

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 129/10
5313320

BETWEEN

SERVICE AND FOOD
WORKERS UNION NGA
RINGA TOTA INC
First Applicant

THE PERSONS LISTED AT
SCHEDULE A
Second Applicants

AND

OCS LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Peter Cranney and Anthea Connor, Counsel for the
Applicants
Paul McBride, Counsel for the Respondent

Investigation Meeting: On the papers and telephone conferences 26 & 29 July
2010

Determination: 29 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem that is likely to involve the interpretation of s.69N of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act 2006. At issue is whether s.69N (2) of the Act applies to the second applicants and OCS. The applicants consider that the second applicants are entitled to redundancy entitlements within the meaning of s.69N (2) of the Act. OCS disagrees.

The proceedings

[2] The applicant has applied for urgency to remove the employment relationship problem to the Employment Court. The grounds for urgency are that the respondent employed a number of the applicants named in the Schedule as cleaners at Massey University from 1 July 2010. Those employees (members of the first applicant) elected to transfer their employment from previous contractors to OCS following subsequent contracting. OCS proposes to restructure its operations at the University and the parties say that this is likely to or could result in a redundancy of a number of employees who have elected to transfer their employment. A dispute has arisen over whether the affected employees have a right to bargain for redundancy entitlements under s.69N of the Employment Relations Act.

[3] The application for removal has been made on the following grounds:

- 1.1 *Important questions of law are likely to arise in this matter other than incidentally (ERA s.178(2)(a)). The important question of law is whether on its proper interpretation Part 6A of the Employment Relations Act confers redundancy entitlements on the second applicants.*
- 1.2 *The case is of such a nature and of such urgency that it is in the public interest that it be moved immediately to the Court (Employment Relations Act s.178(2)(b)). The case is urgent as it involves a large number of employees and a large employer and their potential rights. The matter needs to be urgently resolved so that the respondent and applicants can make informed choices as to how to conduct their employment relations.*
- 1.3 *It is appropriate in all of the circumstances for the Court to determine the matter (ERA s.178(2)(d)).*

[4] The applicants rely on the matters raised under paras.1.1 and 1.2 above and the fact that the issues raised have wide importance to other employers and employees. There has been an affidavit produced from Fala Haulangi, Union Organiser, in support of the application for urgency and removal. In essence the affidavit indicates that on 25 June 2010 OCS put forward a proposal to restructure the cleaning services at Massey University when it took over the contract. There are two main restructuring points that arise from the proposal and these are:

- 5.1 *A proposed reduction in many employees' hours of work at Massey University;*
- 5.2 *A proposal to reduce the amount of work some employees performed at Massey University during term breaks. Some of*

our members work their full hours 50 weeks of the year but OCS wants to reduce the amount of time they work full hours to 31 weeks per year.

[5] Ms Haulangi says that this could mean that many of the Union's members will suffer a significant drop in income or that they are made redundant.

[6] OCS has replied by filing a memorandum of counsel in regard to the urgency and removal. It supports the application for urgency. It supports the removal of the proceedings to the Employment Court and has asked that the matter be removed forthwith.

Issues

[7] Is this a matter for removal and are the criteria for removal under s 178 of the Act met?

[8] S 69N of the Employment Relations Act reads as follows:

Employees who transfers may bargain for redundancy entitlement with new employer.

(1) *This section applies to an employee if –*

(a) *The employee elects, under s.69I(1), to transfer to a new employer; and*

(b) *The new employer proposes to make the employee redundant for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and*

(c) *The employee's employment agreement –*

(i) *does not provide for redundancy entitlements for those reasons or in those circumstances; or*

(ii) *does not expressly exclude redundancy entitlements for those reasons or in those circumstances.*

(2) *The employee is entitled to redundancy entitlements from his or her new employer;*

(3) *If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.*

[9] Section 178 of the Employment Relations Act makes provision for the Authority to remove matters to the Court.

178 Removal to Court

- (1) *Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*
- (2) *The Authority may order the removal of the matter, or any part of it, to the Court if –*
 - (a) *an important question of law is likely to arise in the matter other than incidentally; or*
 - (b) *the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*
 - (c) *the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
 - (d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*
- (3) *Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and any such case the Court must apply the criteria set out in paras.(a) – (c) or sub-section (2).*
- (4) *An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*
- (5) *Where the Authority, acting under sub-section (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
- (6) *This section does not apply –*
 - (a) *to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
 - (b) *without limiting para.(a), to a matter, or part of a matter, about whether the Authority may follow or adopt a similar procedure.*

The facts

[10] It is common ground that the proposal made by OCS is likely to impact on the second applicants. The second applicants became employees of OCS from 1 July 2010 as cleaners at premises owned by Massey University. They elected to transfer their employment from previous contractors to OCS following subsequent contracting. OCS has proposed to restructure its operations at Massey University and the parties say that the dispute has an impact on them in regard to making informed choices as to how to conduct their employment relations. A dispute has arisen over whether the affected employees have a right to bargain for redundancy entitlements under their Collective Agreement and in accordance with the provisions of Part 6A of the Act.

[11] The Collective Agreement is a multi employer Collective Agreement (“meca”) with other employer parties.

[12] I was informed that a proposal has been conveyed by OCS and that decisions are being considered. That will likely bring the issue to the fore between the parties quickly.

Determination

[13] I agreed to deal with the matter urgently as urgency was not opposed and there is an employment relationship problem involving critical timing over impending decisions.

[14] My reasons for removing the matter to the Employment Court are:

- (a) The resolution of the dispute is likely to involve an issue over the interpretation and operation and application of s 69N of the Act. In particular whether or not s 69N (2) of the Act applies. I am satisfied that an important question of law is likely to arise other than incidentally. This is based on the terms of the “meca”, the proposal that has been conveyed and the timing involved and the impact on a number of workers likely to be affected.

- (b) An outcome on such a question of law is likely also to have implications on other employers, in this instance, who are parties to the “meca”.
- (c) In the circumstances experienced Counsel are involved.

[15] I accept the grounds advanced by the applicants and supported by the respondent.

[16] Therefore it is my decision to remove the employment relationship problem in its entirety to the Employment Court to determine the matter instead of the Employment Relations Authority conducting an investigation. I remove the matter to the Court accordingly.

[17] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority