IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 467
5515555

	BETWEEN	SERVICE & FOOD WORKERS' UNION First Applicant
	A N D	UNITE UNION Second Applicant
	A N D	KAREN BAKER and OTHERS Third Applicants
	A N D	SKYCITY AUCKLAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for the Applicants Kylie Dunn, Counsel for the Respondent
Investigation Meeting:	28 October 2014 and 31 October 2014 at Auckland
Date of Determination:	14 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants originally sought a compliance order pertaining to the proper effect of the operative collective agreement between the first and second applicants and the respondent. That Statement of Problem was filed in the Authority on 25 August 2014 and was resisted by the respondent.

[2] Then on 15 September 2014, an amended Statement of Problem was filed pleading the original cause of action together with two fresh issues, the first seeking a declaration in respect of post-notification bargaining (s.69H of the Employment Relations Act 2000 (the Act)) and the second concerning the interpretation of s.69M

of the Act. In addition, an application to remove the whole matter to the Employment Court was also filed together with a foreshadowing of a request for urgency.

[3] After helpful discussions between counsel, the Authority was advised on 17 September 2014 that the application for removal to the Employment Court was discontinued but that an application for urgency was now made by consent. That latter application was supported by reference to the fact that the respondent intended to either terminate or transfer the third applicants on and from 20 October 2014 and it was in the interests of justice for the matter to be dealt with on an urgent basis.

[4] Save for the joint approach to the Authority requesting urgency, the respondent (SkyCity) resisted all of the other causes of action advanced on behalf of the applicants.

[5] The first applicant (SFWU) and the second applicant (Unite) are registered unions representing workers employed by SkyCity who, for the purposes of this application to the Authority, are named in the list of persons providing evidence to the Authority under the generic title third applicants.

[6] SFWU, Unite and SkyCity are all of them parties to a collective agreement, the terms of which cover the employment of the third applicants, amongst others.

[7] The applicants jointly claim that SkyCity is in breach of the operative collective agreement (the agreement) and they seek a compliance order in that regard.

[8] The gravamen of the applicants' first cause of action is that SkyCity is in breach of clause 2 of the agreement. Subclause 2.1 of that clause sets out SkyCity's vision and records that *"employees agree that they will do everything they can in their jobs to help SkyCity achieve this vision"*.

[9] Then in subclause 2.2, the following provision relevantly appears:

> *In return SkyCity aims to provide employees with:*
>
> - *The opportunity and training to develop to their full potential in a climate of teamwork and open communication;*
> - *An organisation which adapts to the needs of its … employees; and*
> - *Leadership that values an empowered and diverse workforce, with the highest standards of integrity, ethics, mutual trust and individual dignity.*

[10] Then in subclause 2.3, the following statement appears:

> *The unions accept that an employee's role is to help SkyCity create … a collaborative team based environment for the business.*

[11] It is the essence of the applicants' claim that SkyCity has not fulfilled its contractual obligations in terms of that clause because of what happened next. In March 2014, SkyCity reviewed its cleaning services and that review highlighted *"five key issues"*. These were:

1. *Lack of supervision.*
2. *Lack of subject matter knowledge to deliver cleaning to SkyCity.*
3. *Lack of engagement with stakeholders.*
4. *No strategy for how cleaning is delivered resulting in constant firefighting which becomes a vicious circle.*
5. *Unmotivated staff.*

[12] Pursuant to that review, SkyCity proposed to dismiss the third applicants for redundancy and compelling those who wished to remain on the site to continue work for a cleaning contractor which would perform the cleaning function at SkyCity that had previously been done in-house.

[13] Various discussions between the parties took place contemporaneously and subsequently at mediation but the matter remained in dispute. The applicants seek a compliance order requiring SkyCity to comply with the terms of the agreement *by providing the third applicants with training to develop their full potential in an environment of teamwork and open communication in order to address the issues referred to …"* in the agreement. In addition, the applicants allege that in its purported breach of the agreement, SkyCity was also in breach of s.4(1A) of the Act.

