IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 25
5549765

	BETWEEN	RADOMIR MIHAJLOVIC First Applicant
		JELENA MIHAJLOVIC Second Applicant
	A N D	PARAMOUNT SERVICES LIMITED First Respondent
		AN14 SERVICES LIMITED Second Respondent

Member of Authority:	T G Tetitaha
Representatives:	A Espie, Counsel for the Applicants D Mitchell, Advocate for the First Respondent No appearance for the Second Respondent
Investigation Meeting:	26 November and 16 December 2015 at Wellington
Submissions Received:	15 and 16 December 2015 from both parties
Date of Determination:	22 February 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

A. **Radomir and Jelena Mihajlovic were employed by Paramount Services Limited at all material times.**

B. **Radomir and Jelena Mihajlovic were unjustifiably dismissed by Paramount Services Limited.**

C. **There is an order Paramount Services Limited pay Radomir Mihajlovic lost remuneration of $5,000.32 less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**

D. There is an order Paramount Services Limited pay Jelena Mihajlovic lost remuneration of three month's wages less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

E. There is an order Paramount Services Limited pay Radomir Mihajlovic compensation of $5,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

F. There is an order Paramount Services Limited pay Jelena Mihajlovic compensation of $5,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

G. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Radomir and Jelena Mihajlovic were cleaners at the Embassy Theatre in Wellington until their employment was terminated for redundancy on 7 November 2014. They allege one or both of the respondents were their employers. They also allege the redundancy was not for genuine reasons and the process leading to termination was flawed.

Facts leading to dispute

[2] The Mihajlovic's are Serbian immigrants. Radomir Mihajlovic moved to New Zealand in 2001 to study English. Following the grant of residency his wife, Jelena Mihajlovic joined him in March 2004.

[3] Radomir Mihajlovic stated work as a cleaner at the Embassy Theatre in December 2002. Jelena Mihajlovic also began work as a cleaner in May 2004.

[4] In 2011 the Embassy's then owner, Event Cinemas, contracted out the cleaning of the Embassy to the first respondent, Paramount Services Limited (Paramount). The Mihajlovics' employment transferred to Paramount by agreement.

[5] In July 2014 the Mihajlovics' were contacted by Stephanie Thorpe, Paramount's Wellington Regional manager, and invited to a meeting at the Embassy Theatre without being told its purpose. Ms Thorpe informed the Mihajlovics' that Paramount was in the process of franchising out responsibility for cleaning the Embassy.

[6] In August 2014 Ms Thorpe met with the Mihajlovics again. She advised the responsibility for cleaning the Embassy had been contracted out to a franchisee, AN14 Services Limited (the franchisee). At some stage they had been given forms headed *"Part 6A Employment Relations Act 2000 – Election to Transfer Employment"*. They duly signed the forms on 2 August 2014 and left them at the Embassy Theatre for Ms Thorpe to collect.

[7] On 7 August 2014 the Mihajlovics were instructed to attend another meeting at Paramount's Wellington office. Also attending the meeting were Paramount's then Operations Manager, Joy Rolton-Walker, and two representatives of the franchisee, Neeraj Narwal and Anil Kumar. The Mihajlovics were told that the franchisee was taking over responsibility for cleaning the Embassy and that it had agreed to the transfer of the Mihajlovics' employment. The Mihajlovics were presented with new employment agreements to sign. They signed the agreement that same day.

[8] On 18 September 2014 the Mihajlovics were contacted by Ms Thorpe and asked to attend a meeting on 24 September. The meeting venue was changed to the Wellington Public Library as the Mihajlovics do not own a car. At the meeting were Ms Thorpe and Murray Hamilton, Paramount's NZ Account Manager. No representative from the franchisee was present.

[9] The Mihajlovics were told that the franchisee was considering carrying out the cleaning duties at the Embassy themselves and that as a consequence, their roles may be dis-established and employment terminated. They were invited to have input into the process and to outline alternatives to redundancy.

[10] On 25 September 2014 the Mihajlovics received a letter from Mr Hamilton summarising the meeting and stating that to maintain the viability of his business, the franchisee needed to consider carrying out cleaning duties himself which would constitute a restructuring of the business.

[11] On 14 October 2014 a second meeting was held. Ms Thorpe and Mr Hamilton attended with Paramount's legal representative, Darren Mitchell. The Mihajlovics' were accompanied by Mino Cleverely as a support person. No other representative from the franchisee was present.

