IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 171
ARC 22/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing:	Evidence of plaintiff witness given 7 August 2015 10-13 August and 19, 20 August 2015 (heard at Auckland)
Appearances:	M W O'Brien and B Nicholson, Counsel for Plaintiff C Meechan QC and J Douglas, Counsel for Defendant
Judgment:	30 September 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The plaintiff, Ms Nisha Alim, worked for Pacific Flight Catering Limited (PRI) which traded as Pacific Flight Catering, from late 2005 as a Catering Assistant. PRI competed with LSG Sky Chefs New Zealand Limited (LSG) for the provision of airline meals to airlines operating from Auckland Airport. One of those airlines, Singapore Airlines, conducted a tendering process which resulted in the letting of a catering contract to LSG, instead of PRI. Forty affected PRI employees, of which Ms Alim was one, elected to have their employment transferred under Part 6A of the Employment Relations Act 2000 (the Act) to LSG on 23 February 2011.

[2] Shortly before the transfer, PRI commenced paying Ms Alim a Supervisor's hourly rate, and also increased her leave entitlements. After transfer, LSG concluded

that the increases were not genuine, although on an interim basis it paid Ms Alim at the hourly rate which PRI had used shortly before transfer; LSG intended that the interim arrangement would apply whilst it clarified the true position as to Ms Alim's terms and conditions.

[3] PRI did not cooperate by providing to LSG relevant documents such as wage and time records which meant that LSG could not readily confirm Ms Alim's correct terms and conditions. Eventually, in early 2012, Ms Alim resigned.

[4] She then brought a relationship problem to the Employment Relations Authority (the Authority), alleging that her entitlements to wages and other payments which were due under her employment agreement were not fully or correctly paid; that LSG had breached the terms and conditions of her employment agreement; that she had been unjustifiably disadvantaged by LSG, and that she had been constructively dismissed. The Authority dismissed all her claims.[1]

[5] Ms Alim, supported by PRI, brought a de novo challenge to the Authority's determination. Ms Alim asserted that:

a) there had been breaches of her employment agreement;

b) she had been dismissed constructively by LSG;

c) LSG had breached the good faith obligations which it owed to her;

d) LSG had failed to provide all wage and time records; and

e) there was a breach of the transfer provisions of Part 6A of the Act.

[6] Later an unjustified disadvantage personal grievance was also pleaded. The remedies which were sought were for unpaid entitlements in the sum of $6,611.97 plus interest, compensation for three months' lost wages in the sum of $10,661.98, and compensation for hurt and humiliation in the sum of $15,000; penalties for LSG's alleged repeated breaches of her employment agreement totalling 30 in number; penalties for LSG's alleged breach of good faith and for failing to provide

[1] *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 472.

wage and time records; and a declaration that LSG had breached the transfer provisions of Part 6A of the Act. Mr O'Brien, counsel for Ms Alim, advised the Court that the monetary payments which were sought totalled $32,273.95; and that the penalties sought totalled $660,000. For its part, LSG disputed liability for each of the causes of action raised for Ms Alim. LSG's position in effect was that it was faced with an invidious situation because of PRI's anti-competitive behaviour; and that it took reasonable steps to resolve the many issues which flowed from the manner in which employees were transferred.

[7] Prior to the hearing, the Court was required to deal with multiple issues which required the issuing of 18 interlocutory judgments.[2] One of those involved an unsuccessful application by Ms Alim for adjournment of the fixture; an application for leave to appeal that decision was declined by the Court of Appeal which meant the trial was able to proceed as had been scheduled.[3] Shortly before the commencement of the fixture, the Court was required to resolve a further issue relating to a witness summons which LSG had served on a Director of PRI.[4] During the course of the hearing, the witness summons was set aside by consent, because counsel for LSG, Ms Meechan QC, indicated that it was no longer necessary for LSG to call the PRI Director.

[8] The Court received evidence from ten witnesses along with substantial documentation, as well as detailed submissions from counsel. I shall deal with aspects of the evidence and submissions as is appropriate in the course of my judgment. I begin by making findings as to the chronology.

