may elect to transfer to new employer

(1) An employee to whom this subpart applies may, before the date provided to the employee under section 69G(1)(b), 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

(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

(3) To avoid doubt,—

(a) the election of an employee to transfer to a new employer may result in the employee being employed by more than 1 employer if—

(i) only part of the employee's work is affected by the restructuring; or

(ii) the work performed by the employee will be performed by or on behalf of more than 1 new employer; and

(b) a person becomes the new employer of an employee who elects to transfer to the new employer whether or not the new employer—

(i) has, or intends to have, employees performing the type of work (or work that is substantially similar) to the work performed by the employee who has elected to transfer to the new employer; or

(ii) was an employer before the employee transferred to the new employer:

(c) this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.

Issues

[31] The ultimate issue is whether Mr Doran validly elected to transfer to Crest for the purposes of s 69I. If he did then he became an employee of Crest by operation of s 69I(2)(a) and his personal grievance has substance. If not, his claim must fail.

[32] To an extent, that issue turns on the evidence and our findings of fact arising out of the evidence. We must also decide:

(a) what is required to make an election to transfer under s 69I; and

(b) the nature of the obligations imposed by s 69G; and

(c) what effect any failure by the outgoing employer to comply with those obligations has on the employee's right to elect to transfer to the incoming employer; and

(d) the scope for an incoming employer to impose conditions on an affected employee's right to transfer.

Discussion and decision

[33] The essential principles of statutory interpretation are well known. The starting point must be s 5 of the Interpretation Act 1999 which provides:

> **5 Ascertaining meaning of legislation**
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[34] In applying that approach, we are guided by the following passage from the judgment of Tipping J in *Commerce Commission v Fonterra Co-operative Group Ltd*[4]

[4] [2007] 3 NZLR 767 (SC).

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[35] The provisions of the Act which are in issue in this case are s 69G (1) to (3) and s 69I(1). The text of those provisions conveys a clear meaning on its face. Section 69I(1) gives each employee affected by a restructuring the right to transfer to the incoming employer. Section 69G(1) to (3) imposes specific obligations on the outgoing employer to provide an informed opportunity for affected employees to exercise that right.

[36] That meaning is consistent with the immediate legislative context of ss 69G and 69I in subpart one of Part 6A of the Act. Section 69A explicitly sets out the object of subpart one:

> **69A Object of this subpart**
> The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—
> (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment
> ...

[37] The case for the defendant is that, notwithstanding this apparently clear and consistent legislative scheme, a number of additional requirements must be met before an election under s 69I(1) will be valid. Mr Kiely submitted that the following three additional requirements should be regarded as implicit in the Act as a matter of commercial practicality:

(a) An affected employee should have not more than five working days from notification of the termination of the outgoing contractor's contract to make an election under s 69I(1).

(b) To be valid, an election to transfer made under s 69I(1) must be in writing and signed by the affected employee.

(c) To be valid, an election to transfer made under s 69I(1) must be received by the incoming contractor no later than three working weeks before the restructure takes place.

[38] Mr Kiely submitted that a feature of the cleaning and hospitality industry is frequent and successive changes in contractual relationships resulting in restructuring of employees' positions. Reflecting evidence given by Mr McLauchlan, Mr Kiely submitted that an incoming contractor required three weeks prior to starting work to organise itself to take over the contract and that, accordingly, any election under s 69I ought to be made prior that period. Mr Kiely submitted further that it was essential any election to transfer be in writing and signed by the affected employee. Otherwise, he suggested, the incoming employer could not be sufficiently certain of the affected employee's intentions.

[39] Mr Kiely also submitted that additional requirements should be implied into the legislation to deter anti-competitive behaviour. He characterised subpart one of Part 6A of the Act as creating a unique set of circumstances where all parties involved have a mandatory relationship forced upon them by the Act. This, he said, is completely at odds with the parties' normal commercial relationship where they would usually compete for the retention of employees and commercial contracts. Mr Kiely submitted that subsequent contracting situations provided an opportunity for outgoing contractors to manipulate selection processes, to cheat, to reduce staff numbers and improperly off-load employment related expenses on to an incoming contractor. He referred us to the decision of the High Court in *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited*[5] where such allegations were discussed.

[40] In support of this submission, Mr Kiely also noted that the duty of good faith imposed by s 4 of the Act did not apply to the relationship between an outgoing contractor and an incoming contractor in a restructuring subject to subpart one of Part 6A. He submitted that this made incoming contractors vulnerable to anti-

[5] AK CIV-2011-404-000277, 14 February 2011. This was an unsuccessful claim by an incoming contractor for an interim injunction requiring the outgoing contractor to provide employees affected by a restructuring with information under s 69G. The claim relied on an allegation of breach of a duty of care which the Court found did not exist.

competitive behaviour by outgoing contractors who could mislead and deceive them. He suggested that, by implying into the Act the additional requirements proposed by the defendant, the ability of outgoing contractors to act to the detriment of incoming contractors would be reduced.

[41] Turning to the policy behind subpart one of Part 6A, Mr Kiely referred us to an extract from the speech of the Minister of Labour introducing the Employment Relations Amendment Bill 2006 into Parliament. He relied on this speech to submit that the purpose of the legislation was to balance the need to allow businesses to grow and contribute to New Zealand's economic transformation with the need to provide protection to specified employees who are particularly disadvantaged when businesses restructure. On that foundation, Mr Kiely submitted that the implication into ss 69G and 69I(1) of the additional requirements proposed by the defendant would provide the balance intended by Parliament by reducing the ability of outgoing contractors to use subpart one of Part 6A in an anti-competitive manner to the detriment of incoming contractors.

[42] With respect, we think that the case for the defendant summarised above has no application to this proceeding. While the concerns and arguments put forward by the defendant may be politically or commercially attractive to some members of society, they provide no proper basis to imply into the Act provisions which Parliament has not seen fit to enact and which are not necessary to give effect to the purpose of the legislation. As Woolford J succinctly said in the *LSG Sky Chefs* case, the objective of the legislation is to protect vulnerable employees not to regulate the affairs of competing businesses.[6] To this end, this part of the legislation focuses on the rights of affected employees and involves the other parties in a restructuring only to the extent necessary to ensure that affected employees can properly exercise their rights.

[43] We turn then to the question whether, on the facts of this case, Mr Doran validly elected to transfer part of his employment to Crest. This involves a number of issues which we address in turn.

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[6] See paragraph [28] of that decision.

Reasonable opportunity

[44] The first requirement of s 69G(1) is that affected employees be provided with a "reasonable opportunity" to exercise the right to make an election under s 69I(1). As there is a subsequent requirement to provide the information necessary to enable employees to make an informed decision, we think that this first requirement relates largely to timing. Affected employees must be given sufficient time after the provision of the necessary information to consider and decide whether to elect to transfer. It may also involve other factors such as access to advice and means of communication. For example, an employee at sea may not have a reasonable opportunity to exercise the right to elect until he or she returns to shore.

[45] What constitutes a "reasonable opportunity" in any particular case will depend on the circumstances involved. It is unrealistic and inappropriate to specify a period of time which will satisfy the requirement in every case as the defendant invited us to do. We also reject the proposition that the interests of other parties, such as the outgoing or incoming contractor, are relevant to what constitutes a reasonable opportunity in this context. The sole purpose of s 69G is to ensure that affected employees may properly exercise their rights of election.

[46] In this case, we find that Mr Doran was given a reasonable opportunity to exercise his right to make an election. He was told on 17 July 2009 what the nature and scope of the restructuring was to be and the date on which it was to take effect. On 20 July 2009, that information was confirmed in the letter to him by Ms Williams which also identified the incoming contractor. Through discussion with Ms Williams and copies of correspondence she sent him, Mr Doran became aware during the following few days that he could make his election in writing or orally and that it should be sent to Mr McLauchlan.