[12] On 15 October 2014 Mr Hamilton sent the Mihajlovics a further letter stating

> *The franchisees have serious concerns that the continuation of your employment would render the business unviable, and the best solution would be to carry out the cleaning duties at the Embassy Theatre themselves.*

[13] A third meeting was held on 6 November 2014 at Paramount's Wellington offices. The Mihajlovics' were accompanied by their lawyer, Alastair Espie. Paramount's representatives at the meeting were Mr Hamilton, Ms Thorpe and the company's legal representative, Mr Mitchell. No-one from the franchisee attended.

[14] The Mihajlovics' were advised at the meeting that their employment would end due to redundancy. Mr Espie sought to bargain for redundancy entitlements on their behalf. The applicants' offer was declined.

[15] On or about 7 November 2014 the Mihajlovics' received a letter confirming their positions had been disestablished and they had been made redundant.

[16] On the same date a letter was received from the franchisee confirming the notice of termination of the employment with that company on the grounds of redundancy effective 6 November 2014 when they were advised of this outcome *"by our agent, Paramount Services Limited."*

[17] A personal grievance was raised on 2 December 2014. The matter was unable to be resolved at mediation.

AN14 Services Limited

[18] AN14 Services Limited (the franchisee) filed a statement in reply but took no further part in the matter before the Authority. It did not file any evidence and did not attend the hearing.

[19] I have the power to proceed if a party fails to attend a hearing *"without good cause"*.[1] The franchisee has been sent copies of my Minutes and notice of the hearing. No good cause has been shown for the failure to attend as the franchisee has not contacted the Authority to explain its absence. I am satisfied I may continue to hear and determine this matter.

Issues

[20] Although there had been some discussion in teleconferences and at the beginning of the hearing about the issues, it became clear these were much simpler than proposed by the parties. I am not bound to treat a matter as being the type described by the parties. I may in my investigation concentrate on resolving the employment relationship problem however described.[2]

[21] In my view only the following issues arose for determination:

Identity of Employer

(a) Did the Mihajlovics' employment transfer from Paramount to AN14 Services Limited?

Unjustified Dismissal

(b) Were the reasons for the redundancy genuine?

(c) Were the respondent employer's actions leading to redundancy what a fair and reasonable employer could have done in all the circumstances?

Penalties

(d) Was the action for penalty filed within 12 months? If not should leave be granted to file this action out of time?

[22] The alleged unjustified disadvantage action pertaining to variations to their employment agreement causing stress and the bargaining for redundancy pertain to the franchisee only. As determined below, the franchisee was not the Mihajlovic's employer. These applications are dismissed.

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1 Clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act).
2 Section 160(3) of the Act.

Did the Mihajlovics' employment transfer from Paramount to AN14 Services Limited (the franchisee)?

[23] The applicants submitted their employment did not transfer to the franchisee before termination. This is because the franchise agreement did not specify a commencement date or agreed date of sale and there was uncontested evidence Paramount continued to manage all aspects of the Mihajlovics' employment up and until termination. This included payment of wages, control of their cleaning duties, undertaking the restructuring and exploring redeployment within Paramount prior to termination. In contrast the franchisee had no involvement in the Mihajlovics' employment including the process leading to termination.

[24] The respondent submitted the date the Mihajlovics' employment transferred was 24 August 2014. It produced a Call record for Paramount Services Limited pertaining to the Embassy Theatre site and a signed franchise agreement between Paramount and the franchisee dated 22 July 2014 ("franchise agreement"). Appendix 1 to the franchise agreement included the Embassy Theatre site as part of the cleaning contracts purchased with the franchise. It further submitted the Mihajlovics' had sufficient notice of their right to elect transfer in July 2014, freely signed the transfer forms and employment agreements and any defects (such as omission of the date for transfer) were not deliberate, serious or sustained nor did it disadvantage them.

Law

[25] In deciding whether the applicants were employed by one or both respondents, the Authority must determine *the real nature of the relationship between them* (s.6(2) of the Act). This assessment includes considering *all relevant matters, including any matters that indicate the intentions of the persons* and *is not to treat as a determining matter* any statement by the parties describing *the nature of their relationship* (s.6(3) of the Act).