[14] The second cause of action concerns s.69H of the Act. That section provides that after receiving a statutory notice to exercise the right to transfer to an incoming contractor (in circumstances such as SkyCity was proposing in respect of the third applicants here), an employee may bargain with his or her employer for alternative arrangements.

[15] The applicants in the present matter claim that the extent of that right to bargain must be read so as to include the right to bargain about whether the contracting out should occur or not.

[16] The applicants seek a declaration that the right to bargain includes the right to bargain about whether or not contracting out should occur.

[17] Further and finally, the third cause of action involves s.69M of the Act. That section provides that where an employee who is a union member covered by an operative collective agreement and elects to transfer to a new employer in circumstances such as those proposed by SkyCity, that employee carries the terms and conditions of their employment with them to the new employer and from the effective date of the transfer of such an employee or employees, the new employer becomes a party to the operative collective agreement as well, but only in respect of the transferring employees.

[18] What the applicants seek in the present case is a determination from the Authority that the effect of the relevant provision in the agreement is to require that any new employees engaged by the new employer must be employed on terms and conditions which are not inconsistent with the agreement.

[19] This proposition relies on the effect of the coverage clause and the new employees clause, a combination of which it is said, has the effect of requiring that waged employees who are members of either of the party unions, and who work at the SkyCity Auckland site, on any of the scheduled jobs, will be paid and derive their conditions from the agreement, whether those waged employees are continuing or new.

[20] Conversely of course, the statutory provision that I have just referred to in s.69M of the Act, seeks to bind the new employer to the existing collective employment agreement for that site but only in respect of the employees which that new employer has acquired by virtue of those employees having transferred across from their former employer.

Issues

[21] It will be convenient if the Authority considers each of the causes of action in turn. Accordingly, I propose to address the following questions:

(a) Is there a breach of clause 2 of the agreement; and

(b) Does the right to bargain under s.69H confer a right to bargain about contracting out; and

(c) What is the effect of s.69M(2)?

[22] In the course of the concluding submissions made for the applicants at the investigation meeting, counsel indicated that the second and third questions could effectively be parked meantime and returned to later should that be necessary and that priority need be given only to the first issue identified.

[23] Counsel for the respondent resisted that proposition and indicated that, so far as SkyCity was concerned, a decision on all three matters was sought.

[24] That being the position, I intend to address all three issues in this determination.

[25] One final procedural aspect needs to be addressed; although the relief sought by the applicants in respect of the first issue is by way of compliance order, the applicants propose and SkyCity does not disagree that if the applicants were to be successful in respect of the first issue for determination, then a declaration by the Authority as to the position will suffice at first instance with compliance orders being sought later on should that become necessary.

[26] I indicated to the parties that if I were to reach the conclusion that the applicants had succeeded in respect of the first cause of action, I might well direct the parties back to mediation and such a course of action would be consistent with no compliance order issuing meantime.

Is there a breach of clause 2 of the agreement?

[27] The effect of the applicants' claim is that SkyCity has not complied with the operative collective agreement and therefore that the proposed disestablishment of SkyCity's own cleaning operation and the inevitable consequences for its own cleaning staff, are improper.

[28] The applicants say that the third applicants named in the proceeding are effectively each of them subject to prospective dismissals by virtue of the decisions taken by SkyCity. Moreover, it is contended that by virtue of that status, the

Authority ought to have regard to s.103A of the Act which is of course the test for justification in the statute.

[29] But it cannot be right that the law on justification is relevant to the present proceeding; s.103A applies in circumstances where the Authority or the Court is asked to adjudicate on an employer's justification for acting in the way that it did and the section only has force or effect where a personal grievance is raised. Here, as counsel for SkyCity points out, no personal grievances have been raised and so reference to s.103A is misplaced.

[30] However, the next point that the applicants make is well made; they refer to the line of authority which confirms that a fair and reasonable employer will comply with the law and I am referred to a decision of Judge Travis in *Tan v. Morning Star Institute Education Ltd* [2013] NZEmpC 82 where the learned Judge said at para.[53]:

> *A fair and reasonable employer, objectively viewed, must comply with its statutory and contractual obligations.*

[31] Counsel also referred me to a decision of Colgan CJ in *Harris v. The Warehouse Ltd* [2014] NZEmpC 188 when the Court found that non-compliance with statutory or contractual obligations can ground a finding of unjustified dismissal. Another decision of Chief Judge Colgan in which a similar reference can be found is *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 when His Honour, in commenting on the force and effect of s.4 of the Act, observed that a good and fair employer would comply with those statutory obligations *"… because a fair and reasonable employer will comply with the law"*.

[32] It seems to me uncontroversial to say that a fair and reasonable employer will comply with the law and that compliance includes compliance with the contractual obligations that that employer is a party to. The real question is whether, in doing what it did, SkyCity did in fact fail to comply with the relevant contractual provision, or not. While the applicants maintain that SkyCity did fail to fulfil its obligations, SkyCity maintains that while it was aware of those obligations, it fulfilled them to the letter. Moreover, SkyCity says that even if a breach of clause 2 were to be found (and that is denied), that breach of itself does not have the effect of preventing the implementation of the decision to contract out.

[33] The first point of reference then is a consideration of subclause 2.1 of the operative collective agreement. That describes SkyCity's vision and records that its employees will *"... agree that they will do everything they can in their jobs to help SkyCity achieve this vision"*.

[34] The applicants say that this provision places a *"substantial and heavy"* onus on the employees.

[35] The countervailing obligation on SkyCity is in subclause 2.2 which I set out in full at para.[9] above. The applicants say that this subclause *"imposes similarly substantial and heavy obligations on the employer which are said to be 'in return' for the heavy obligations assumed by the employees"*. Not surprisingly, both parties dwell on the use of the word *"aim"* at the beginning of subclause 2.2. According to SkyCity, there is a difference between aiming for a goal and achieving it whereas the applicants say that the obligation on SkyCity, by virtue of its seriousness, requires constant effort and in effect, it is contended that because the applicants can demonstrate that that constant effort is lacking, SkyCity has failed in its contractual obligation.

[36] Of course that view is not accepted by SkyCity which says simply that it has aimed to achieve the various outcomes referred to in clause 2.2 and the fact that it has perhaps fallen short ought not to be taken as evidence of a want of will.

[37] But as the applicants say in their submissions, these are reasonably onerous obligations which the employer appears to have willingly acceded to. The first obligation is that SkyCity aims to provide employees with the opportunity and training to develop to their full potential in a climate of teamwork and open communication.

[38] The applicants say that those opportunities simply have not happened and that, in effect, because SkyCity has, so it is said, adopted a minimalist approach to training in particular, it cannot be said that any of the third applicants have had the benefit of developing to their full potential.

[39] Again of course SkyCity does not accept that submission; it says that all staff received training at induction and that further training beyond the induction point, is really unnecessary unless and until new equipment or tasks are introduced. When that happened, SkyCity says further training was provided.

[40] I observe at this point that the evidence is reasonably solid that induction training was provided across the totality of the witnesses who made themselves available for examination by the Authority but I am less satisfied that subsequent training was provided on an as and when required basis and even the principal witness put up by SkyCity seemed to accept that there were not insignificant deficiencies in the way that training was delivered once staff had been through the induction process.

[41] Moreover, with respect to SkyCity's submission on the point, the issue here is not about just the delivery of training. It is about the development of human potential which seems to me to be what this subclause is all about. In my view, the key words in the first bullet point of this subclause are the words *"to their full potential";* the sub clause then goes on to emphasise that point by talking about a climate of teamwork and open communications.

[42] I make this observation because it seems to me that the focus on training is to some extent misplaced; training is a means to an end for the purposes of this first bullet point and not an end in itself.

[43] By that I mean that the wording of the first bullet point properly construed seems to me to contemplate the development of the full potential of these employees through training, but also through opportunity, because that word is also used. Opportunity presumably encapsulates the prospect of promotion through the ranks, the prospect perhaps of moving within the SkyCity enterprise into an entirely different kind of role and matters of that kind.

[44] Moreover, that *"full potential"* is to be developed in a climate of teamwork and open communication and those last mentioned qualifications seem to me to import a collaborative decision-making process which seeks to genuinely promote a transformative employment relationship.

[45] I invited counsel for SkyCity to agree with my proposition that these were unusual words and she demurred; she argued that clauses talking about a common enterprise between employer and employee were a commonplace in employment agreements and I agree with that, but these words go far further. These words seem to contemplate a different kind of approach to the working environment of employees who typically, to put it shortly, are generally at the bottom of the economic heap.

[46] The next bullet point is equally significant because amongst other things, SkyCity is aiming to provide employees with an organisation which adapts to their needs. Again, I say this is an unusual obligation and one that cannot and should not be made lightly.

[47] Given that obligation, I would have expected there to be evidence before me which disclosed at least some attempts by SkyCity to adapt its organisation to the needs of this group of employees. I say "attempts" because I accept without reservation the point that SkyCity makes that its obligation is to aim in a particular direction and there must be, logically, a difference between "aiming" and "achieving". But in relation to this particular aspect of the clause, I am unable to identify any evidence that suggests that SkyCity has tried to adapt its organisation to the needs of the employees. Put shortly, these unusual obligations on an employer seem to be mirrored by quite ordinary behaviour by the employer whereas I would have expected these unusual obligations to be mirrored by unusual and innovative responses from the employer.

[48] It cannot be right and just for parties to engage in bargaining, reach settlements which include innovative and progressive clauses such as this, but then effectively honour them in the breach by not doing anything differently from what other employers who do not have the vision to include such innovative provisions would do.

[49] The next bullet point aims to provide the employees with leadership that *"values an empowered and diverse workforce ..."*. It seems to me that in order to have an empowered and diverse workforce, that workforce has to have been engaged with by the employer and provided with the sorts of opportunity that seem to be contemplated by the first two bullet points. The very notion of empowerment seems to postulate a class of employee who frankly I did not see at my investigation meeting; indeed, the only aspect of the behaviour of the third applicants which seemed to me to come anywhere near a sense of empowerment was the collective conviction of those folk that they wanted to remain within the SkyCity family rather than be forced into the employment of a third party, albeit on the same site. There was, I thought, some residual belief, on the part of these employees, in the SkyCity enterprise, and in the promises that they clearly think they were made by SkyCity when these particular provisions (now in dispute) were agreed to.

[50] A further aspect of the final bullet point in subclause 2.2 is its reference to the *"individual dignity"* of its *"diverse workforce"*. Based on the employees who attended my investigation meeting and gave evidence, I accept without reservation that the workforce, certainly if that sample is representative, is a diverse one but the thrust of the third bullet point appears to rest on the leadership of SkyCity helping by its approach to the promotion of individual dignity. What the applicants say is that, to the contrary, the approach adopted by SkyCity has had the reverse effect.

[51] What counsel for the applicants referred to in his closing address as the central submission of the applicants is the proposition that the decision in principle of SkyCity to terminate its own cleaning operation and contract out that entity only became a necessity because of SkyCity's failure to fulfil its obligations in terms of the collective employment agreement. In fact, it is contended that if indeed there is a necessity to contract out the cleaning operation, that is a direct and inevitable consequence of SkyCity's failure to honour the obligations that I have just traversed from the collective employment agreement.

[52] I have already made clear my view that the obligations created by the provisions of the agreement are special and unusual and, put generally, such obligations would in my view create a requirement for the employer party to behave in a qualitatively different way from an employer bound by more commonplace obligations. As I have already said, this was not a situation where the parties had simply undertaken to work collaboratively for the good of the business as is a commonplace in many collective employment agreements and indeed in some individual employment agreements. If the only provision that we were concerned with here was the provision in subclause 2.3 of the operative collective employment agreement, then I should have been less concerned to try to identify the special and extended engagements by the employer with the employees that it seems to me the detail of clause 2 requires.

[53] Subclause 2.3 simply provides that the parties will work together to help each other in a collaborative team-based environment. Those words might be expressed more grandly in this document than in some others but the proposition is, I am satisfied, a common one in employment agreements where each party effectively recognises that the relationship is symbiotic, that each needs the other in order to prosper.

[54] But as I say, the other subclauses go much further and seem to me to impose aspirational goals for the workforce which it is incumbent upon SkyCity to help deliver.

[55] Perhaps subclause 2.1 which requires the employees to do everything they can *"in their jobs"* to help SkyCity achieve its vision can be seen as just a reworking of the collaborative principle expressed in subclause 2.3 but I am satisfied the bullet point provisions in subclause 2.2 cannot be dismissed as easily and that this provision requires of the employer effort to develop the full potential of the affected staff, effort directed at providing an organisation which may not be employee-centred but which at least is required to try to adapt to the needs of the employees and finally leadership from the employer which values the unique attributes of the workforce with all its colour and diversity, but which seeks to promote notions such as *"mutual trust and individual dignity"*.

[56] I say again that I am satisfied none of that is commonplace or ordinary and by its very nature those words create obligations that go far beyond the run of the mill.

[57] So in a practical sense, what happened? SkyCity commenced a review of its cleaning services. That resulted in a paper issued in March 2014. As the applicants' counsel astutely pointed out, that paper, a copy of which has been filed in the Authority, fails entirely to address or even recognise the unique nature of the provisions I have just been commenting on. Indeed, it is fair to say that there is no evidence whatever in that paper that clause 2 of the collective employment agreement was even considered by the authors.

[58] There were various causes of this apparent deficit in cleaning services identified and with the possible exception of the fifth of those causes, all of them were failings of the employer. The essence of the conclusion reached to contract out appears to rest on the propositions that, first, cleaning is not SkyCity's core business and therefore, second, its delivery of cleaning is never going to be best practice.

[59] Even in the recommendation section, it is apparent that the authors consider the benefit of outsourcing would enable the same staff who would transfer from SkyCity to the incoming cleaning contractor to be properly trained, skilled and motivated so as to do the work required.

[60] But that seems to me to be precisely what the obligation created by clause 2 is all about, requiring SkyCity to provide the wherewithal for its subject employees to be provided with the necessary skills, motivation and structure to best develop their potential as employees and thus their ability to contribute to the business success of the employer.

[61] Nor were SkyCity's witnesses particularly helpful to its cause either. The principal witness it put up, as I have already noted, gave frank and straightforward evidence, which I believed, which seemed to confirm that SkyCity had adopted a *laissez faire* approach to its operation, at least since it started worrying about the quality of it, and it seems to me the difficulty for SkyCity in that regard is that its anxiety about the quality of its cleaning services becomes almost a self-fulfilling prophesy. By failing to engage with its own people, by failing to have properly trained and skilled managers and supervisors in the area, by failing to invest in training whether in-house or outsourced, by failing to engage appropriately with its people in terms of team meetings and the like, SkyCity effectively ensured that the outcome of its review would be a conclusion that the present system was not working and it needed to be changed.

[62] But if the present system is not working because of failures by SkyCity and those failures include breaches of its contractual obligations, then that behaviour is not the behaviour of a fair and reasonable employer.

[63] It seems to me that the evidence I heard suggested that training, with the exception of induction training, was inadequate, that supervision was at best patchy, that staff meetings were irregular if they happened at all and that engagement between management and the workforce was far less than would appear in any way satisfactory.

[64] Ms Tamainu, SkyCity's principal witness, confirmed that staffing levels meant that training was inadequate; that view was echoed by the applicant witnesses who gave evidence to me in one way or another.

[65] In relation to team meetings, which is an obvious conduit of information, Ms Tamainu said that team meetings had mostly been discontinued in February or March of this year and she appeared to accept that if there were complaints about cleaning standards, staff never got to hear about them.

[66] Again, this evidence is consistent with the evidence I heard from the applicants who, in the main, said that team meetings had stopped some months ago and second that they were never told that cleaning standards were not up to scratch until the review was on foot.

[67] Again, it seems to me fair to assert that the evidence I heard from both sides suggested a recent decline in engagement between management and staff (the failure to meet), and a failure to address complaints to the source, that is to the people who were actually doing the work.

[68] In that latter regard, Mr Money, the SkyCity manager with overall responsibility for the area, said that there were complaints, that they were addressed but he seemed to concede that when they were addressed they were addressed at supervisory level and not, as it were, on the shop floor. The consequence of that approach is that the workforce, who SkyCity characterised as being demotivated, never get to know that their work is not up to scratch and more importantly why it is not up to scratch.

[69] In those circumstances, again it is difficult not to see the failure, both to hold meetings and to deal properly with complaints, as systemic failures. In the same way, the failure to train, which seems to be accepted, also appears to be systemic. SkyCity, on its own evidence, was not investing sufficient resource in providing for training, either because it had not the experience or expertise to do it (Mr Money's point), or because there were insufficient staff allocated to the tasks.

[70] I am satisfied then that the obligations on SkyCity are if not unique at least unusual and that by their very nature, the sort of active, constructive, responsive and communicative engagement with staff that is mandated by s.4(1A) of the Act, is also required by force of the provisions of this agreement and that on the evidence I heard, there was simply insufficient effort made by SkyCity to fulfil the special obligations that it accepted that it had in terms of clause 2 of the agreement. I think SkyCity failed to recognise the extent of the obligations that it had under that clause and had it done so, it would have behaved differently.

[71] I think the evidence for SkyCity's failure is to be found first in the March 2014 report which I am satisfied fails entirely to reflect the values that SkyCity has committed to in clause 2 of the operative collective employment agreement.

Moreover, I am satisfied that that report identifies what could loosely be referred to as systemic failures by SkyCity in respect of its cleaning operation, failures which go to the heart of its obligations in terms of clause 2 and which evidence breach of that clause.

[72] In particular, I am not satisfied that an employer with an obligation to provide opportunity and training to staff *"to their full potential"* would allow the systemic failures that SkyCity's own report seems to confirm and that the weight of evidence (including SkyCity's own viva voce evidence) also confirms.

[73] The March 2014 report does not in my judgment disclose SkyCity as an organisation adapting to the needs of its employees; indeed quite the reverse is the case given that the obligations in the employment agreement is simply not mentioned. Nor is there evidence of leadership designed to enhance mutual trust and individual dignity; indeed quite the reverse is the case. The report evidences leadership and supervisory failure as one of the key building blocks in what I have characterised as a systemic failure by SkyCity in this part of its operation.

[74] Moreover, those conclusions, based as they are primarily on the SkyCity March 2014 report, are also supported by the weight of viva voce evidence, including evidence from SkyCity whose principal witness accepted that the deficits in the cleaning operation were a function of systemic failure. That is, that the failures to provide a satisfactory level of cleaning in the SkyCity establishment is a function of SkyCity's own decision-making such that, in truth, I feel justified in concluding that, as I have already noted, the failure of the cleaning operation was, in truth, a self-fulfilling prophesy.

[75] Given the systemic failure that I am satisfied is demonstrated by the weight of evidence, I must conclude that SkyCity has failed to fulfil its contractual obligations. However, I also want to be very clear that the effect of my conclusion is not to be read down so as to include an implicit conclusion that SkyCity cannot contract out.

[76] Such a proposition is plainly wrong; there is clear provision in the collective employment agreement for SkyCity to contract out and in reaching the conclusion that I have, I have not also concluded that SkyCity cannot contract out its cleaning operation, only that the process that it has used to get to that provisional conclusion is

wrong in principle because it has not taken proper account of its contractual obligations.

[77] Consistent with the earlier intimation in this determination, I do not propose to issue a compliance order but simply make the declaration that I have and remind the parties of the availability of mediation services if they think those services may assist them in progressing the matter.

[78] For the avoidance of doubt, I have considered but rejected the idea of directing the parties to mediation pursuant to s.159 of the Act; both parties are advised by experienced and able counsel and can access mediation services if required. In the alternative, if either party wishes a direction to mediation from me, I will happily discuss that with counsel.

Does the right to bargain under s.69H confer a right to bargain about contracting out?

[79] The observations that I make about this claim are very much in the nature of limited assertions pertaining to the particular circumstances of this case. I accept the point made for SkyCity that there is no case law yet on this section and given the conclusion that I have just reached in relation to a breach of clause 2 of the operative collective employment agreement by SkyCity, I am not satisfied that I need to make anything more than preliminary observations about this particular claim.

[80] Not only does the effect of my conclusion in respect of the first cause of action take away the necessity to dwell to any extent on this claim, it is also fair to observe that, to date anyway, the applicants have chosen not to bargain with SkyCity in terms of s.69H.

[81] The effect of the claim made by the applicants is they want to know whether, amongst the things they could bargain about, was the very fact of contracting out.

[82] I agree with SkyCity's submission that, given the circumstances of the present case, the question asked by the applicants here is very much a hypothetical one. They have yet to engage with their employer under s.69H, presumably at least in part because of their desire to await the determination of the first cause of action in the present proceeding.

[83] That said, I venture to express the observation, without deciding the matter, that the logic advanced by the applicants does not attract me. Looking both at s.69F and s.69G of the Act, it would seem as plain as can be that before parties can engage pursuant to s.69H, there must have been a decision made by the original employer to contract out or the provisions in s.69G make no sense.

[84] If the decision by the original employer has already been made (as I postulate here), then it seems implausible that the Parliament intends that, notwithstanding that earlier decision by the original employer, that matter is still able to be bargained about.

[85] However, as I say, I do not think it appropriate for me to decide the matter here, given I am not persuaded it is relevant in the particular circumstances of this case. If the parties wish to have this matter dealt with definitively, I am happy to schedule time to hear counsel in a fulsome way so that the matter can be addressed substantively.

What is the effect of s.69M?

[86] In effect, what this third cause of action is inviting me to decide is whether the coverage clause and the new employees clause in the operative collective employment agreement have the effect of abrogating the statutory rule in s.69M. The reason I put the matter in this way is that what the applicants are saying in practice is that they want to know whether the effect of the contractual provisions might require the new employer to employ new workers on terms and conditions of employment which are not inconsistent with the agreement that that new employer effectively inherited together with the employers who have brought their terms and conditions of employment with them.

[87] So, to express the matter slightly differently, in the present case, if the former SkyCity employees were to commence employment with a cleaning contractor under the terms of the provisions of Part 6A of the Act, the former SkyCity employees would carry their existing terms and conditions of employment with them when they transferred. So the terms and conditions that the former SkyCity employees would work under with the new employer would be the same as the terms and conditions under which they previously served SkyCity.

[88] The question in issue here is what terms and conditions are to apply to new employees who are employed by the new employer but who are not employees who the new employer has inherited from SkyCity? The applicants in the present case maintain that the effect of the collective employment agreement which is brought over by the SkyCity employees effectively requires the new employer to offer the same terms and conditions to incoming staff.

[89] It seems to me that as with the previous claim, the applicants have put the cart before the horse. Unless and until the applicants are in a position where the question that they seek a determination on is actually before them front and centre, any response from the Authority is no more than an attempt to answer a hypothetical question.

[90] Moreover, in the present case, assuming that the parties get to this point, there is a third party involved and the Authority would be gravely in error it seems to me in making any observations about this claim without hearing from any affected third party, assuming there is one.

[91] Accordingly, I am not prepared to take this matter any further.

Determination

[92] I have decided that SkyCity is in breach of clause 2 of the operative collective employment agreement because it has not done what Judge Travis in *Tan* enunciated as the test where the Court found that a fair and reasonable employer must comply with both its statutory and contractual obligations.

[93] Moreover, I am satisfied that in failing in its obligation in that regard, SkyCity is also in breach of s.4(1A) of the Act in failing in its obligations to be *"active and constructive in establishing and maintaining a productive employment relationship"* where the parties are *"responsive and communicative"*. It seems to me that by breaching the terms of its contractual obligations, SkyCity has also failed to meet the good faith obligations required of it by s.4(1A) because that is not what a good and fair employer would do.

[94] I have declined to make any decision in respect of the second and third causes of action; in relation to the cause of action concerning s.69H I have expressed a view, without deciding the issue, that I am not attracted by the logic advanced by the

applicants and that I am prepared to hear argument on the question should the matter become less hypothetical and in respect of s.69M, I have declined to make any observation on the footing that the matter is so hypothetical that not all the affected parties have even been heard by the Authority.

Costs

[95] Costs are reserved.

James Crichton
Member of the Employment Relations Authority