Don't Forget the Workers!

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Part 6A issues in business restructuring

As staff are often a company's most valuable asset, it is important to consider them when selling either the shares or assets and business of a company. This does not just mean considering the effect of the transaction on the employees, but considering issues such as:

a. how employees fit into the proposed transaction
b. what is the best structure to adopt
c. will the employees transfer to the new employer if the business is sold, and if so, on what terms and conditions
d. how will employees' accrued entitlements be treated— will these be paid out or transferred?

Sale and purchase transactions are implicitly affected by redundancy issues. Notwithstanding, the nature of the transaction, liability or potential liability for redundancies must be taken into account. The general principle in a share transaction is that the sale and purchase does not result in a change in the employer and, accordingly, the transaction itself does not result in any redundancies.

In a sale and purchase of assets and business, there is a change of employer. A change of employer results in employees' employment agreements with the original employer being terminated and they become redundant to the needs of the original (vendor) employer. In such sale transactions redundancies either:

a. arise from the failure/refusal of employees to transfer to the new employer
b. arise notwithstanding the employees have transferred to the new employer (technical redundancies).

The liability in respect of the first type is relatively uncomplicated; entitlement to redundancy compensation is usually set out in the employment agreement between the parties. If there is no formula set, or entitlement under the contract, then there is no entitlement to compensation.
Liability in respect of the second type is more complicated and as a starting point, employers should ensure that all employment agreements contain a technical redundancy provision that covers this situation.

Employment Relations Act 2000

The Employment Relations Act 2000 is the principle statute, which governs employment relations in New Zealand. The sale of all or part of a business and assets is considered a 'restructuring' under Part 6A of the Act. Part 6A sets out the provisions that are intended to protect affected employees where the employer proposes to sell all or part of its business so that the affected employees' work will be performed for the new employer.

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A subsequent contracting situation can also arise. This is where one employer provides services to another business under a contract for services, and this contract is transferred to another employer when the contract for services comes up for tender. The original employer, which we call the 'outgoing employer', will need to make any staff that are now surplus to their requirements redundant.

Background to Part 6A

Part 6A was first introduced into the New Zealand employment law landscape with the Employment Relations Amendment Bill 2004. The Bill, in its original form, was intended by both the Labour government and the Service and Food Workers Union ('SFWU') to address what they saw as a number of undesirable social consequences of business transfer situations. The SFWU were concerned that in subsequent subcontracting situations, which happened frequently in the commercial cleaning and food catering industries, the various service providers were competing only in respect of wages. This resulted in downward pressure on the wages of the employees, which became known colloquially as the 'race to the bottom'.

The Labour government's first attempt at continuity of employment legislation did not last long. The Employment Court in *Gibbs v Crest Commercial Cleaning Limited*[1] held that the provisions of Part 6A did not apply to subsequent contracting situations. The government remedied this by amending the legislation in 2006 with the Employment Relations Amendment Bill (No 2) 2006.

Essentially, Part 6A is designed to provide specified categories of employees, which parliament considered 'vulnerable', with protection and continuity of employment in business transfer situations. Parliament sought to achieve this by requiring the workers to transfer with the business activity that was being transferred. The incoming employer would be prohibited from negatively changing their terms and conditions. As a result, a transferring employee is entitled to transfer on the same terms and conditions they enjoyed immediately prior to the transfer. The transferring employees also retain their accrued annual leave and holiday entitlements, which must be recognised by the incoming employer. This was to remedy the situation where a transfer occurred in the month leading up to Christmas and employees were left without enough leave to spend Christmas with their families.

Operation of Part 6A

Part 6A preserves continuity of employment for specified categories of employees. The way this works in practice is that the employee must first be considered eligible to transfer. In order to be considered eligible to transfer, the employee must come within one of the specified categories in Schedule 1A and also be performing the work that it is the subject of the subsequent contracting (s 69F). Where the lost contract represents only part of the employer's business, only those employees engaged in the work that is transferring are entitled to transfer. This may be difficult to determine in some cases where the outgoing employer's business is structured in a way where every employee works on every contract, in which case the outgoing employer will need to conduct some form of selection process.

[1] *Gibbs v Crest Commercial Cleaning Limited* [2005] 1 ERNZ 339.

Determining eligibility within Schedule 1A is a more difficult question. Schedule 1A sets out the specified categories of employees that are protected under Part 6A. These include, most commonly, cleaning services, food catering services, and orderly services. One might assume that this is a reasonably easy test to satisfy. However, as we will discuss shortly, the Employment Court has had some difficulty in defining these categories.

Once an employee is eligible to transfer they must give notice to their employer of their election to transfer (s 69G and s 69I). They will then transfer on the date the contract concludes. By virtue of section 69I(2)(b), the new employer must employ the transferring employees on the same terms and conditions they enjoyed immediately prior to transfer. They must also recognise the transferring employees' accrued holiday pay and leave entitlements (s 69J(1)). Section 69J(2)(a)(ii) expressly prohibits the outgoing employer from paying these entitlements to the transferring employees upon transfer.

The intention of the legislation is that the incoming employer, by winning a contract, will be increasing their business and is, therefore, able to take on these transferring employees to continue doing the new work. This may not always be the case as businesses may tender for work in order to increase utilisation and productivity of existing staff. However, under Part 6A this is not a possibility.

Section 69N recognises this issue and confers a right for transferring employees to bargain for redundancy entitlements if they are surplus to the incoming employer's needs and, subsequently, made redundant. The entitlement to bargain for redundancy is subject to the provisions in the transferring employees' employment agreement. If the relevant employment agreements provide for redundancy, the incoming employer would be liable for those payments. On the other hand, where the employment agreement is silent on this point, the transferring employees may bargain for redundancy entitlements.

The Supreme Court decision in *Service & Food Workers' Union v OCS Ltd*[2] held that the term 'redundancy entitlements' was broader than the concept of redundancy payments. It held that, given in s69B, the Act defines redundancy entitlements as including redundancy compensation, if an employment agreement only excludes a right to redundancy compensation, the employees are entitled to bargain for other forms of redundancy entitlements, such as retraining or outplacement support.

Commercial reality

It appears that parliament intended to protect employees but did not consider how this legislation would work when two competing employers are involved. Parliament did not address the commercial reality of the situation and, therefore, many of the provisions are lacking the specificity needed to address these issues. For example, the incoming employer must recognise the holiday and leave entitlements of the transferring employees and the outgoing employer is expressly prohibited from paying these entitlements to the employees. However, the Act does not address which of these two employers must pay for these entitlements. The Supreme Court is currently considering this very question, which we will discuss in more detail later.

[2] *Service & Food Workers' Union v OCS Ltd* [2012] NZSC 69.

To aid the operation of Part 6A in business transfers, parliament adopted sub-part 2 of Part 6A which includes a disclosure regime which allows tenderers to request information about the employment-related entitlements of employees who might transfer prior to tendering for the work; the obvious implication being that the tenderer (potential incoming employer) was in the best position to factor those costs into its tender. The High Court, on the other hand, commented in the *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited & Anor*[3] (*LSG v Pacific*) case that the disclosure of transfer information prior to tender was unable to give any meaningful estimate of the transfer costs and, therefore, does not indicate parliament's intention to have the incoming employer pay for those entitlements. Again, this is subject to appeal to the Supreme Court.

Eligibility to transfer

The most hotly contested and debated subject within Part 6A is that of the eligibility of employees to transfer. As you would expect, employees want to ensure they come within Part 6A so that they benefit from continuity of employment and are able to keep their jobs. Defining the work which the contract services relate to is, generally, a straightforward task. However, this is inextricably linked to the definition of the services provided, such as cleaning services and food catering services. Therefore, the definition and breadth of those categories is subject to some debate.

The categories of services that have been considered by the Employment Court are the cleaning services and the food catering services. There has been a trilogy of cases; starting with Judge Travis' decision in *Matsuoka v LSG Sky Chefs New Zealand Limited*[4] ('*Matsuoka*'), continuing with Judge Inglis' decision in *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd*[5] (*Lend Lease*), and finally being considered in another of Judge Travis' decisions, in *Tan v LSG Sky Chefs New Zealand Limited*[6] (*Tan*). We will examine each of these cases to shed some light on how the Court has interpreted the scope of the categories of services.

Matsuoka v LSG Sky Chefs New Zealand Limited

The scope of Schedule 1A and, in particular, 'food catering services' was first considered in the *Matsuoka* decision.

By way of background, Mr John Matsuoka was employed by PRI Flight Catering Limited trading as Pacific Flight Catering (Pacific). Pacific lost its contract to provide food catering services to Singapore Airlines to LSG Sky Chefs New Zealand Limited (LSG). Pacific considered Mr Matsuoka was eligible to transfer and he elected to transfer to the incoming employer. LSG, after reviewing his duties, took the view that he was not eligible to transfer under Part 6A as he was not a *vulnerable* employee and did not fall within Schedule 1A.

Mr Matsuoka's duties included work as a ground steward for a maximum two hours a day during which his duties included placing all necessary equipment, such as cutlery and glasses on the metal carts containing the food, loading and driving the trucks, unloading carts and off-loading empty carts and returning them to the base. Outside these two hours, Mr Matsuoka spent two-three hours per day arranging stock, water, beverages, and dry ice for the airlines. The rest of his time was spent

[3] *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited & Anor* [2012] NZHC 2810.
[4] *Matsuoka v LSG Sky Chefs New Zealand Limited* [2011] NZEmpC 44.
[5] *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86.
[6] *Tan v LSG Sky Chefs New Zealand Limited* [2013] NZEmpC 35.

arranging trucks and running messages. Essentially, he was described as a 'jack-of- all-trades' as he did whatever work that was required on the day. Mr Matsuoka also had management responsibilities, and his pay rate was such that he would not traditionally be considered a *vulnerable* employee.

The Employment Court determined that Mr Matsuoka came within Schedule 1A and was eligible to transfer. It found that, although Mr Matsuoka may not be considered vulnerable due to his level of salary ($42 p/h), the word "vulnerable" does not appear anywhere in Part 6A. To use criteria of vulnerability would be to restrict parliamentary intention, which was to protect specified categories of workers and not those who qualify under a subjective test of vulnerability. Mr Matsuoka spent a maximum of one hour per day on the Singapore Airlines catering functions. However, the Employment Court decided that this was sufficient to bring him within the statutory protections. The Employment Court held that we should consider "all the services necessary to get the food and drink to those passengers in a form in which they would be able to consume it".

In considering "all the services necessary", the Employment Court adopted a *de minimis* approach to the situation whereby an employee involved in any amount of the necessary services would qualify as a specified employee entitled to the protections of Part 6A. The Employment Court also found that, although the Act provides for situations where an employee can transfer with only part of the work, thereby having two employers and working for both, this was not practical and could not result in an employee working part-time for two employers as opposed to full-time for one employer. This is because an employee is entitled to be employed on the same terms and conditions as they enjoyed immediately prior to transfer, which includes the status as a full-time employee.

Pacific's business was organised so that every employee worked on every airline and, therefore, it was impossible to say which employees worked only for Singapore Airlines, i.e. the contract that was lost. Therefore, as Singapore Airlines represented 40 per cent of Pacific's business, 40 per cent of the workforce was entitled to transfer. Pacific, then, undertook a selection process to determine which of its employees would be given the opportunity to transfer. This approach was upheld by the High Court in the case of *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited*[7].

The *Matsuoka* decision represents one approach the Employment Court has taken to the eligibility of transferring employees. This approach is, essentially, if an employee performs food catering services as part of their job, no matter how small a part, they will be considered to provide food catering services and are therefore eligible to transfer under Part 6A.

Lend Lease Infrastructure Services (NZ) v Recreational Services Limited

The second decision we are considering is Judge Inglis' decision in *Lend Lease Infrastructure Services (NZ) v Recreational Services Limited.* This case concerned the scope of cleaning services under Schedule 1A.

Lend Lease employed cleaners or, for want of a better word, 'horticulture specialists' to clean and maintain public spaces and parks for Auckland Council. Their duties involved, among other things, graffiti removal, cleaning sumps and cess pits, loose litter collection, water blasting to remove moss and dirt, barbeque cleaning, and sweeping paths. Other duties involved the 'cleaning of playgrounds' and the removal of tree branches, vegetation, and tipped rubbish. The question that arose was whether some or all of these duties could be considered as cleaning services under Schedule 1A. It

[7] *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited* [2013] NZHC 43.

was contended that, at the very least, cleaning graffiti off structures and water blasting them amounted to cleaning services.

The Employment Court took the contrary view. It held that the employees were not engaged in cleaning services and, therefore, not eligible to transfer under Part 6A. It found that cleaning services are what we would generally consider office cleaning and conjures up images of working inside not outside. With respect, that seems to be a difficult distinction to make, because if parliament intended Schedule A to only cover indoor cleaning it would have limited its language to something such as commercial cleaning services and not broader cleaning services.

The Employment Court also found that the specified service must arise other than incidentally to the work performed. In these circumstances, the cleaning of parks was incidental to the main function of these employees, which was to maintain and beautify the public buildings and gardens.

The Employment Court seems to have been persuaded by a floodgates' argument, whereby it was considered that if the Court adopted this reasoning it would allow dental hygienists who, incidentally, clean the equipment that they use to be covered under Part 6A. With respect, this concern seems unfounded as a distinction could be made between cleaning services arising incidentally, and when they are a core function of the job. In *Lend Lease*, cleaning of the parks was a specific employee KPI (key performance indicator). Therefore, it could be suggested that cleaning arose other than incidentally to their work.

However, the Employment Court judgment stands for the proposition that the provision of such services must arise other than incidentally in the total work balance and can be considered to impose a threshold requirement of "more cleaning services than not". The Court appears to have expressed itself in such a way that an employee must provide more cleaning services than not in order to qualify under Part 6A. This would suggest a threshold requirement of 51 per cent and above in order to qualify under Part 6A.

This is difficult to reconcile with the *Matsuoka* decision, which essentially held that any amount is good enough and we can apply a *de minimis* threshold. While the *de minimis* threshold is similar to the incidental test in *Lend Lease*, the threshold requirement in *Lend Lease* is a new test altogether and cannot be considered an extension of *Matsuoka*.

Pittard v ERS New Zealand Ltd t/a Transpacific Industrial Solutions

In *Pittard v ERS New Zealand Ltd*[8] the Employment Relations Authority had no difficulty in accepting that cleaning graffiti off bus shelters was cleaning services, albeit an outside activity.

We can contrast this with the Employment Court's approach in *Lend Lease*, where the Court took a narrow view.

Tan v LSG Sky Chefs New Zealand Limited

The final case dealing with the issue of eligibility is that of *Tan v LSG Sky Chefs New Zealand Limited.* This was another decision of Judge Travis in the Employment Court.

[8] *Pittard v ERS New Zealand Ltd* ERA Wellington WA147/09, 5 October 2009.

This case also arose out of the transfer of the Singapore Airlines contract from Pacific to LSG. Mr William Tan was an equipment store supervisor at Pacific. His duties included ordering in stock for the food catering business, such as napkins, plates, cutlery, condiments, ice, and alcohol. It is safe to say that without these items the food catering services business could not operate.

When Mr Tan presented himself at LSG for transfer, they again did not consider him eligible to transfer under Part 6A. The Employment Court found that Mr Tan was not eligible to transfer. It determined that Mr Tan's duties were not proximate enough to the actual provision of food services. This was an interesting decision as Judge Travis, who had decided in favour of Mr Matsuoka, now had an opportunity to reconsider his decision under similar circumstances. Judge Travis notes in his judgment that he had been waiting for the *Lend Lease* judgment to be given and that, in his view, it had changed the law since *Matsuoka*, which, in conjunction with the Supreme Court decision in *OCS* allowed him to take a different view in the *Tan* case.

The Employment Court considered the obiter comments of the Supreme Court in the *OCS* decision regarding vulnerability and has relied on these to strictly interpret the test in *Matsuoka*. There is difficulty with this approach. The Employment Court noted that there was, at the Supreme Court level, little difference between obiter and ratio and could, therefore, consider the comments made regarding vulnerability. With respect, this approach seems unsound in that obiter comments should be given their correct weighting, even at a Supreme Court level, and introducing elements of vulnerability into the test for eligibility under Schedule 1A appears contrary to parliament's intention and the Judge's own comments in *Matsuoka*.

Regardless, the *Tan* decision can be seen as providing a third test for determining the eligibility of employees to transfer. This test considers a proximity relationship between the employee and the actual provision of food services. The difficulty with this decision is that parliament chose not to limit food catering services to food services or those proximate enough to food services; it chose to express itself in terms of food catering services. The Employment Court considered that if Mr Tan was allowed to transfer, it would again open the floodgates for all support staff in a food catering services business to transfer. This would include accounts and HR managers, which is clearly not the intention of Part 6A.

Enter the Court of Appeal

Leave was sought from the Court of Appeal to appeal the Employment Court's decision in *Tan*.[9]

The Court of Appeal, in declining leave to appeal, held that the Court's role, in determining questions of eligibility under Part 6A, is to apply the statutory definition to a set of facts. This will necessarily result in a factual finding that is not amenable to appeal as a question of law. Further, the fact-specific nature of these cases makes it difficult to set out a definitive test for determining eligibility. The Court of Appeal held that the outcomes of *Matsuoka* and *Tan* were different because the facts were different: [10] Mr Matsuoka delivered food directly to the airline, whereas Mr Tan did not.

This has left the Employment Court to determine eligibility on a case-by-case basis.

[9] *Tan v LSG Sky Chefs New Zealand Limited* [2013] NZCA 399.
[10] At [14].

Hypothetical Contracting Out test

The three Employment Court decisions have left the law surrounding eligibility unclear. The Court of Appeal has suggested case-by-case analysis is the only way to deal with the situation.

While moving into the realm of conjecture, one potential approach that avoids this situation is what could be considered the Hypothetical Contracting Out test. This involves postulating a hypothetical business that carries on the specified business activity (for example food catering services) as well as another business activity that does not fall within Schedule 1A.

Now consider who in the business would be made redundant if the food catering services side of the business were contracted out. Under this approach, it would be only those employees engaged in "all the services necessary" to operate a food catering services business that would be made redundant. This approach would not allow HR, secretarial, and payroll staff to transfer as they would not be made redundant as a result of the loss of the work. It may be that some support staff are made redundant as a result of the reduction in workforce following the transfer (provided food catering services was a significant part of its business). However, this is one step removed from the work lost as a result of contracting out.

This approach conforms with the objects of Part 6A, as it was originally designed to protect those employees who would be made redundant as a result of contracting out.

Looking into the future

On 26 April 2013, parliament introduced the Employment Relations Amendment Bill 2013. This Bill provides some changes to the Employment Relations Act 2000; not least among them are changes to Part 6A. The amendments propose to put stricter timeframes around the election to transfer to give all parties some clarity. Under the proposed amendment, affected employees will have five working days from receiving a notice of the right to make an election to transfer to decide.

Parliament is also trying to address potential issues around the provision of information in transfer situations. The new amendment requires the outgoing employer to provide information, such as employment agreements, wage and holiday records, personnel files that include performance, and disciplinary and grievance information. The amendment also attempts to deal with the question of who should pay for an employee's entitlements in a transfer situation. It does this by providing a default formula if the employers cannot agree as to how to apportion the liability. There is, currently, no suggested default formula so much will depend on the substance of the formula. However, the current default position is that expressed by the Court of Appeal under which the outgoing employer is not liable for pre-transfer accrued entitlements. This section will need to expressly overrule the Court of Appeal decision to stop it from applying.

Another change has attempted to deal with the 'poison challis' situation. This is where the outgoing employer increases wages and terms and conditions prior to transfer in order to make the contract uneconomical for the incoming employer. Parliament has attempted to remedy this situation by creating an implied warranty whereby the outgoing employer warrants that it has not changed the terms and conditions, or the work done by the employees, without good reason. It will be interesting

to see how the Courts define "without good reason" as this is not currently provided for in the amendment.

It is worth noting that there are no proposed changes to criteria for eligibility. However, removing s237A has been suggested. This has been suggested in recognition of the difficultly the Governor-General has in determining whether new categories of specified employees should be added to Schedule 1A. It has been decided that this responsibility should be left to parliament. Section 237A has never been used, but the significance of removing this section is that the Supreme Court in *OCS* relied on this section to justify its comments about vulnerability. These comments obviously will no longer apply if the section is removed.

An exemption has been introduced for small and medium enterprises (SME); that is, businesses with less than 20 staff. These employers and their employees will no longer be covered by Part 6A. Given that 90 per cent of businesses in New Zealand are SMEs, there is a question about whether this effectively waters down the protection provide by Part 6A.

Further consideration needs to be had to the possibility that employers will attempt to structure their businesses in such a way that they fit within this exemption and have less than 20 staff. Parliament has seen this issue and tried to address it by considering, for the exemption, a company's subsidiaries, subcontractors and franchises. However, there are many creative ways to potentially get around this provision.

The question remains as to what this all means. Are these amendments useful and do they take Part 6A any further towards its objective of providing protection for specified categories of employees? The majority of the proposed amendments deal with issues between the two employers in a transfer situation and do not help the employees very much. However, by the same token, the amendments' attempt to minimise the possibility of the employers fighting a commercial battle with the employees caught in the middle.

The SME exemption has the most potential to affect employees subject to Part 6A. Given the large numbers of businesses who would fall within the exemption, does this effectively erode the protections of Part 6A? One could consider that this is not as important as it first appears. For example, in the airline food catering industry, there are only two companies involved. There are such high start-up costs involved that only big companies can survive. Many of the other industries covered by Schedule 1A are dominated by big players as well.

Tricky issues

There are a number of other tricky issues that still need to be resolved by the Courts in order to make Part 6A truly effective. There is the issue of who should pay for the employment-related entitlements of the transferring employees and the subcontractor conundrum.

Who should pay? – Pacific Flight Catering Limited & Anor v LSG Sky Chefs New Zealand Limited

We already know that the incoming employer must recognise the leave entitlements of the transferring employees and that the outgoing employer is prohibited from paying these out. The legislation does not deal with how the liabilities should be apportioned between the outgoing and

incoming employer. This is a rather contentious issue as the value of these entitlements can be in the hundreds of thousands of dollars. As you can imagine, both the incoming and outgoing employers are interested in avoiding the liability for these entitlements.

If the incoming employer were held to be liable for these entitlements, the outgoing employer would receive a windfall as they originally built the entitlements into their business costs and now do not have to pay them out. This would result in a much needed cash injection into the business. On the other hand, if the outgoing employer is liable for the transferring employees' entitlements, the incoming employer would receive a windfall. This would be because they would be receiving a cash injection into their business when they had covered these expenses under their tender bid. This could also negatively impact on the outgoing employer's financial viability as it is likely they have just lost a major contract and may be in financial trouble as a result. Paying out such a large amount could financially cripple an employer.

It is arguable that parliament intended the incoming employer to bear the costs of these entitlements as it has included a disclosure regime under sub-Part 2 of Part 6A. The disclosure regime under sub-part 2 provides the incoming employer with the opportunity to request entitlement details about the transferring employees in aggregate form and they could, therefore, be able to incorporate these costs into the tender. This creates an incentive for the tenderer to be diligent. The High Court differs on this point.

The question of who pays for employee entitlements has been addressed by the High Court and the Court of Appeal. LSG is currently requesting leave to appeal to the Supreme Court on this issue. The High Court held that it was the outgoing employer who was liable for these entitlements. It found that the common law action of money paid to the use of another under compulsion of law allowed the incoming employer to be liable to the transferring employees for their respective entitlements. However, the primary liability rested with the outgoing employer and the incoming employer was, therefore, entitled to recover the amount of any payments from the outgoing employer. This liability only arises when payment is made to the transferring employees by the incoming employer. Therefore, reimbursement by the outgoing employer will necessarily occur over a number of months and potentially years as employees slowly use up their entitlements such as annual leave.

One obvious issue with this position is that if the outgoing employer could become insolvent and is put into liquidation, the liability has not yet crystallised and cannot, therefore, be recovered in liquidation proceedings by the incoming employer. This would put the incoming employer out of pocket as they would have to bear the full value of any outstanding costs.

The High Court also commented that the disclosure regime under sub-part 2 did not evidence any intention of parliament to have the incoming employer deal with the entitlement costs. This was because the information disclosed under sub-part 2 could not give any meaningful indication of cost. The Court of Appeal differed in its opinion of who should be responsible for accrued leave entitlements.[11] The Court of Appeal determined that LSG was liable for the full cost of the accrued leave entitlements as the fourth element of the cause of action (money paid to the use of another under compulsion of law) had not been made out, viz, Pacific was not directly liable to the employees for accrued leave entitlements. LSG could not, therefore, have paid Pacific's debt.

In coming to this conclusion, the Court of Appeal considered that there can be no contractual basis for a claim against the outgoing employer as the effect of sections 69I(2)(a), 69M(2), and 69J(1) was

[11] *Pacific Flight Catering Limited & Anor v LSG Sky Chefs New Zealand Limited* [2013] NZCA 386.

that an employee is treated as having always been an employee of the new employer. Therefore, any employment agreement between the transferring employees and the outgoing employer is terminated.

The Court of Appeal also held that Part 6A places responsibility on the new employer to meet the cost of accrued leave entitlements of the transferring employees. The Court noted that there appeared to be a lacuna in the legislation in this regard, although the undesirable consequences that may result are an issue for parliament to deal with.[12]

The subcontractor conundrum

Another tricky issue with Part 6A relates to the involvement of subcontractors in the contractual process for the specified categories of services. Part 6A by virtue of section 69B defines the services provided under Schedule 1A in the subsequent contracting situation as including any and all services that have been subcontracted to another provider. A simple example of this is where a food catering business subcontracts the actual preparation of the meals to another entity and only carries out the transportation and service functions. So far, there are no issues with the proposition that subcontractors are eligible to transfer.

However, the situation becomes more complicated when there are multiple subcontracting parties. Let us take a situation where an airline has contracted out its food catering services. Party A wins the contract to provide food catering services. Party A subcontracts the food catering services contract to Party B. Party B, subsequently, subcontracts the food catering services contract to Party C. Party C then subcontracts part of the food catering services contract to Party D. Along comes Party E who successfully tenders for the work, winning the contract from Party A to provide food catering services direct to the airline. The question is whether employees from Party A, Party B, Party C, and Party D are all eligible to transfer to the new Party E. Currently, on the face of it: the answer to this question is yes, they are all eligible to transfer to Party E.

The situation becomes even more complicated when Party E subcontracts part of its business to Party F. The question now becomes whether employees from anywhere among the parties A, B, C, and D are eligible to transfer across to Party E and down to subcontractor F whereby those employees doing the work could follow that work up and down the chain of subcontracting. Again on the face of it, the answer would be yes. Where this runs into difficulty is that Party F, which provides services to Party E, may have nothing to do with the airline contract and may not even be aware that Party E is tendering for the work. If Party E is successful, Party F may be required to take on staff where it never contemplated being involved in a Part 6A transfer situation.

This situation seems extremely complicated and unfair to those parties who are not involved in the provision of services that relate to Part 6A, yet may still be forced to take on transferring employees. Contextualising this situation, take the example where Party A provides food catering services to an airline. They subcontract their bread making responsibilities for the bread rolls to Top Bread Limited. The contract for catering services transfers to Party B, and Party B uses, for its bread making services, Shorter Rise Breads Limited. Are the bread makers from Top Bread Limited entitled to transfer to Shorter Rise Breads Limited? Hopefully, you can see by now that this extension can lead to illogical consequences.

[12] The Author notes that the Supreme Court has granted leave to appeal the decision from the Court of Appeal. The appeal is scheduled to be heard in June 2014.

One way to potentially deal with this situation is to examine the definition of the specified categories of work under Schedule 1A. By doing this, we could suggest that the service in which the bread makers work is not food catering services, although it does compliment and form part of the overall food catering services. By arguing that bread making is not food catering services, it, therefore, falls outside the definition of food catering services as part of Schedule 1A and stops the transferring employees from transferring to another bread maker. This approach, however, may not work in all situations as all of these contractors may legitimately be involved in food catering services. Therefore, the question to be asked is how far up and down the chain, in terms of subcontracting parties, do the rights and protections of Part 6A apply. The legislation, while well intentioned, was never meant to provide logically inconsistent outcomes.