[47] The only information required by s 69G which was not explicitly given to Mr Doran was a date by which his right to make an election must be exercised. That omission was entirely understandable as Mr Doran had told Ms Williams as early as 17 July 2009 that he wanted to transfer to the incoming contractor. Subsequently, he reaffirmed that election several times to Ms Williams. There was no need for her to

specify a date for Mr Doran to do something he had already done and her failure to do so did not render the opportunity Mr Doran had to exercise his right of election unreasonable.

Valid election under s 69I(1)

[48] The defendant's case was that Mr Doran had not validly elected to transfer to Crest. In addition to the proposition that a valid election to transfer under s 69I(1) must be in writing and signed by the affected employee, Mr Kiely also submitted that the only means by which an election might validly be communicated to the incoming employer were those set out in s 69G(2)(d), that is by post, fax or email.

[49] We reject those submissions. The right to elect to transfer conferred on affected employees by s 69I(1) is unqualified. In this context, to elect means simply to choose. We accept that it is implicit in subpart one, and s 69I(1) in particular, that an election must be communicated to the incoming employer to be effective but no further implication is required to achieve the purpose of the legislation. To suggest, as the defendant does, that the election must be communicated in some particular form would be to restrict the right to elect, contrary to the statutory intention. That was amply demonstrated when, in the course of argument, Mr Kiely had to accept that the interpretation proposed by the defendant would prevent any affected employee making an election by speaking directly to the incoming employer.

[50] A factor in our consideration of this issue must be s 69G(2)(d) which provides that the information to be provided to affected employees must include "how to make an election, the person to whom an election is to be sent, and the form in which the election is to be sent (for example by post, fax, or email)." Mr Kiely submitted that the information provided in order to satisfy this obligation can restrict the right to elect conferred by s 69I(1). Thus, he suggested that an employee who is told to make an election by post cannot validly make that election in person or by email.

[51] While we recognise the superficial logic of this argument, we cannot accept its substance. The information described in s 69G(2) must be given to the affected

employees by the outgoing employer. If the submission made by Mr Kiely were to be accepted, the outgoing employer could effectively deprive affected employees of the right to elect by specifying means of election which were unavailable to the employee. An example might be to tell an employee that the election must be made by email when the employee has no access to a computer or the internet. We cannot accept that Parliament intended the right to elect conferred by s 69I(1) to be subject to constraint in this way. The right to elect is at the heart of subpart one and any constraint on that right would undermine the essential purpose of the legislation. A construction which is far more consistent with the purpose of the legislation is that the information to be provided pursuant to s 69G(2)(d) should inform the employee of possible ways of making a valid election, rather than limiting the employee's means of doing so.

[52] We conclude that an election under s 69I(1) can be validly made by any means which effectively conveys the affected employee's choice to the incoming employer. It may be done orally or in writing, either by the employee personally or by someone acting on his or her behalf.

[53] Applying that construction to the facts of this case, we find that Mr Doran validly elected to transfer to Crest. He did so on at least five occasions. The first was when Ms Williams told Mr Bailey on or about 20 July 2009 that Mr Doran wished to transfer. Ms Williams was acting on Mr Doran's behalf with his approval. Mr Bailey was undoubtedly the agent of Crest as it was he who gave the quote to Tonkin & Taylor on behalf of Crest. The second occasion was when Ms Williams spoke to Mr McLauchlan by telephone on or about 24 July 2009. The third occasion was by means of Ms Williams' letter to Mr McLauchlan of 24 July 2009. The fourth occasion was when Mr Doran spoke to Mr McLauchlan on 30 July 2009. The fifth occasion was when Mr Doran sent an email to Mr McLauchlan the following day..

Other issues raised in evidence

[54] Although the final submissions relied on by the defendant were limited to those summarised and discussed above, Mr McLauchlan's evidence traversed a number of other issues. In fairness to him and to Crest, we think it appropriate to

record and comment on them. Those issues were listed by Mr McLauchlan in his letter to Ms Williams dated 29 July 2009:

> Unfortunately you have not supplied the appropriate documentation as set out in the legislation.
>
> Once we are in receipt of the duly executed employment contracts, site specifications, election notices and an undertaking that you procedurally followed clause 69G of Part 6A of the Employment Relations Act we will be in a position to following our obligations under the Act.
>
> You will also need to advise if Mr Doran will be continuing to work for your company on other sites as this will affect your responsibilities in regard to his entitlements.

[55] We have concluded that Mr McLauchlan had no right to insist upon a signed document recording Mr Doran's election. Equally, he had no proper basis on which to insist on the provision of the other information he sought in this letter. More particularly, he had no right to make the provision of that information a prerequisite to Crest complying with its statutory obligation to employ Mr Doran if he elected to transfer.

[56] As we have already observed, the focus and purpose of ss 69G and 69I is to confer on affected employees an informed opportunity to transfer to the incoming contractor. Those sections are not concerned with the provision of information by one contractor to another. That is the role of subpart two of Part 6A of the Act headed "Disclosure of costs relating to transfer of employees under proposed restructuring".

[57] The purpose of subpart two is to enable contractors who are negotiating, tendering for or considering entering into an agreement to obtain disclosure of the costs of employment of existing staff who would be eligible to transfer if an agreement was reached. The information which may be requested, and which the existing contractor must disclose, is set out in the definition of "employee costs transfer information" in s 69OB:

> **69OB Interpretation**
> (1) In this subpart, **employee transfer costs information**, in relation to a proposed restructuring,—
> (a) means information about the employment-related entitlements of the employees who would be eligible to

elect, under section 69I, to transfer to a new employer if the proposed restructuring were to proceed; and

(b) includes—

(i) the number of employees who would be eligible to elect to do so; and

(ii) the wages or salary payable in a stated period (for example, a week, fortnight, or month) to the employees for performing the work that would be subject to the proposed restructuring; and

(iii) the total number of hours the employees spend in a stated period (for example, a week, fortnight, or month) performing the work that would be subject to the proposed restructuring; and

(iv) the cost of service-related entitlements of the employees whether legislative or otherwise; and

(v) the cost of any other entitlements of the employees in their capacity as employees, including any entitlements already agreed but not due until a future date or time.

[58] While it is immediately apparent that much of this information would be derived from the employment agreements between the existing contractor and its employees, there is nothing in the definition, or in the subpart as a whole, which requires the disclosure of complete individual employment agreements. Indeed, somewhat to the contrary, s 69OC(6) requires:

> (6) Employee transfer costs information provided under this section must be provided—
>
> (a) in aggregate form; and
>
> (b) to the extent practicable, in a form that protects the privacy of the employees concerned.

[59] A further factor affecting this issue is that disclosure may only be sought where the party seeking information is negotiating an agreement, deciding whether to enter into an agreement or tendering for an agreement.[7] Once an agreement has been concluded, there is no longer any right to seek disclosure of information under subpart two.[8] Tonkin & Taylor accepted Crest's tender on 17 July 2009. That created an agreement between them. It follows that Crest had no subsequent right to seek disclosure of any information by Hills. Mr McLauchlan's professed belief that Hills had a statutory obligation to provide the information he sought in his letter of 29 July 2009 was misconceived.

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[7] Section 69OC(1).

[8] The one exception to this may be s 69OE which relates to updating information but that will only apply where disclosure has been sought prior to an agreement being formed.

[60] For completeness, we also record that Crest had no right to insist that Hills provide an undertaking that it had discharged its obligations under s 69G of the Act.

Result

[61] The effect of our conclusion that Mr Doran validly elected to transfer to Crest in respect of the cleaning work at Tonkin & Taylor is that he became an employee of Crest by operation of statute with effect from 1 August 2009.[9] The terms of employment were those which had previously existed between Mr Doran and Hills in relation to the work at Tonkin & Taylor.[10]

[62] By refusing to recognise and implement the employment relationship, Crest dismissed Mr Doran. That dismissal was plainly unjustifiable.

Remedies

[63] Mr Doran sought the following remedies:

(a) Reimbursement of wages lost as a result of him not being employed by Crest to do the cleaning work at Tonkin & Taylor.

(b) Compensation for humiliation, loss of dignity and injury to his feelings as a result of the unjustified dismissal.

(c) Penalties payable to the Crown for breach of the duty of good faith imposed by s 4 of the Act and breach of the obligation under s 65 to provide him with a written employment agreement.

Wages

[64] The measure of reimbursement to which Mr Doran is entitled must be based on what he would have earned had Crest employed him to do the work at Tonkin & Taylor. That is a combination of the hours required to do the work Crest contracted to do for Tonkin & Taylor and the rate of pay due to him under the terms of his employment agreement with Hills. Evidence of both these factors was initially

[9] Section 69I(2)(a).
[10] Section 69I(2)(b).

unclear. In her letter to Mr McLauchlan of 24 July 2009, Ms Williams recorded the hours for which Mr Doran worked as 4.25 per week and his rate of pay as $13 per hour. In his email dated 31 July 2009, Mr Doran recorded hours totalling 5.75 per week and referred to a rate of $13.25 per hour.

[65] In oral evidence, these issues were resolved to our satisfaction. While working for Hills, Mr Doran was paid for 4.25 hours per week for the work at Tonkin & Taylor, regardless of the hours he actually spent on the job. There was no evidence of the payment made to the Crest franchisee who took over the Tonkin & Taylor work or of the hours per week actually spent doing that work. Ms Robertson, who was one of Crest's witnesses, did however say that the work Crest was required to do was the same as that done by Hills with the addition of cleaning a shower. This was consistent with what Ms Williams said in her letter of 24 July 2009 that she had been told by Tonkin & Taylor of the updated cleaning schedule and estimated this would add an extra 15 minutes each time the shower was cleaned. As this was required once a week, we conclude that the time required to do the work after Crest obtained the contract would have been 4.5 hours per week and that Mr Doran would have been paid for that time had he been employed by Crest.

[66] As to the rate of pay, Ms Williams said in her oral evidence that Mr Doran's rate of pay was $13.00 per hour in July 2009 but that it had been agreed that the rate would increase to $13.25 per hour in August 2009. This was supported by evidence from wage records showing that Mr Doran had been paid $13.25 per hour for other work he did for Hills after August 2009. At that rate of pay, Mr Doran would have been entitled to $59.65 per week had he worked for Crest.

[67] Awards of reimbursement for lost remuneration are governed by s 128 of the Act:

> **128 Reimbursement**
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
> (a) that the employee has a personal grievance; and
> (b) that the employee has lost remuneration as a result of the personal grievance.
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to

> the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[68] A key issue in deciding the amount of any award under s 128 must be the extent to which the loss suffered by the employee is "as a result of the personal grievance" as opposed to any other cause. Any employee who has suffered a loss must take all reasonable steps to mitigate his or her loss by trying to obtain alternative employment. In this case, Mr Kiely submitted that there was no evidence that Mr Doran had taken sufficient steps to mitigate his loss and as a result, no order for reimbursement should be made.

[69] The evidence was that, up until July 2009, Mr Doran had been working up to 40 hours per week for Hills, working both in the daytime and in the evening as required. On 21 July 2009, however, Mr Doran gave notice to Hills that he was resigning as a full time employee and would only be available to do a limited amount of part time work. The reason Mr Doran did this was to provide day care for his special needs daughter. He remained available to do work in the evening when his partner was caring for the child but not otherwise. As the work at Tonkin & Taylor was performed during the early evening, it suited Mr Doran well. He also had another cleaning job for Hills which took two hours per week. Mr Doran's evidence was that, when Crest refused to employ him at Tonkin & Taylor, he took such other evening work as he was offered but that there was very little such work available.

[70] Although this evidence is far from comprehensive, we are satisfied that the loss of remuneration suffered by Mr Doran was principally as a result of his dismissal by Crest. Over the six months or more following 1 August 2009, that loss was at least the equivalent of 3 months' wages. We award that amount, which is $775.45, by way of reimbursement.

Compensation for distress

[71] It is fundamental that any award of compensation under s 123(1)(c)(i) of the Act must be based on evidence. In this case, Mr Doran gave limited evidence of the distress he experienced as a result of his dismissal. The principal issue for him was the loss of income. Having reduced his working hours to provide care for his child, the household budget was finely balanced. Mr Doran and his partner were relying on receiving the income from his work at Tonkin & Taylor. Without it, they were in financial difficulty and struggling to pay their bills. Mr Doran said this gave rise to pressure and strain. We accept that this was a significant source of distress to Mr Doran. In all the circumstances, we think a just award of compensation is $4,000.