[26] In considering *"all relevant matters"* under s.6 of the Act, the Authority shall apply "tests" such as control, integration and the "fundamental test"[3].

[27] The control test considers the degree of control and supervision exercised by the employer over the alleged employee's daily work.[4]

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3 *Curlew v. Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 EmpC at [46]

[28] The integration test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become *part and parcel of the organisation*.[5]

[29] The fundamental test asks the question whether the alleged employee engaged themselves to perform the services with the employer as a person in business on their own account.[6]

Was the transfer of the Mihajlovic's employment governed by Part 6A of the Employment Relations Act 2000?

[30] The transfer of employment of specified categories of employees' also known as "vulnerable" employees is governed by Part 6A of the Employment Relations Act 2000 (the Act). Part 6A protects those employees affected by restructuring by continuity of employment. This Part also protects the rights of workers to choose whether to transfer their employment and to bargain for new terms and conditions with the new employer before their election is made.[7]

[31] Ms Thorpe whom primarily dealt with the Mihajlovics' transfer of employment did not appear to apprehend the employer's statutory obligations. When asked by the Authority if she agreed this was a restructuring she replied *"no it was an inhouse transfer, not a restructuring."* When directed to the form she had produced headed "Part 6A Employment Relations Act 2000 Election to Transfer Employment" and asked why this was necessary for an inhouse transfer she replied:

> *We never talked about it as a restructuring. It was an internal transfer of employees from franchisor to franchisee.*

[32] The franchising of the cleaning contract for the Embassy Theatre was a restructuring under s.69B and 69C(4) of the Act. Paramount had contracted out the cleaning of the Embassy Theatre to the franchisee. The Mihajlovics' were Paramount's employees and were within the specified category of employees protected by Part 6A[8].

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4 *Bryson v. Three Foot Six Ltd [2003] 1 ERNZ 581 (EmpC) at [38]*.
5 *Bank voor Handel n Scheep AART N v. Slatford (No.2)* [1953] 1 QB 248 (CA) at 295
6 *Bryson v. Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [52]
7 *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2012] NZSC 69 at [2].
8 Section 69A and Schedule 1A of the Act.

When did the restructuring take effect?

[33] Section 69I provides that if an employee elects to transfer to a new employer, then they will become the employee of the new employer, on the same terms and conditions that applied at the "specified date", which is the date on which the restructuring takes effect.

[34] The date this restructuring "takes effect" must be the date the Embassy Theatre cleaning contract was assigned to the franchisee. It is at that point the Mihajlovics' employment is affected by the restructuring because Paramount no longer owns the right to clean the Embassy Theatre site.

[35] Clause 16.1(a) of the franchise agreement provided for the assignment and ownership of all cleaning contracts to the franchisee from *"the agreed date of sale"* subject to payment of any applicable finder's fee or other agreed consideration.

[36] Assuming all other conditions were met, the earliest *"agreed date of sale"* would have been 22 July 2014 being the date the franchise agreement was signed. It is more likely to have been a few days later if payment of a fee or consideration was required. The call log notes a call on 29 August 2014 from one of the franchisee's directors stating handover of the Embassy Theatre site occurred on 24 July 2014. Paramount's NZ Account Manager Murray Hamilton confirmed under oath that it was not unusual for cleaning contracts to transfer to franchisees within days of signing the franchise agreement. From the evidence the date this restructuring took effect was 24 July 2014.

Was there a valid election to transfer?

[37] An election to transfer cannot have any effect if the restructuring has already occurred. As determined above, the restructuring occurred on or about24 July 2014. The Mihajlovics' signed the election to transfer several days later on 2 August 2014.

[38] Even if the late signing did not affect its validity, an election to transfer must be made before the date provided to the employee under section 69G(1)(d) namely a date 5 working days after the affected employee has been provided with the information required under s.69G(1)(a) to (c) of the Act or such later date as the employee's employer and new employer may agree.

[39] The information under s.69G(1) must be provided 15 working days prior to the restructuring taking effect. The required information was never given to the Mihajlovics' by Paramount by the due date. The omitted information included the date of the restructuring and the date by which their election to transfer was to be executed.

[40] Transfer may still occur at a later date by agreement between Paramount and the franchisee (s.69G(1)(d)(ii). There is no evidence of any agreement to transfer at a later date. The respondent's evidence disagrees about the date for transfer. As noted below the franchisee inserted a commencement date into the draft employment agreement of 18 August 2014. Paramount states the date of transfer was 24 August 2014 relying upon Ms Thorpe's evidence which disputed evidence from the franchisee director in the Call record that handover occurred on 24 July.

[41] There are also concerns about the validity of election to transfer that the Mihaljovics' signed. There was a dispute whether the election to transfer contained the name of the franchisee at the time the Mihajlovics' signed it. Radomir Mihajlovic states it did not. Stephanie Thorpe whom handwrote the name on the election states that it did. I prefer Radomir Mihajlovic's evidence because there was uncontested evidence of similar conduct by Paramount. It was not contested Paramount arranged for the signing of the Mihajlovics' intended employment agreements then allowed the franchisee to make handwritten changes after they had been signed.

[42] An election to transfer cannot be validly executed without the new employer's name. There is no evidence the Mihajlovics' consented to the handwritten change although there is evidence they were aware of the name of the new employer.

[43] In my view the written election to transfer was invalid and there was no evidence of any further agreement regarding transfer. Therefore the Mihajlovics' remained employees of Paramount.

Did the Mihajlovics' employment later transfer by written agreement?

[44] Individual employment agreements were signed between the Mihajlovics' and the franchisee. A copy of the agreement was not provided to the Mihajlovic's until 15 October 2014. The copies provided contained a number of handwritten changes.

[45] The evidence from Joy Rolton-Walker, Paramount's former Operations Manager confirmed the only handwritten change made in her presence and prior to the Mihajlovics' signing the agreement was the deletion of the 90 day trial period (clause 3). Any other changes were made subsequent to the Mihajlovics' signing the agreement.

[46] The agreements produced contained further handwritten changes. These included changing the name of the employer from Paramount Services Limited to "AN14 Services Limited"; insertion of the employees names on the front and second page; insertion of "Neeraj" in clause 4.3; and in Schedule B insertion of a commencement date of "18/8/14" and wages of "$15.00 per hour".

[47] The agreement incorrectly recorded the place of work as "national or such other place as the employer may conduct its business". Radomir Mihajlovic gave evidence he had made another handwritten change after signing inserting the place of work as the "Embassy Theatre" but it was not in the copy of the agreement he received. I accept his evidence given the history of unilateral handwritten changes to employment documents between these parties. I also accept the first time the Mihajlovics' became aware of the majority of handwritten changes to the employment agreement was on 15 October 2014.

[48] The Mihajlovics' employment with Paramount could be terminated upon two weeks' notice in writing.[9] This employment agreement did not operate as a termination in writing of the previous employment with Paramount. It also did not transfer the Mihajlovic's employment from Paramount to the franchisee. The employment agreement signed by the Mihajlovics' named Paramount as the employer, not the franchisee and gave no commencement date. Therefore the Mihajlovics' employment remained with Paramount.

Did the Mihajlovics' employment later transfer by oral agreement?

[49] The parties subsequent conduct does not indicate an oral agreement for transfer of their employment prior to dismissal.

[50] Following the meeting on 7 August 2014 where the employment agreements were signed, little if anything changed to the Mihajlovics day-to-day employment.

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9 Statement of Problem Attachment "A" and "B" Employment Agreements between Paramount and Radomir and Jelena Mihajlovic Clause 14.

Instructions continued to be given by Paramount's then Operations Manager, Joy Rolton-Walker. Paramount continued to pay the Mihajlovics' wages. Cleaning products and equipment were supplied by Paramount. At no time did the franchisee directly contact the Mihajlovic's about their work.

[51] The redundancy process was conducted by Paramount ostensibly on behalf of the franchisee. However Paramount did not limit its involvement to acting as the franchisee's agent. During the process Paramount explored redeployment options within its own company for the Mihajlovics'.[10]

[52] It was not until the day following termination that the Mihajlovics' received their first communication by way of letter from the franchisee purporting to confirm their dismissal for redundancy

[53] Paramount produced at hearing a handwritten agency instruction from the franchisee. It was signed but undated. It was apparently given to Mr Hamilton around the start of the redundancy process. The Mihajlovics' were not privy to the agency arrangements between the respondent's. This agency instruction does not determine the real nature of this relationship.

[54] For the Mihajlovics' Paramount remained in control of their employment up and until termination. Their cleaning work was an integral part of Paramount's business as it continued to income from the cleaning contract albeit a reduced percentage. The Mihajlovics' were clearly not in business on their own account and were employed at all times.

[55] Radomir and Jelena Mihajlovic were employed by Paramount Services Limited at all material times.

Unjustified Dismissal

[56] The dismissal for redundancy was both substantively and procedurally flawed. There were no genuine reasons for redundancy because the concerns were peculiar to the franchisee only. The process was also conducted on an unfair basis. The concerns and investigations were limited by the assumption the franchisee was their employer when it was not.

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[10] Statement of Problem Appendix H and I Letters Paramount to the Mihajlovics'dated 15 October 2014 and 7 November 2014.

[57] Radomir and Jelena Mihajlovic were unjustifiably dismissed by Paramount Services Limited.

Penalties

[58] The only action for penalty would be for non-compliance with the requirements of s.69G. An action for recovery of penalties must be commenced within 12 months of either the date when the cause of action first became known or when the cause of action should reasonably have become known to the Mihajlovics'.[11]

[59] The events giving to a cause of action in this matter occurred in July 2014. The earliest date by which an action for penalties should have reasonably become known to the Mihajlovics' was 7 November 2015 when they obtained legal advice and could have reasonably become aware of the possibility of breaches of the Act giving rise to an action for penalties.

[60] A statement of problem was filed on 27 March 2015 but did not seek to bring an action for recovery of penalties. This was raised during a teleconference on 18 November 2015. The commencement of this action was outside of the statutory 12 month timeframe which expired on 7 November 2015.

[61] The Mihajlovics' seek an extension of time using the provisions of s.221(c) of the Act which permits an order to *"extend the time within which anything is to or may be done"*.

[62] The exercise of the discretion under s.221(c) requires factors such as the extent of the delay, the explanation for it, and whether the delay is excusable to be addressed.[12]

[63] There is no explanation for the delay. The Mihajlovics' had access to competent legal advice from November 2015. I decline to extend the time for filing the action for penalties. Accordingly the action for penalties is dismissed.

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11 Section 135(5) of the Act.

12 *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 (EmpC) at [24].

Other remedies

[64] Given the Mihajlovics' have a personal grievance of unjustified dismissal, they seek payment of lost remuneration pursuant to s128. They were paid to 7 December 2014.

[65] Radomir Mihajlovic seeks the statutory cap for lost wages of three months totalling $5,000.32 less PAYE. He has produced evidence and given oral evidence of his attempts to mitigate his losses.

[66] Jelena Mihajlovic seeks wages in excess of the statutory cap for the period 7 December 2014 to 4 August 2015 of 34 weeks salary totalling $15,300 less PAYE. She gave evidence of efforts to obtain work throughout that period.

[67] The Authority still needs to have regard to all contingencies that might, but for the unjustified dismissal, have resulted in the termination of the employee's employment.[13] Paramount had assigned the cleaning contract to the franchisee. It was clear Paramount had no suitable alternative employment for them to be redeployed to at the time the dismissal occurred. It was likely the Mihajlovics' would have had to have been made redundant within three months in any event. Accordingly I decline to award more than the statutory three months lost wages.

[68] Both Radomir and Jelena Mihajlovic gave compelling evidence of their hardships both financial and emotional caused by the loss of their jobs. They both sought medical and therapeutic assistance following termination. The range of compensation awarded for these types of grievances has been $4,000 to $4,500.[14] In my view a just award of compensation under s.123(1)(c)(i) of the Act would be $5,000 per applicant.

[69] There is no evidence of contributory conduct requiring a reduction in remedies pursuant to s.124 of the Act.

Result

[70] The following declarations and orders are now made:

A. Radomir and Jelena Mihajlovic were employed by Paramount Services Limited at all material times.

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13 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [37]–[38].

14 *Doran v Crest Commercial Cleaning (No 1)* [2012] ERNZ 161 at [71] ($4,000); *Fotu and Anor v Crest Commercial Cleaning Ltd* 05 September 2012 [2012] NZERA Auckland 307 ($4,500).

B. Radomir and Jelena Mihajlovic were unjustifiably dismissed by Paramount Services Limited.

C. There is an order Paramount Services Limited pay Radomir Mihajlovic lost remuneration of $5,000.32 less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

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F. There is an order Paramount Services Limited pay Jelena Mihajlovic compensation of $5,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

G. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority