IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 472
5375852

	BETWEEN	NISHA ALIM also known as SHABEENA SHAREEN NISHA Applicant
	A N D	LSG SKY CHEFS NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Anthony Drake and Rosemary Childs, counsel for Applicant Joanne Douglas, counsel for Respondent
Investigation Meeting:	3 September 2012, 27 and 28 February 2013
Submissions Received:	2, 23 and 27 September 2013
Date of Determination:	15 October 2013

DETERMINATION OF THE AUTHORITY

A. The applicant's claims including personal grievances are unsuccessful.

B. Costs are reserved.

Employment relationship problem

[1] From February 2011 until January 2012 the applicant Ms Nisha Alim, known also as Shabeena Shareen Nisha, and the respondent LSG Sky Chefs New Zealand Ltd (LSG) had an employment relationship. For much of that time there were problems in it. Consequently Ms Alim has brought claims against LSG for remedies available under the Employment Relations Act 2000 where an employee has a

personal grievance of any kind, or where entitlements to wages and other payments due under an employment agreement have not been fully or correctly paid by the employer, or where the employer has breached terms and conditions of the agreement or provisions of the Employment Relations Act.

[2] Ms Alim complains of all of those problems and claims monetary remedies from LSG including compensation under s 123(1)(c)(i) of the Act, reimbursement of lost remuneration, recovery of full entitlements to wages and other money, and penalties under s 135 of the Act.

[3] Excluding penalties and interest, the amounts claimed are $6,612 for wages and other payments and $15,000 for injury to feelings compensation.

Part 6A of the Employment Relations Act

[4] The employment relationship with LSG was not formed in the usual way by mutual consent reached between the parties following an exchange of offer and acceptance, but by operation of statute which required only Ms Alim, the employee party, to decide she wanted to transfer her employment to LSG.

[5] Ms Alim became eligible to do this at the end of 2010 as a result of restructuring following the loss by her employer at that time of a contract to supply food catering services to Singapore Airlines. Her employer then was 'Pacific' which in this determination refers to PRI Flight Catering Ltd, a company trading as Pacific Flight Catering, and its subsidiary company Pacific Flight Catering Ltd.

[6] Ms Alim and a number of others had been employed by Pacific in a category of work to which Part 6A of the Employment Relations Act applied, protecting them as 'vulnerable' workers in the event of restructuring. The provisions enabled them, if they wished, to transfer their employment to LSG which had won the airline food catering contract from Pacific and which, under the Act, upon transfer became their new employer.

[7] Section 69I in Part 6A provides that if as a result of restructuring an employee elects to transfer, then to the extent that the employee's work is to be performed by the new employer, the employee will be employed on the same terms and conditions by the new employer as applied to the employee immediately before the date on which the restructuring takes effect. Ms Alim made her election on or before

31 December 2010 to transfer to LSG with effect from 23 February 2011, the operative date of the restructuring.

[8] Within the latitude given the Authority under s 160(3) of the Act to concentrate on resolving any employment relationship problem, however described by the parties, and standing back from the detail of Ms Alim's claims, I consider the employment relationship problem in this case to be principally the transfer of Ms Alim's employment to LSG pursuant to Part 6A of the Act, in the particular circumstances it took place.

[9] The problem lay in, or with, ascertaining the terms and conditions of employment which transferred with her pursuant to s 69I of Part 6A. This was as much a problem for LSG as for Ms Alim, and although not one created by either it became a problem that LSG had to try and overcome if the transferred employment was to produce a successful relationship, which sadly it did not.

[10] The transfer was undertaken in circumstances which affected Ms Alim, her co-workers and LSG as well, and which brought into question the actions or conduct of Pacific and revealed some inadequacies in the provisions of Part 6A.

[11] Material deficiencies in the statute will to some extent be addressed by the passage of provisions of the Employment Relations Amendment Bill currently before Parliament. The actions and conduct of Pacific have occupied the Authority in previous cases, and also the Employment Court in several cases and the High Court in one case. There is now a *corpus* of judgments and decisions from those Courts and the Authority in relation to the circumstances in which 40 employees including Ms Alim transferred employment from Pacific to LSG on 23 February 2011.

[12] There is also a recent Court of Appeal decision from action LSG took in 2012 against Pacific in the High Court; *Pacific Flight Catering Ltd and PRI Flight Catering Ltd v LSG Sky Chefs NZ Ltd* [2013] NZCA 386. That decision has overturned a High Court judgment of 25 October 2012 on a question of law, although it is not one which has any bearing on Ms Alim's case in the Authority. The decision does not upset any findings of fact or observations made by Woolford J in the High Court in *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd and PRI Flight Catering Ltd* [2012] NZHC 2810, which have been referred to by the Authority previously in this case and by the Employment Court in another case before it involving Pacific.