Penalties

[72] The first penalty sought was for breach of the duty of good faith imposed by s 4 of the Act. That duty is imposed only on persons within certain employment relationships listed in s 4(2). The only possible relationship between Mr Doran and Crest which might have given rise to the duty of good faith would be that of employer and employee. Prior to 1 August 2009, the only basis on which it could be said that Mr Doran was an employee of Crest was that he was a "person intending to work" as that term is defined in s 5 of the Act:

> **person intending to work** means a person who has been offered, and accepted, work as an employee

[73] The definition of "employee" in s 6 of the Act includes a person intending to work.

[74] While it arguable that the statutory right to elect transfer was a form of offer of employment and Mr Doran's election to transfer constituted acceptance of that offer, we refrain from reaching a conclusion that Mr Doran was an employee of Crest prior to 1 August 2009. That is because we find that the test for breach of the duty of good faith was not satisfied in any event. The relevant provision of s 4A of the Act provides that a general failure to observe the duty of good faith is liable to a penalty only if the failure was "deliberate, serious and sustained". We find that the

unwarranted demands made by Mr McLauchlan as prerequisites to Crest observing its statutory duty under s 69I(1) were serious and sustained but, perhaps ironically, they were not deliberate breaches of a duty of good faith. The impression we gained from the evidence was that, although the views held by Mr McLauchlan were an irrational and unreasonable interpretation of Part 6A of the Act, they were views he genuinely held. It cannot be said, therefore, that his actions were a deliberate breach of any duty of good faith Crest may then have owed to Mr Doran.

[75] The second penalty sought is for Crest "not complying with section 65, in not providing [Mr Doran] with a written employment agreement". We think this claim is misconceived. Section 65 is concerned only with the form of individual employment agreements. As at 2009, it imposed no obligation on an employer to provide an existing employee with a written employment agreement. Section 63A(2) imposed an obligation to provide a copy of any proposed employment agreement for the purposes of bargaining but, as the employment relationship in this case was created by operation of statute rather than it being the result of bargaining, we do not think that this section was breached.

[76] No penalties are imposed on Crest.

Interest

[77] The money we have ordered Crest to pay Mr Doran as reimbursement of lost remuneration is money he would have earned in late 2009 had he not been dismissed. He has been deprived of the use of that money since or, put another way, Crest has had the use of that money since. That is an injustice which ought to be remedied by an award of interest. Crest is to pay Mr Doran interest on the reimbursement of lost remuneration at the rate of 6 per cent per annum from 1 January 2010.

Conclusion

[78] In summary, our conclusions are:

(a) Mr Doran validly elected to transfer to Crest his employment cleaning the premises of Tonkin & Taylor.

(b) Crest unjustifiably dismissed Mr Doran.

(c) Crest is ordered to pay Mr Doran $775.45 as reimbursement of remuneration lost by him as a result of his dismissal.

(d) Crest is to pay Mr Doran interest at the rate of 6 percent per annum on $775.45 from 1 January 2010 down to the date of payment.

(e) Crest is ordered to pay Mr Doran $4,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

Comment

[79] We wish to commend Ms Williams. In the course of events in this matter, she went well beyond the extent of Hills' legal obligations in a genuine effort to assist both Mr Doran and Crest in the transfer process. She showed courtesy and generosity which, unfortunately, was not appreciated or reciprocated by Mr McLauchlan.

Costs

[80] Mr Doran has been successful in his claim. Subject to any offers without prejudice as to costs which may have been made, he is entitled to a reasonable contribution to the costs he has incurred in pursuing that claim. The parties are encouraged to agree costs. Failing agreement, Mr Zindel should file a memorandum within 30 working days of this decision. Mr Kiely will then have 20 working days in which to respond.

A A Couch
for the full Court

Signed at 2.25pm on 21 June 2012