Alteration of pay records by Pacific

[13] It had become apparent by the time of the High Court hearing in August 2012 that vital payroll information provided by Pacific to LSG prior to the transfer of Ms Alim and 39 others was misleading. With reference to this Woolford J held at para.[8] of his judgment, as follows:

> *The evidence at trial however established that the information provided to LSG on that date* [of transfer] *had been deliberately inflated. Pacific now accepts that shortly before the 40 staff transferred to LSG, it altered the pay records of all but two or three of the staff (in large part without the employees' knowledge) to increase their leave balances by between 40 and 100 hours. It also increased their hourly pay rates, again without consultation or formal notification.*

[14] This problem was encountered early in 2011 by Ms Marie Park the Human Resources Manager of LSG, when trying to establish what the terms and conditions of employment of Ms Alim and others by Pacific had been before the transfer.

[15] LSG had no previous experience of the operation of Part 6A, the provisions of which would have been greatly improved if they had placed more of an obligation on the outgoing employer, Pacific, to provide accurate and verified information and do so in a timely way.

[16] It is an issue in this case whether the changes made by Pacific were such that LSG had been required to regard the altered information as corresponding with Ms Alim's terms and conditions of employment at the date of transfer.

Authority's preliminary findings

[17] The investigation meeting held in this case over three days in September 2012 and February 2013, was followed by the release to the parties on 25 June 2013 of preliminary findings made by the Authority from the evidence presented to that point. A copy is annexed to this Determination.

[18] The findings were entirely unfavourable to Ms Alim. In giving them the Authority observed and emphasised that although Pacific had been the employer party to the employment agreement with Ms Alim before transfer, no direct evidence from Pacific had been called about that employment and its terms and conditions. Ms Alim could not expect LSG to know for certain what her terms and conditions with Pacific

had been immediately before 23 February 2011 when she transferred, but Pacific, as the other party to the relationship, must have been able to say what they were.

[19] No application was made to have Pacific joined as a party to the Authority's investigation.

[20] Upon release of the preliminary findings the parties through counsel, Mr Drake and Ms Douglas, were advised that they would have another opportunity to call more evidence at a resumed investigation meeting. No further evidence was tendered.

[21] It is reasonable to infer that neither party considered there was any more evidence they could call that was likely to support their respective positions or challenge the Authority's preliminary findings. If Pacific could have supported Ms Alim's claims to being a 'Supervisor' and to being entitled to certain rates of pay and amounts of leave, it is reasonable to expect Pacific would have willingly provided that evidence.

[22] Ms Alim has also been financially backed by Pacific in bringing claims against LSG. For that reason Pacific could be expected to have assisted her with any supporting or corroborating evidence it could give.

[23] Several other transferees have been funded by Pacific to take proceedings against LSG in the Employment Court and the Authority, the extent of which assistance given to one of those is shown in the costs decision relating to the claims against LSG brought by Mr John Matsuoka; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 96. The Employment Court recorded $128,000 of costs had been underwritten by Pacific (incurred in pursuing total remedies of only $30,000, and of which $1,000 only was awarded). Mr Matsuoka recovered $20,000 as a contribution to costs for his marginal success, but he does have further claims against LSG before the Court although in pursuing them it seems likely he will incur still more legal costs.

[24] If necessary, by summons Ms Alim could have compelled any witness from Pacific to give evidence. She found no difficulty obtaining evidence in that way from Mr Tim Oldfield, the in-house lawyer of her union, the Service and Food Workers Union (SFWU).

[25] In this case where the unusual law of Part 6A applies and where there is a high level of representation available to an employee, the Authority and the new employer LSG could expect an applicant such as Ms Alim to present evidence confirming or verifying terms or conditions of employment, by calling as a witness for that purpose the former employer party to the transferred employment relationship. In seeking to enforce the transfer provisions of Part 6A she had some onus to do that, in my view. If her wage rate had been altered to reflect a promotion to a different position such as that of Supervisor, someone in Pacific's management at the time should have been readily able to confirm that is what happened, and also when and how any decisions had been made about that. It has not been suggested that Pacific is no longer in existence or that material witnesses from Pacific are unable to be found or are incapable of giving evidence.

[26] In the High Court, Pacific's Human Resource Manager and Acting General Manager, Ms Gerda Gorgner, gave evidence in relation to the inflated information Pacific had supplied LSG. She told the Court she had not been privy to the decisions made around the alterations. Her evidence was that Mr Terry Hay, one of the owners of Pacific, had made those decisions and that although she had performed a managerial role in the business, she had not been consulted about the changes.

[27] That evidence, if repeated by Ms Gorgner to the Authority, and if accepted, could not have assisted Ms Alim, as it threw no light on the reason for the changes to payroll information. If without good explanation Ms Gorgner changed that evidence before the Authority, Ms Alim would still not have the assistance of evidence able to be safely relied upon.

[28] Although from the evidence given to the High Court, it seems Mr Hay could have been a material witness, Ms Gorgner told the Court that he was not being called because he lived outside New Zealand in Hawaii.

[29] From Ms Gorgner's evidence to the High Court, Mr Hay seems likely to have known the reason for the alterations that were made to Ms Alim's pay rates and leave entitlements. If Mr Hay had evidence which could have assisted Ms Alim, for a mere fraction of the $128,000 outlaid in assisting Mr Matsuoka another transferring employee, he could have helped her too by travelling to New Zealand to give evidence, or made arrangements to have his evidence taken by video conference if that was more convenient to him.

[30] Ms Alim's claim is left at a point where the evidence that has been presented strongly indicates, as the Authority has recorded in its preliminary findings, that payroll information provided by Pacific to LSG had been tampered with. Indeed, "deliberately hijacked" was the expression Pacific's own counsel used in the High Court, once Pacific had eventually acknowledged that the alterations or many of them were not sustainable on any basis.

[31] The alterations had not been made to record actual entitlements under employment agreements but were brought about for some other purpose, so far left unexplained by Pacific. Naturally for LSG that conduct cast doubt on the truth or accuracy of the information provided for all transferring employees, including Ms Alim. Understandably LSG became inquisitive and was unfairly burdened with trying to establish the real entitlements of Ms Alim and others. LSG risked becoming a vulnerable party too, if unable to receive or obtain reliable information as to what the terms and conditions had been in Ms Alim's employment relationship with Pacific.

[32] The evidence supports a finding that LSG did not get from Pacific on behalf of Ms Alim before she transferred, adequate communication and response in relation to her terms and conditions of employment and the exercise of establishing what those were. This information was necessary to facilitate the statutory transfer and achieve the Act's objectives in Part 6A. Instead, I find from the evidence of Ms Park, Pacific was uncooperative to the point of being obstructive and providing LSG with information intended to mislead it.

[33] I consider that in the difficult circumstances presented and while doubt remained, LSG as the new employer of Ms Alim was entitled to take practicable steps on an interim basis, balancing as far as possible Ms Alim's rights with its own, including rights to fair dealing in employment and in trade.

[34] Following the extensive submissions made by counsel, Mr Drake and Ms Douglas, and with no further evidence presented, the preliminary findings given in June have been reviewed by the Authority. It has been pointed out by Ms Douglas that in two respects there are matters for correction or clarification by the Authority. First, for reasons explained by Ms Douglas the inflation by Pacific of Ms Alim's leave entitlement is accepted by LSG to have been by 41.97 hours, not 55 as I found. The difference is accounted for by leave that did accrue at the end of Ms Alim's service

with Pacific before her transfer to LSG from 23 February 2011. Second, service pay was not paid by LSG as a discrete entitlement, although the value of it was allowed for in a composite rate paid by interim arrangement to Ms Alim, while her real or true transfer entitlements were being ascertained by her new employer. With those corrections, I now confirm the preliminary findings as the final conclusions of fact reached by the Authority.

Catering Assistant, or Supervisor?

[35] A major part of her case is Ms Alim's claim that before transfer to LSG she had been employed by Pacific as a Supervisor, and that therefore she became entitled to be paid by LSG at rates provided for that position by the applicable collective employment agreement Pacific had with her union the SFWU.

[36] Unfortunately for Ms Alim, as one of 40 employees whose pay rates and other entitlements had to come under close scrutiny, LSG was justifiably sceptical of her claims to have been a Supervisor. LSG regarded her as having been employed by Pacific before transfer in the position of Catering Assistant under the collective agreement.

[37] Looking at all the evidence I am not persuaded on a balance of probabilities that Ms Alim had been promoted or appointed to the position of Supervisor at any time before her transfer to LSG. I find it had not been a term of her employment with Pacific that she was a 'Supervisor' designated as such under the collective agreement.

[38] I agree with the submissions made by Ms Douglas in this regard. The evidence is vague as to when Ms Alim become a Supervisor with Pacific and how that was achieved. There will usually be some indicators of how and when such a change has occurred, but no direct evidence about that was presented from Pacific, the employer at the time.

[39] I accept the evidence of Ms Park that when interviewed on 29 December 2010 in anticipation of the transfer to LSG of a number of Pacific employees, Ms Alim had made no mention that she was, or regarded herself then to be, a Supervisor with Pacific. I agree with the submission that given the purpose of the 29 December meeting and the nature of the enquiries generally being made of Pacific employees, Ms Alim is likely to have confirmed her exact position and duties if she had been a Supervisor.

[40] Although 'Supervisor' was used by Pacific in a pay slip, this must be viewed against the fact that changes to rates and entitlements were made for many if not most of the 39 other employees who transferred to LSG. The alterations were made at the same time shortly before the transfer. While these changes may have superficially appeared related to the performance of work by the employees, the employment agreements must be regarded as merely a façade to disguise other objectives of Pacific towards LSG in making the alterations.

[41] The Authority heard evidence from Ms Penny Mortensen that she too found herself described in Pacific's pay records as a Supervisor, when she knew she had not accepted that position nor had been offered it. There were four Supervisors she said within the structure at Pacific and Ms Alim was not seen or known by her to be one of them.

[42] A Supervisor under the collective agreement attains that position by 'designation' of the employer. It can be expected that the designation would be made known to the employee at or near the time, especially if it was a change the employee might want to decline. I agree with the submission that some clear and unequivocal action will usually have taken place when an employee is designated to a role that entails a promotion or acceptance of greater responsibilities, in return for a higher rate of pay.

[43] Employment law does not recognise that an employee's position of employment can morph from one to another without regard to the express or presumed intention of employer and employee both. What was recorded in pay slips and other advice passed by Pacific to LSG was apparently information in relation to terms and conditions but those things, ultimately, were a matter of agreement between Pacific and Ms Alim. A one-sided only picture has been presented by her of that agreement, and then unconvincingly. Her position seems to be that although she had not known at the time that it had happened, she agrees now with the changes Pacific had purported to make to her terms and conditions of employment.

[44] As stated in the Authority's preliminary findings, Ms Gorgner's letter claiming that a "mistake" had been made about the level to which Ms Alim's rates as a Supervisor should have been increased, is not reliable evidence as to the reason why there was an increase in them before transfer. Given her evidence to the High Court that she did not know why rates had been increased and had not been consulted about

that, if a mistake of some kind had been made it is reasonable to expect Ms Gorgner to explain to the Authority what that mistake was and how it came to be made.

[45] Somebody at Pacific must have programmed 'Supervisor' into the payroll system and that person ought to have been able to say why that was done and on whose instruction, and also whether a mistake had been made in any way about the pay rates for that position. Ms Alim with her access to Pacific and apparent alliance to her former employer, could reasonably be expected in this investigation to produce that person as a witness.

[46] I agree with the submission for LSG that Ms Alim's true terms and conditions were those that applied up to the pay week ending 30 January 2011. Under interim arrangements made with the SFWU while it was seeking to confirm the true position, LSG paid no less than the appropriate rate applying before 30 January. After transfer LSG paid a composite or all-inclusive rate above that. Ms Park gave evidence to the High Court that until LSG could establish figures with certainty as to entitlements, interim figures were used and employees were advised of that approach being taken. That was a practicable and sensible step taken which should not have disadvantaged Ms Alim if, once her true terms and conditions had been ascertained any necessary adjustments to her pay were made retrospectively and with interest paid on any arrears.

[47] That interim arrangement, I am satisfied, was properly and reasonably entered into by LSG with Ms Alim's union. Under the arrangement, Ms Alim was paid a flat rate of $17.68 per hour which included overtime (paid at single time) but without the service pay allowance in addition. This was an increase over the actual rate in the collective agreement for a Catering Assistant of $15.96 per hour.

[48] It would have been unrealistic for Ms Alim to expect LSG to consider her circumstances in isolation from those of most of the 39 other employees who had transferred from Pacific. The adjustments made by Pacific in relation to those others simply compounded the uncertainty LSG was faced with in trying to resolve the question of what their terms and conditions of employment with Pacific really had been.

[49] Unlike Ms Alim, some of the other transferring employees had disowned the increases and adjustments made by Pacific in purported conformity with their terms

and conditions. A small number of employees did not receive any increases or have any adjustments made, but they can be distinguished as SFWU officials or delegates. The high antipathy shown by Pacific towards that union and its officers employed by Pacific has been noted in cases previously determined by the Authority.

[50] It is understandable that Ms Alim may have developed a sense of entitlement to be regarded as a Supervisor. Pacific had used that title in a pay record and had written her a letter saying that she had mistakenly been paid the lower of two rates for a Supervisor. If Ms Alim was an exception to the artifice created by Pacific in relation to many other employees, then it might be expected that Pacific would provide some evidence that her situation should be viewed apart from those of many if not most other transferring employees. In the absence of such evidence it is reasonable to assume that the descriptions used and amounts supplied by Pacific to LSG were not reflective of the actual terms and conditions of employment of the employees, but that they had been contrived for some purpose more to do with LSG having been a successful business competitor of Pacific rather than promoting the objects of Part 6A of the Act to protect the employment of Ms Alim and others.

[51] I therefore confirm the Authority's preliminary finding that Ms Alim transferred to LSG in the position of Catering Assistant under the applicable collective agreement covering her work for Pacific. She was, I find, fairly and in good conscience paid for that position on the basis of the information about her obtained by LSG.

Other pay and leave claims made by Ms Alim

[52] These are addressed in this Determination under the heads;

- Service pay
- Overtime under the collective agreement
- Call-back
- New claim for overtime
- Accrued annual leave
- Alternative leave
- Kiwisaver deduction

- Additional pay
- PAYE rate for bereavement leave

Service pay

[53] Under the collective agreement service pay was payable to "Full time" employees who had completed the required number of years of "current continuous service."

[54] The pay information Pacific provided showed Ms Alim as receiving service pay for 4 years' service as at 6 February 2011. That is consistent with a start date for full time work in 2006, not 2005.

[55] I find that Ms Alim's full time employment for the purposes of the service allowance payable under the collective agreement began in April 2006, which was about the time she became a member of the SFWU. Before then from about November 2005 she had been a casual employee, working in other jobs as well as for Pacific.

[56] Ms Alim became entitled to the rate for 5 years' service on 28 April 2011, which I accept was the anniversary of her commencement full-time with Pacific.

[57] She was not paid the service allowance separately while LSG was trying to ascertain her true terms and conditions of employment with Pacific. Instead, by arrangement with the SFWU, I find she received $17.68 per hour which covered the value of service allowance in a composite or all-inclusive rate. LSG reasonably doubted that she was entitled to that rate as Pacific had represented in payroll information, but decided to pay it instead of $15.06, in the interim, while trying to establish the actual entitlement. Ms Park demonstrated that Ms Alim was not being disadvantaged by this arrangement for the hours being worked by her.

[58] I find that Ms Alim has no claim as she suffered no reduction in pay overall. As a Catering Assistant she had been entitled to $15.96, not $17.68 as paid.

Overtime under the collective agreement

[59] I find that the interim arrangement covered overtime worked by allowing for it to be paid at T1 of $17.68 per hour. That rate was higher than the ordinary time rate of $15.96 for a Catering Assistant. Some payments made by LSG at T ¼ were a result of genuine mistake made because of understandable confusion as to whether Ms Alim was covered by LSG's collective agreement which provided for T ¼ or by Pacific's collective agreement. LSG's agreement would have applied if Ms Alim had become employed by LSG other than by statutory transfer under Part 6A. The legal officer for the SFWU, Mr Oldfield, considered there was a conundrum arising from Part 6A as to which collective agreement applied, so it is not surprising that LSG was also uncertain and made a mistake. There was also the issue as to whether an employee had to be working for the old employer on the contract that had been lost – Singapore Airlines in this case – or simply working on a category of work coming within Part 6A. This issue was subsequently clarified by the Court in the *Tan* case.

[60] I find Ms Alim has no claim in this regard.

Call back

[61] I find Ms Alim was paid for call backs at the interim flat rate and she has no claim.

New claim for overtime

[62] This is a claim raised late in the investigation. I am not satisfied that the evidence supports it. The alleged underpayments were not questioned by Ms Alim at the end of the particular pay periods to which they relate, as is reasonable to expect given that there was a formal process for raising issues with pay, a process Ms Alim had used on occasion.

[63] The claims are also based on clock-in hours of time when work was not necessarily being performed. The appropriate procedure was for Ms Alim to obtain authorisation to work before her rostered start time and then complete a manual time sheet. The absence of time sheets indicates that the additional hours claimed were not authorised.

[64] I find Ms Alim has no claim in this regard.

Accrued annual leave

[65] It is too much of a coincidence that at the same time Ms Alim had her annual leave entitlement increased by Pacific, most of the other employees had theirs increased as well and to a degree that Pacific has subsequently acknowledged cannot be justified.

[66] Ms Alim's explanation for the change in her entitlement was that the increased amount was to account for time off in lieu owed to her. Again, Pacific's payroll programmer ought to have been able to verify that arrangement, but no evidence was called in that regard.

[67] I am satisfied that LSG has with considerable difficulty given the state of transfer information supplied by Pacific, thoroughly and diligently endeavoured to ascertain and pay Ms Alim's true annual leave entitlement. I am satisfied that it achieved that end and has paid Ms Alim out correctly. Where necessary it has been prepared to go back, reconsider and make adjustments.

[68] LSG fairly acknowledged her final pay after termination in 2012 did not correctly allow for all holiday pay due, and it recalculated and paid her entitlement. This claim is not made out.

Alternative leave

[69] This claim depends on the major claim of Ms Alim that she was a Supervisor. I have found she was not a Supervisor but a Catering Assistant and accordingly there is no claim for a consequential increase in the rate of pay for the days of alternative leave Ms Alim was paid for.

Kiwisaver deduction

[70] This claim too is dependent on the major claim in relation to Ms Alim's position of employment. This claim is not made out, as I have found that Ms Alim was not entitled to become employed as a Supervisor upon transfer to LSG.

Additional pay

[71] This claim was not been raised until final submissions were made on behalf of Ms Alim. I have no evidence in support of it before me, despite the parties being given an opportunity to call further evidence. The claim is not made out.

PAYE rate for bereavement leave

[72] Ms Alim was on paid bereavement leave for two days in August 2011. The claim that for those days PAYE was over-deducted and forwarded to the IRD is one that Ms Alim as a taxpayer may pursue with the Department, which can make appropriate adjustments to her account and repay any overpayment to her.

Unjustified dismissal grievance

[73] Ms Alim's evidence was that her employment ended after she had given her resignation to Ms Peta Kome of LSG's Human Resources department. This was at the end of 2011. She continued to work until 21 December and was then on annual leave until the effective date of the resignation, 10 January 2012. Her evidence was she had mentioned to Ms Kome when giving notice that she was planning to study and do some casual work.

[74] Ms Alim has subsequently claimed that her employment had ended by dismissal rather than resignation. She alleges the dismissal in the circumstances was a constructive one rather than actual. In particular, she contends that LSG had seriously breached her terms and conditions of employment to an extent that it became foreseeable she would resign and leave rather than put up with unlawful actions.

[75] I do not find that the employment ended by dismissal. LSG had been faced with very difficult circumstances not of its own making and had been trying even up until Ms Alim resigned to overcome those. LSG was justifiably mistrustful of the information given by Pacific and had no independent means of verifying terms and conditions of employment in an employment relationship to which it had been a stranger. The statutory provisions did not help in that regard; in another case Pacific has had to be forced by order of the Authority to disclose the information for four particular transferring employees.

[76] LSG fairly and reasonably reached an interim arrangement with Ms Alim's agent the SFWU to maintain her pay at a certain level while it continued to try and

establish what her terms and conditions had been with Pacific immediately before transfer. Also, Ms Alim had access to a process for resolving disputes and did not need to resign, unless she wanted to cut back from fulltime work, as she had indicated to Ms Kome.

[77] Ms Alim had previously invoked the grievance procedure, in July 2011. I find on that occasion LSG had responded to the claim and engaged in the process of settle the grievance. Ms Park reasonably believed from Ms Alim that it had been resolved.

[78] LSG had not wanted her to resign and had offered her promotion, which she declined. LSG's action does not support the allegation that LSG had embarked on a course of conduct with the objective of inducing Ms Alim to resign involuntarily.

[79] I conclude from the evidence that Ms Alim's employment with LSG did not end at the initiative of LSG by dismissal but ended at her own requirement, by resignation.

[80] Accordingly, the issue of justification for the termination does not arise to be determined under s 103A of the Act.

[81] I find that Ms Alim does not have an unjustified dismissal personal grievance.

Unjustified disadvantage grievance

[82] There is no suggestion in this case that Ms Alim took part in altering her pay rates and entitlements. She was not told by Pacific that had been done and her first knowledge of it seems to have come from the payslips themselves. She was not complicit in Pacific's "reprehensible" conduct, as to the Court of Appeal it has appeared to be.

[83] Even if Pacific's conduct in altering the payroll information was not unlawful, it is not tenable to submit for Ms Alim that there was nothing irregular or underhand about Pacific's conduct, implying that she simply became caught up in the cut and thrust of commercial tendering.

[84] Whether the wholesale alterations to pay and leave entitlements were made malevolently, whimsically or gratuitously, I am entirely satisfied that LSG acted fairly in questioning them and in taking reasonable and practicable measures while trying to

establish whether or not they had been made to reflect bona fide terms and conditions of employment consented to by Ms Alim before the transfer was effected.

[85] I accept that the arrangements, intended as interim only, as made with Ms Alim's union the SFWU, did not materially disadvantage Ms Alim in her employment or in the terms and conditions of that employment.

[86] Ms Park demonstrated in a written analysis that overall Ms Alim was earning more from continuing to receive the higher Pacific adjusted pay rate for a Supervisor than if she had been paid at the rate appropriate for a Catering Assistant.

[87] Making interim arrangements of this sort is what a fair and reasonable employer could have done, in all the circumstances known at the time by LSG. Accordingly LSG's actions, if they had disadvantaged Ms Alim, were justifiable under the test at s 103A of the Act.

[88] I find that Ms Alim does not have an unjustifiable disadvantage personal grievance.

Penalties

[89] It could not have been intended that in becoming a new employer upon a transfer effected under Part 6A, the new employer would have been forced into the situation LSG faced as a result of the old employer's actions or conduct in deliberately inflating pay and leave entitlements.

[90] Had I found that Ms Alim was not paid correctly or that in any respect LSG had breached her terms and conditions of employment, it is unlikely penalties would have been considered appropriate or deserved, in the unusual and highly extenuating circumstances.

[91] Given the deficiencies inherent in Part 6A itself of the Act, I do not consider any penalty would have been warranted for a breach of the Act, if any had been established. More rigour could have been required in the statutory process by which the new employer would become informed by the old employer of vital information about the transferring employee, as well as the nature of the employment itself with the old employer.

Determination

[92] For the above reasons, the Authority determines there are no orders that should justly be made against LSG in relation to any of the specific claims brought to it by Ms Alim for investigation.

[93] Given the conduct of Pacific, the transfer of Ms Alim's employment to LSG in this case was the antithesis of a 'seamless' changeover, as the Court of Appeal has considered was intended by the Act in Part 6A. LSG was confronted with a deep and wide seam it had to try and unpick before there could be stability in the relationship with Ms Alim.

[94] Lengthy submissions were made urging the Authority to find in favour of Ms Alim in all of her many claims, but they failed to adequately address the monolithic fact that Pacific made unsustainable adjustments to pay and leave entitlements, or payroll records of those. Pacific itself eventually acknowledged this in the High Court.

[95] Further the submissions were unrealistic in trying to have Ms Alim's case kept apart from most of the 39 others who transferred and who also had unjustifiable adjustments made by Pacific. No evidence has been presented to show that she alone for some reason did not have her records improperly interfered with before transfer.

[96] In questioning Ms Park, Pacific's counsel, Mr Stewart QC, acknowledged that a large number of the increases made by Pacific just before the transfer could not be justified. They included the claim by Ms Alim ('Nesha'). The Notes of Evidence taken before Woolford J record;

> Mr Stewart. *But what you are certain about is that the accrued balances are not at the level which PRI* [Pacific] *communicated to you?*
>
> Ms Park. *No, not at that stage.*
>
> Mr Stewart. *And even now you must know that they can't be that high?*
>
> Ms Park. *Sorry, say again?*
>
> Mr Stewart. *You must know that with a large number of those increases they can't be sustained on any basis?*
>
> Ms Park. *You'll have to ask another way, I don't understand what you're asking?*
>
> Mr Stewart. *Alright. Where there has been increases of 100 hours per month -*

(and, further on in the transcript)

Mr Stewart. *….. if you're satisfied with the payslips being produced and put together in a report by an expert, that the amounts are substantially less than PRI have conveyed to you that that should be the amount that is paid ….*

Ms Park. *Um, I guess.*

Mr Stewart. *Because the employees can't really expect to get a windfall of 100 hours above their true entitlement.*

Ms Park. *However we have got claims for that …. one is at the Authority ….*

Mr Stewart. *Which one's at the Authority?*

Ms Park. *Nesha.*

Mr Stewart. *And what's her claim for?*

Ms Park. *Her claim is for – one of her claims is for the additional – the added on annual leave.*

Mr Stewart. *She wants the increased annual leave?*

Ms Park. *Mmm.*

[97] Mr Drake submitted there is nothing that prohibits an employer from increasing wage rates and leave balances prior to transfer. That is true if the increases are intended to be made and received as a reward under a contract of service. The submission ignores Pacific's position taken in the High Court case that the adjustments or many of them were not able to be sustained "on any basis," the proposition put to Ms Park by Pacific's counsel.

[98] I cannot find there is a distinction that can be made of the nature or quality of Pacific's conduct based on the difference in the proceedings before the High Court and the Authority. In the former place, the case was about liability as between LSG and Pacific for money paid under compulsion of law, whereas in the latter it has been about LSG' liability as a new employer in law. In both cases the same money and entitlements had been passed to Ms Alim for the same purported purpose. If the increases were not sustainable on any basis in the High Court case they cannot be justified in the Authority either, particularly where they were made without reference to Ms Alim and without her knowledge.

[99] It is, as Mr Stewart QC also put it to Ms Park, to expect "a windfall" for an employee to claim the benefit of the employer's actions that are not sustainable on any basis.

[100] Before it even began, the employment relationship of Ms Alim with LSG had been undermined by Pacific's actions. Although when the relationship failed Ms Alim became a victim of that conduct and consequently did not receive the protection intended by Part 6A of the Act, the result of this case would be iniquitous if LSG was now to also become a victim of Pacific's actions.

Liability of Pacific to Ms Alim

[101] Although Ms Alim apparently is financially backed in this case by Pacific, and although Ms Alim's legal representatives Kensington Swan have also acted for Pacific in cases arising out of the transfer of employees to LSG on 23 February 2011, I expect Ms Alim would have been given access to appropriate legal advice with regard to any liability Pacific may have towards her, whether in employment or other branch of law, arising from any of Pacific's actions or conduct prior to Ms Alim's transfer.

[102] It is entirely a matter for Ms Alim to consider any advice she has received in this regard, and it is for her to decide how she should act upon that advice.

Costs

[103] It is a concern to the Authority that when questioned Ms Alim seemed to have little idea that she might be liable for costs if she was unsuccessful in her case against LSG. That is now the result and accordingly LSG is entitled to costs against Ms Alim.

[104] An application is to be made by LSG in writing within 14 days of the date of this determination. Ms Alim may reply in writing with a further 14 days.

A Dumbleton
Member of the Employment Relations Authority

25 June 2013

5375852 – NISHA ALIM v LSG SKY CHEFS NEW ZEALAND LTD

Authority's preliminary findings

1. My preliminary findings of fact set out below have been made after consideration given to the evidence presented in this case, particularly by Ms Nisha Alim and Ms Marie Park, and also to material findings made by the High Court and Employment Court in a number of cases involving Pacific Flight Catering Ltd and PRI Flight Catering Ltd (PFC/PRI), and LSG Sky Chefs New Zealand Ltd (LSG) and the Service & Food Workers' Union Nga Ringa Tota Inc (SFWU).

2. The cases are those of John Matsuoka brought against LSG in the Employment Court, and LSG against Pacific Flight Catering Ltd in the High Court, and most recently PFC/PRI against SFWU and others in the Employment Court; [2013] NZEmpC 106.

3. Although it had been the employer party to the employment agreement with Ms Alim, PFC/PRI did not provide nor seek to provide any direct evidence in this case, whether through Ms Gerda Gorgner or any other company witness.

4. Relevant law against which the Authority's findings have been made includes ss 69I(2)(b) and 69M(a)(2) of the Employment Relations Act 2000, which in summary provide;

   > S 69I(2)(b) – If an employee elects to transfer to the new employer ..... the employee is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date ....
   >
   > S 69M(1)and (2) – If an employee who elects to transfer to a new employer is a member of a union and bound by a collective agreement and the new employer is not a party to the collective agreement that the union is a party to, on and from the date on which the employee becomes an employee of the new employer, the new employer becomes a party to the collective agreement .....

5. Ms Alim began permanent employment with PFC/PRI on or about 28 April 2006. Until then, from about November 2005, she had been a casual employee of PFC/PRI.

6. Ms Alim and 39 other PFC/PRI employees transferred to LSG from 23 February 2011.

7. At transfer Ms Alim was a member of the SFWU.

8. She transferred to LSG as a Catering Assistant.

9. PFC/PRI had paid her the Catering Assistant's rates under clause 6 of the Pacific Flight Catering Ltd Catering Assistants Collective Agreement of December 2009.

10. The pay rate was increased by PFC/PRI from $15.96 per hour to $17.68. This occurred without prior notification to Ms Alim or discussion with her. On 23 May 2011 the rate was purportedly increased again, to $18.03 which is the rate for a Supervisor under the collective agreement. The letter written on 23 May 2011 by Ms Gorgner about the increase (No 50 of Bundle of Documents) is not reliable evidence as to the reason for the increase.

11. The pay rate was not altered by PFC/PRI to reflect the seniority of Ms Alim's position, or supervisory content of it. She had not been employed by PFC/PRI as a team leader or supervisor. The pay rate was not altered to correct a 'mistake'.

12. The increase was not a response to any representations Ms Alim had made or any feeling of entitlement she had to be paid a higher rate reflecting higher duties being performed. The pay rate was increased at the same time and for the same reasons why many others of the transferring employees also received upward adjustments. Those increases were made without notice to Ms Alim and the other employees and coincided with their transfer to LSG.

13. The purpose of the increases was to deliberately "inflate" the entitlements of employees. The increases in pay rates and annual leave were not intended to advantage or reward Ms Alim in the performance of her employment agreement with PFC. No evidence has been provided from the employer party to the agreement PFC/PRI that was the case.

14. Most likely the increases were intended by PFC/PRI to disadvantage its competitor LSG in the performance of the Singapore Airlines catering contract the latter had won off the former;

> *The evidence at trial however established that the information provided to LSG on* [date of transfer] *had been deliberately inflated. Pacific now accepts that shortly before the 40 staff transferred to LSG, it altered the pay records of all but two or three of the staff (in large part without the employees' knowledge) to increase their leave balances by between 40 and 100 hours. It also increased their hourly pay rates, again without consultation or formal notification.*
>
> Finding of Woolford J at para [8] of judgment of 25 October 2012 in High Court case of LSG v PFC/PRI

15. In the High Court Ms Gerda Gorgner, the HR Manager of PFC/PRI, claimed to have little or no knowledge of the reason for the increases.

16. Without co-operation from PFC/PRI and Ms Alim, LSG had no way of establishing or verifying the terms and conditions of Ms Alim's previous employment with PFC/PRI. The information LSG received and the circumstances surrounding the transfer of the PFC/PRI employees gave LSG genuine reason to be mistrustful of the accuracy or truth of that information.

17. A body of evidence and findings has grown from other cases, pointing to tampering by PFC/PRI with the wage and time records it was required to keep for the transferring employees.

18. Ms Marie Park expressed her concerns in this regard;

> *Most* [transferring employees] *think that the increases were given just because they were transferring.*
>
> *Nisha – she has been "promoted", no discussion or paperwork, I don't think it is genuine.*
>
> See, Ms Park's email to SFWU of 19 February 2011 - No 24 of Bundle of Documents.

19. LSG acted reasonably given its mistrust, by seeking better information about Ms Alim's terms and conditions immediately before her transfer.

20. LSG endeavoured to obtain that information as quickly as possible in the circumstances.

21. LSG entered into an interim arrangement with Ms Alim and her union the SFWU to pay her $17.68 per hour inclusive of overtime and service allowance until the true terms and conditions of her employment at transfer could be established and applied.

22. Ms Alim and her agent the SFWU expressly agreed to that arrangement, and Ms Alim affirmed it by her conduct in accepting her remuneration paid on that basis.

23. The interim arrangement did not disadvantage Ms Alim financially or in any other way in her terms and conditions of employment.

24. Objectively in the circumstances LSG acted fairly and reasonably in implementing and performing that interim arrangement.

25. Ms Alim resigned her employment with LSG with effect from 12 January 2012.

26. In the circumstances, if LSG in any way breached any term and condition of Ms Alim's employment LSG was or should have been aware of, LSG acted without fault in that its acts or omissions were not wilful, deliberate or intentional but were caused by its inability to obtain accurate information regarding the terms and conditions of Ms Alim's employment immediately before her transfer in February 2011.

27. Ms Park's belief that the information was incorrect or invalid was well founded and reasonable. LSG's actions are explicable and excusable in that light.

28. On transfer to LSG Ms Alim was entitled to be paid $15.96 per hour. Her annual leave balance had been inflated by 55 hours represented to LSG by PFC/PRI and Ms Alim in the

records provided at transfer. She had not accumulated those hours through performance of her employment agreement with PFC/PRI. The leave balance was not increased to recognise overtime worked or an entitlement to 'time off in lieu'.

29. Ms Alim has not been underpaid for overtime. The interim pay rate arrangement was ended when Ms Alim resigned.

30. Ms Alim's entitlement to service pay was correctly assessed and paid by LSG based on a start date of 28 April 2006 with PFC/PRI.

A Dumbleton

Member of the Employment Relations Authority

25 June 2013