Factual overview

[9] From late 2005 Ms Alim worked for PRI as a Catering Assistant. From 2 December 2009, she was covered by the Pacific Flight Catering Ltd, Catering Assistants' Collective Employment Agreement (the PRI CEA), the parties being PRI and The Service and Food Workers' Union Nga Ringa Tota (the Union). The PRI

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2 These may be found on the Employment Court's website, under the same intitulment as applies to this judgment.

3 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZCA 359.

4 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 139.

CEA stated that it continued in force until 1 December 2010. Because bargaining had commenced by that date, it continued to be in effect under s 53 of the Act. Until early 2011, key terms and conditions of the PRI CEA for a catering assistant who had been employed as such for more than one year included a salary determined at a rate of $15.96 per hour, overtime paid at time and a half for the first five hours and double time thereafter, call-back paid at the overtime rate, and service-pay. It was these provisions which applied to Ms Alim.

[10] As mentioned earlier, in 2010, PRI held the contract to provide catering services to Singapore Airlines. A tendering process was conducted. On 23 November 2010, PRI learned that its tender for the catering contract was unsuccessful, and that LSG was the successful tenderer.

[11] On 3 December 2010, PRI notified employees that it proposed to reduce staff by 50 per cent. A selection process would be undertaken, so that employees selected for transfer would receive notice of their right to make an election to transfer to LSG as the new employer. This was confirmed by formal advice 10 days later. Employees were told that PRI had decided to go ahead with the previously proposed restructuring, and that it would now need to decide which employees would remain and which would not. Those who were not to be retained would have a right to elect transfer to LSG with continuity of service and on existing terms and conditions of employment.

[12] On 20 December 2010, a formal notice of the right to make an election to transfer to LSG was given to those employees which LSG had decided not to retain. Those persons were asked to make their election by 31 December 2010. If they elected not to transfer they could then be made redundant with effect from 22 February 2011.[5]

[13] From late December 2010 to 23 February 2011, the New Zealand Human Resources Manager for LSG, Ms Park, met with most of the employees who elected to transfer their employment to LSG.

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[5] The narrative in paras [10] to [12] is derived from the judgment of Woolford J in *LSG Sky Chefs NZ Ltd v Pacific Flight Catering Ltd*, Civ 201-404-00277, 14 February 2011.

[14] At a meeting held on 29 December 2010, Ms Alim told Ms Park that she was a catering assistant at PRI involved in working on cold foods and salads for business and economy class, and that she wished to transfer to LSG. Ms Alim described the contracts she was working on as including Malaysian Airlines in the Halal Section, Cathay Pacific, Air Tahiti Nui, and Air Pacific. Ms Park did not record that Ms Alim was working on the Singapore Airlines contract, although Ms Alim says she did advise Ms Park to this effect. Ms Alim's hourly rate at this stage was recorded as $15.96, the standard rate for a catering assistant. Other topics such as overtime, call-backs, sick leave entitlement and long service leave were also discussed at this meeting. Initially Ms Park formed the view that Ms Alim would not qualify for transfer to LSG under Part 6A of the Act, because it was her understanding Ms Alim had not worked on the Singapore Airlines contract. Ms Park noted, however, that Ms Alim said she had excellent references from the chefs with whom she had worked. She said she would otherwise have likely offered Ms Alim a role based on what she told her because she appeared to be a competent Catering Assistant.

[15] On 31 December 2010, Ms Alim signed a notification of election to transfer to LSG in these terms:

> I elect to transfer to [LSG] subject to maintaining my current terms and conditions and keeping my current shift pattern.

[16] In late December 2010 and early January 2011, Ms Park corresponded with Ms Gorgner, Human Resources Manager and Acting General Manager of PRI, in order to ensure a smooth transition for those employees who elected to transfer their employment to LSG. Ms Park sought the names of employees who had elected to transfer, their contact details, their terms and conditions of employment, their weekly hours spent on the Singapore Airlines contract, a description of their duties, and historical payroll data so as to assess leave and service entitlement balances.

[17] Initially, Ms Gorgner advised Ms Park that 55 employees were eligible to transfer, but that updated information regarding those persons would not be available until late January 2011. A current estimated value of annual leave, special leave and alternate leave was given for 55 people, said to amount to $440,000. Approximate redundancy costs would be $710,000. No information was provided regarding terms

and conditions of employment, hours worked on the Singapore Airline contract, a description of duties, or payroll data. Ms Gorgner said this information could not be disclosed due to the provisions of the Privacy Act 1993.

[18] Ms Gorgner declined a request from Ms Park for a meeting to discuss the practicalities and to ensure a seamless transfer of employees. Ms Park responded on 30 December 2010 stating that it was important that they meet, and that this should be sooner rather than later.

[19] On 11 January 2011, Ms Park emailed Ms Gorgner seeking clarification on a number of issues. One of her queries related to the transfer of entitlements; Ms Park suggesting these would need to be verified and signed off by all parties. Ms Park also proposed that once the value of accrued leave had been agreed, a payment should be made by PRI to LSG. This resulted in a letter being sent by lawyers acting for PRI to LSG suggesting that there was a misunderstanding as to provisions of Part 6A of the Act; in particular the lawyers said there was no requirement for PRI to make any payment to LSG. It was contended there was nothing to negotiate and nothing to agree, and that PRI preferred "not to meet in relation to what is an automatic transfer of employees".

[20] On 26 January 2011, LSG filed a claim in the High Court seeking an interim injunction requiring PRI to comply with the obligations under Part 6A of the Act.

[21] Prior to the hearing of that application, Ms Gorgner wrote to Singapore Airlines and to LSG on 7 February 2011 stating that the number of employees eligible to transfer was now 60, and the expected number who would transfer was 42. A new value for the leave entitlements was provided.

[22] From 6 February 2011, Ms Alim received payslips that recorded her as now being paid at the Supervisor rate of $17.68. The payslips also recorded enhanced leave entitlements, although Ms Alim had not been informed that this would happen. Later in this decision I will consider the question of whether Ms Alim actually worked as a Supervisor, or was promoted to such a position.

[23] On 14 February 2011, Woolford J heard and gave an oral judgment declining LSG's application for an interim injunction.[6] The Court held that PRI was entitled to select employees for eligibility to transfer whether or not they were directly employed on the Singapore Airlines contract. Although there was a direction that the substantive proceeding should be advanced to a fixture, LSG did not pursue the matter further.

[24] Also on 14 February 2011, Ms Kome, Human Resources Assistant at LSG, met with Ms Alim for the purpose of completing a new employee form, and an application form. In the latter, Ms Alim did not complete the panel as to the position she was seeking. Following her meeting with Ms Alim, Ms Kome sent Ms Park an email stating that Ms Alim had told her that her pay rate had been increased. Ms Kome reported that this was also the case in respect of a number of other employees.

[25] On 15 February 2011, Ms Gorgner forwarded a schedule which, for the first time, provided information as to who had elected to transfer, together with details of hourly rate, holiday anniversary, long service entitlement dates (where that applied) and long service hours entitlements. In the case of Ms Alim, the hourly rate was recorded as $17.68 with a two per cent deduction for KiwiSaver, a holiday anniversary date of 10 November 2011, a long service entitlement date of 1 May 2018 and a long service entitlement of 40 hours. On a separate schedule it was stated that her sick leave anniversary was 10 May 2011, that she had a sick leave annual entitlement of eight days, and that her service pay based on current continuous employment for four years.

[26] On the following day, 16 February 2011, Ms Park and Ms Kome held a group induction meeting for those who had elected to transfer to LSG; Ms Park also met with individual employees. Ms Park had by this time become aware of the alterations which had been made to hourly rates and entitlements. She said that a number of employees were offended by the fact that PRI had changed the

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6 *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd*, above n 5.

information of individual employees. Some had noticed that their pay had been increased without any explanation to them. This was the case in respect of Ms Alim.

[27] Ms Park also met with Ms Alim that day and completed a form entitled "Employee Agreement Clarification – Pacific Flight Catering". Ms Park recorded, a "pay increase" of $17.68, which Ms Alim described as being the rate for a "Team Leader". When Ms Park asked Ms Alim why she thought she had been given such an increase, she said she had been "fighting for a while" for the Team Leader rate and had just received it in her pay. She was not recorded as having said that she had been promoted to the role of Supervisor.

[28] With regard to leave balances, Ms Alim said that she did not think her annual leave had increased. Ms Alim confirmed to the Court that she advised Ms Park that PRI had not discussed any pay increase with her, and that it had "just appeared" in her pay at the commencement of the month.

[29] Later that day, Ms Park prepared a comparative table summarising the information relating to employees who had been interviewed at the end of December 2010, and who indicated subsequently that their pay rate had been increased by PRI. In respect of Ms Alim she noted that the equivalent Supervisor's position at LSG would be under an independent employment agreement (IEA) as a Bench Coordinator, with payment by salary. Ms Park recalled that Ms Alim was unable to state exactly why she had received a pay increase; there had been no meeting with Ms Alim to explain why it occurred. She recorded that Ms Alim thought she had been promoted, and was also expecting a PRI CEA increase. Also on the spreadsheet, Ms Park recorded that there was a general consensus that all transferring employees were receiving increased wages and leave. She sent this table to Union representative, Mr Dasgupta, and a Union lawyer, Mr Oldfield. In the course of the email she highlighted people whose circumstances needed to be discussed, including Ms Alim. She said:

> She has been "promoted", no discussion or paperwork, I don't think it is genuine. If so, our equivalent position is a salaried IEA one of Bench Coordinator.

[30] Also on 16 February 2011, Ms Gorgner sent a further schedule to Ms Park. It summarised start date, occupation, and annual holiday hours. Ms Alim's occupation was described as "Catering Assistant Supervisor". Her start date was 10 November 2005, and her annual holiday hours' entitlement was 200 hours, due to service of more than six years.

[31] On 18 February 2011, Ms Park wrote to Ms Gorgner asking again for information which had been requested previously, and which had not been received. Ms Gorgner replied on 19 February 2011 stating that a number of payroll reports had been sent on 15 and 16 February which would ensure "a seamless continuity of pay" for the transferring of employees. She said a final update of entitlements would be provided at the conclusion of employment with PRI. She went on to state that transferring employees had been put through a lot of "totally unnecessary confusion, uncertainty and emotional [hardship]" as a result of LSG's lack of understanding of Part 6A of the Act. Arrangements were then made for PRI's lawyers to handover relevant information to LSG representatives on the day of transfer, 23 February 2011.

[32] A letter dated 21 February 2011 addressed "To Whom it May Concern" and signed by Ms Gorgner stated that Ms Alim had been employed from 10 November 2005 to 22 February 2011 "as a Catering Assistant Supervisor". There is no evidence that this letter was provided to LSG at the time.

[33] Another document, describing Ms Alim as "Catering Assistant Supervisor" was produced by Ms Alim stating that it was provided to LSG before her employment with PRI ended on 22 February 2011. There is no direct evidence that LSG in fact received this document either.

[34] On 22 and 23 February 2011, Ms Gorgner provided to Ms Park updated reports for leave balances. These showed Ms Alim as having holiday pay of 273.85 hours, special leave of 63.5 hours, and alternative leave of 24 hours.

[35] Ms Alim commenced work at LSG as a Catering Assistant on 25 February 2011. Thereafter she generally worked 40 hours per week on a morning

shift, primarily on a Halal food assembly shift. LSG commenced paying Ms Alim at the rate of $17.68 per hour. Ms Park decided that Ms Alim would be paid a higher rate than that which applied under the PRI CEA for Catering Assistants, but it would be regarded as including the additional $5.02 per day service pay, and allowance for any overtime which was not expected to be significant; this would be an interim arrangement until LSG could resolve whether or not Ms Alim was "truly a Supervisor".

[36] Ms Park then attempted to obtain further wage and time records from PRI. Ms Alim signed an authority on 4 March 2011 for this purpose. In late March, the transferred employees were advised by LSG that although it had been possible to validate leave records from payslips for some, for the remainder there was uncertainty as to the actual amount of leave owed, and LSG was attempting to obtain the relevant leave and payroll records from PRI. Once that was available, there would be discussions as to the correct entitlements to be loaded on to the LSG payroll system, which in turn would show on individual payslips.

[37] On 30 March 2011, Ms Alim received a text from Ms Gorgner asking her to arrange a time to view her relevant records. Ms Alim asked Ms Park what she should do about this; Ms Park suggested that the issue be discussed with the Union. She was also advised by Ms Park that regardless of whether she herself saw the records, LSG would need to verify them. Ms Alim stated that she was not going to view the records, and would wait for the Union to do so. Ms Alim spoke to Mr Dasgupta of the Union. He said she told him that she was not happy about revisiting PRI and facing Ms Gorgner "and her intimidating tactics". On 6 May 2011, Ms Alim provided an authority to the Union to obtain the relevant records from PRI. Ms Alim completed another such form on 10 June 2011.

[38] In the course of May 2011, the Union was involved in meetings with LSG and individual transferees to discuss their terms and conditions. One objective was to transfer employees onto the LSG CEA where it was beneficial for them to do so. The Union recognised that such an option was not beneficial for Ms Alim. By 31 May 2011 Mr Richards, an organiser, was able to advise Ms Park that a number of Union members were willing to transfer to the LSG CEA at the end of the month.

There were six employees, however, who would remain on current rates and not transfer to that CEA in the meantime, and for whom an alternative arrangement would need to be worked out. This group included Ms Alim.

[39] In late May 2011, Ms Alim met with Ms Gorgner and obtained a letter from her which stated that PRI had made a mistake in paying her $17.68 per hour; the rate should have been $18.03 per hour, since she was on a KiwiSaver holiday, and the KiwiSaver had been mistakenly deducted. Ms Alim said she provided this letter to Ms Park.

[40] On 10 June 2011, Mr Dempsey, (HR Manager Auckland for LSG who had recently become involved in issues concerning PRI transferees) wrote to Ms Alim recording the options which had been discussed between the company and the Union as to the possibilities of a transfer to the LSG CEA, but stating that in her case she was currently better off remaining on her existing employment agreement, and that she would remain covered by its terms and conditions. It was noted that other opportunities for advancement might be discussed in the near future after discussion with Union representatives.

[41] On the same day, Mr Richards sent Ms Park an email stating that Ms Alim should be paid daily service pay at the rate of approximately $7, as well as a Supervisor's rate of $18 plus per hour. He said that to ensure the "letter of the law" was upheld, Ms Alim was entitled to be paid at the same rate as she was receiving at PRI immediately before she was transferred. Ms Park phoned Mr Richards in response, stating she believed that Ms Alim had not been promoted and was not therefore entitled to be paid the amount she was claiming.

[42] By 29 June 2011, issues of concern had not been resolved. Ms Alim and four other transferred employees wrote to the Union stating that their balances for holiday and special leave were not appearing on payslips, and that they were having problems with overtime. This letter was forwarded to Mr Dempsey, who commented that it was hard to put data onto the payslip when it was not available from PRI.

[43] At about this time, in order to assist its members because copies of wage and time, holiday and leave records had been requested but not provided, the Union sought a compliance order from the Authority. After mediation was undertaken between the Union and PRI early in June 2011, the Authority began an investigation meeting on 30 June 2011.[7] The Authority recorded in its determination[8] that the Union had required verification of wages and time, holiday and leave records, so as to verify wage rates and annual holiday entitlements of affected employees, in February, March, April and May 2011. Later, the Authority's determination was the subject of a challenge to this Court, which found that Ms Gorgner "indulg[ed] in obfuscation to try and avoid meeting the Union's and employees' requests";[9] and that "this was an attempt to conceal the action of the "poisoned chalice" as it has been referred to, of the increased liabilities being passed on to LSG".[10]

[44] On 11 July 2011, a meeting was held between Ms Park, Mr Dempsey, Mr Dasgupta and Mr Richards. The topic of Ms Alim's actual terms and conditions of employment was discussed. Mr Dempsey noted that LSG would not pay Ms Alim $18.03 per hour unless she provided her wage and time records; and that LSG did not think Ms Alim was a Supervisor, because it was believed she had never worked in such a position.

[45] On 21 July 2011, Ms Park told Mr Dasgupta that where possible, she had prepared calculations for transferring employees based on payslips, estimating annual leave and alternative leave accruals and start dates. She advised that she was intending to inform employees as to her conclusions, so that their records could then be adjusted appropriately.

[46] Ms Alim told the Court that she was informed by colleagues that Ms Gorgner was offering transferred employees $500. She said she was paid this sum for previously unpaid overtime. For their part, however, Ms Park and Mr Richards

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7 *Service & Food Workers Union Nga Ringa Tota Inc v Pacific Flight Catering Ltd* [2011] NZERA Auckland 525 at [7]-[9].

8 *Service & Food Workers Union Nga Ringa Tota Inc v Pacific Flight Catering* [2012] NZERA Auckland 200.

9 *Pacific Flight Catering Ltd v The Service and Food Workers Union Nga Ringa Tota Inc* [2013] NZEmpC 106, [2013] ERNZ 254 at [9](j).

10 At [22].

understood the sum of $500 was paid to employees who agreed to withdraw their authorities addressed to the Union for those documents.

[47] By 25 July 2011, Ms Alim had been in touch with Ms Gorgner again, because the latter wrote a yet further letter "To Whom it May Concern" confirming Ms Alim's transfer arrangements. The letter stated that LSG had been provided with all relevant payroll data, so that it could honour Ms Alim's entitlements under Part 6A of the Act.

[48] On 28 July 2011, Ms Alim wrote to Ms Park raising a personal grievance for "non recognition of my entitlements under the collective employment agreement". Attached to that letter was the letter she had received from Ms Gorgner of 25 July 2011. Ms Alim stated that the failure to recognise her entitlements had subjected her to undue stress that forced her to take sick leave. She also stated that she was not receiving her correct hourly rate, leading to financial constraint to the point where she had to borrow money.

[49] Ms Park held a meeting to discuss these issues on 4 August 2011; she met Ms Alim and Mr Dasgupta, a Union representative. The evidence establishes that Ms Park was initially distracted by some personal concerns. Ms Park realised this was so, apologised and said she would "start again". Ms Park said that she was having difficulty understanding the nature of Ms Alim's grievance, and wanted to understand her concerns. In her notes Ms Park recorded her understanding that Ms Alim had not been promoted, but it had been agreed to pay Ms Alim at a higher rate until the issue was sorted. "Extras" would not be paid in the meantime. Ms Park said that the Union had not subsequently advised her as to how she thought these issues could be resolved. Ms Park also went on to say that she was unaware of the correct leave balances because there was not accurate information from PRI, and wage and time records had not been provided.

[50] Having given Ms Alim an explanation, Ms Park apologised regarding the difficulties which had arisen in determining her leave entitlements. She also referred to the fact that Ms Alim had agreed with PRI that she would not request wage and

time records for a payment of $500; the clear implication was that this precluded verification of the facts.

[51] After discussing the advantages Ms Alim was receiving given that she was being paid more than a Catering Assistant would recieve under the PRI CEA, Ms Park informed Ms Alim that letters were being prepared advising affected employees that calculations were being undertaken to "transfer something" to their leave accounts. This would be an interim amount until details could be finalised, and then either increased or decreased as required. This would ensure employees had "something to go with", until payslips or records could be obtained. Ms Park said she realised Ms Alim and her co-workers were caught in the middle, but this had "come about from elsewhere". Ms Park then recorded that Ms Alim said "everything was fine", and that she did not need any further assistance such as from an employee assistance program.

[52] In the course of the meeting, there was discussion as to Ms Alim's medical condition, since a medical certificate from Ms Alim's General Practitioner (GP) had been provided dated 15 July 2011, confirming that she was "suffering from stress which is directly related to her workplace".

[53] On 12 August 2011, Ms Park sent a standard form letter to employees who still had leave issues, one of whom was Ms Alim. It stated that LSG had insufficient records including payslips that would facilitate relevant calculations. A meeting was proposed to review relevant records; Ms Alim was asked to bring any payslips for 2011, employment letters and her first employment agreement.

[54] As a result of this initiative, Mr Richards met with four affected employees including Ms Alim on 23 August 2011. His notes of that meeting record Ms Alim as stating that she should be receiving additional entitlements as she had been employed for six years; that her LSG payslips were incorrect; that her leave balances from PRI were not being honoured; she was not being paid her service allowance; and she had written to LSG on 28 July 2011 requesting that these be paid.

[55] At about this time Mr Dasgupta met with Ms Alim at her home. He brought two contracts with him – LSG's CEA, and an LSG individual employment agreement for a Bench Coordinator role. Ms Alim said that he told her she should sign one of these agreements, but that the Bench Coordinator role, which was under an IEA, did not allow for the payment of overtime, and that if she made mistakes she could be "demoted or fired on the spot". Ms Alim said that Mr Dasgupta put her under some pressure to sign one or other of these agreements, rather than remain on the PRI CEA.

[56] On 25 August 2011, Mr Richards met with Ms Park to discuss Ms Alim's concerns. There was an issue as to whether Ms Alim was also present. In their briefs of evidence, neither Ms Alim nor Mr Richards referred to her as having been in attendance. However, the level of detail recorded by Ms Park and Mr Richards in their respective file notes mean that it is more likely than not that Ms Alim was present and that she provided information which they recorded. Again there was discussion as to Ms Alim's terms and conditions at the time of transfer to LSG, and as to her start date with PRI. Ms Park recorded this as being 28 April 2006. In his notes Mr Richards queried this, recording the possibility that Ms Alim had been a casual employee from November 2005. Mr Richards also recorded that Ms Alim's balances at the time of transfer were "probably about" 220 hours for annual leave, 24 hours alternate leave, eight days sick leave, and "perhaps" a starting date of November 2005. There was discussion as to options for the future which included Ms Alim remaining on the PRI CEA or alternatively, to transfer to the LSG CEA, but to remain on a rate of $17.68 per hour. No agreement was reached on these issues; Mr Richards recorded that they would meet again in the week of 5 September 2011. Such a meeting did not take place.

[57] On 8 September 2011, 20 days leave was entered into the LSG payroll system, under the description "Bal B/fwd from Pacific Catering 160.00 hrs @ 8/day". Ms Park told the Court this was an interim adjustment. It was the possibility Ms Park had referred to at the meeting on 4 August 2011. In an email sent by Ms Park on 23 September 2011, Mr Richards was notified that the balance transferred for annual leave had been incorrect in Ms Alim's case, and that it would be sorted out for the next pay. While Ms Alim was not expressly informed of these

arrangements, the adjustment was reflected in her payslips as from 14 September 2011.

[58] On 16 September 2011, Ms Park had emailed Mr Richards asking for confirmation of the figures discussed at the meeting of 25 August 2011. Ms Park stated she thought Ms Alim was looking for her PRI payslips. Ms Park's email had been prompted by Ms Alim ringing her to obtain an update. Mr Richards responded by confirming the figures he had recorded, as mentioned already. He also said that he had not made any notes regarding Ms Alim looking for other payslips; rather she had brought in four payslips that she had found in her car, and that Ms Park had taken copies of them. He proposed a further meeting. Such a meeting did not take place.

[59] Ms Alim told the Court that apart from problems over her hourly rate and leave balances, there were regular errors in her LSG payslips, particularly as to overtime. She said she lodged pay queries with regard to practically every pay period. LSG maintained hardcopies of such query forms, and six only were available for production to the Court. These will be considered later.

[60] At this stage, the focus, at least with regard to Ms Alim, was on whether she would transfer off the PRI CEA. There is no evidence that any further steps were taken with regard to the outstanding issue of leave balances, or as to obtaining clarity with regard to whether Ms Alim had, in fact, been promoted to the role of Supervisor.

[61] On 21 November 2011, Mr Dempsey wrote to Ms Alim, outlining the options as to future terms and conditions. Mr Dempsey said that LSG understood that Ms Alim had never actually carried out a role as Supervisor at PRI. However, LSG was prepared to grandparent her rate of pay at the time of transfer ($17.68 per hour) on the basis Ms Alim would work as a Catering Assistant on an IEA; her rate would remain at that level until such time as the relevant CEA Catering Assistant rate exceeded $17.68 per hour at which point her rate of pay would be reviewed. Alternatively Ms Alim could transfer to the LSG CEA as a Catering Assistant at $16.35 per hour. This offer was made on the basis of LSG's assessment that her

capabilities were at the level of Catering Assistant. The offer was open until 28 November 2011. Ms Alim was told that if she did nothing, her employment would continue under the terms and conditions of the existing PRI CEA. Mr Richards told the Court that he regarded the PRI CEA as now having the status of an IEA, since its term had expired. Ms Alim did not accept the offer.

[62] On 16 December 2011, Mr Richards emailed Ms Park stating that Ms Alim wanted her holiday entitlements from PRI to be verified in writing. Mr Richards explained that he was unsure if there had been an agreement of an interim amount for her. He recorded that Ms Alim was also unhappy that her PRI CEA entitlements were not being fully honoured, for example her service pay and overtime rates.

[63] On 2 January 2012, Ms Alim submitted her resignation to Ms Kome, stating that she was planning to study and obtain casual work. She told the Court, however, that the real reason was that she felt the problems as to her terms and conditions were ongoing and had not been resolved, and she was experiencing considerable stress which had required her to obtain medical treatment. Ms Alim said she was not meeting her financial obligations, which placed stress on her and her family. She explained that she had suffered from depression which resulted in her seeing a counsellor. The counsellor told her she should leave her job because of the effect it was having on her. Regarding her resignation, Ms Alim also met with Ms Park, who spoke to her informally. Again, Ms Alim did not explain why she was leaving.

[64] At the time of resignation Ms Alim decided to take two weeks' annual leave so that she did not have to work out her notice period. Having resigned, she went to PRI and spoke to Ms Gorgner about what had occurred. Ms Alim said Ms Gorgner said she would try and help her and suggested she return to PRI the following day. Ms Alim did so and worked for a few hours. However, a PRI Director instructed that PRI was not to employ her.

[65] Ms Alim's final LSG pay was not resolved until early March 2012. At that time Ms Park made a final estimate of her leave balances at the time of transfer from PRI – 221.03 hours for annual leave, 16 hours for alternate leave and eight days sick leave. Her decision as to these matters meant that a further adjustment was made in

Ms Alim's favour in the payroll system, of 45.03 hours. Ms Alim's final pay was then calculated and credited.

The pleadings

[66] In the course of the hearing, Mr O'Brien sought leave to file a second amended statement of claim. As this was not opposed by the defendant, leave was granted. Accordingly, the case falls for determination on the basis of the second amended statement of claim dated 18 August 2015, and the first amended statement of defence of the same date. It is convenient now to outline the six causes of action and the response of the defendant in each instance.

[67] The first cause of action alleges a breach of the PRI CEA. It is asserted that at the time of transfer to LSG Ms Alim was in receipt of a Supervisor's terms and conditions of employment. It is alleged that she should have been paid thereafter at the full rate provided in the PRI CEA for a Supervisor, $18.03 per hour; this rate should have been used not only in respect of the hours for which Ms Alim was paid by LSG, but also for overtime and call-back, alternative leave, accruing leave, additional pay for hours worked but not reimbursed, and for bereavement leave. It was further asserted that an incorrect commencement date for the purposes of service pay was adopted; and that the transferred leave balance was incorrectly assessed. In response LSG pleaded that while investigating Ms Alim's correct terms and conditions and leave entitlements, which could not be ascertained from the information provided by PRI, an interim arrangement for pay was agreed to, namely $17.68 per hour for normal hours. The rate Ms Alim was paid was sufficient to cover overtime, service pay and call-back rates to which she would have been entitled under the PRI CEA. It was further pleaded that Ms Alim rejected an offer of employment by LSG as a Bench Coordinator, which was the equivalent of the PRI Supervisor position; thus Ms Alim was unwilling to accept the responsibility associated with the Supervisor's role.

[68] For Ms Alim it was also pleaded that LSG breached Part 6A of the Act in that it did not employ her on the same terms and conditions as applied to her immediately before transfer, as required by s 69(I)(2)(b) of the Act; and failed to recognise her

entitlements to sick, annual and alternative leave not taken before the date of transfer, contrary to s 69J(2)(a)(iii) of the Act. A declaration for this alleged breach was sought. LSG pleaded in response that Ms Alim was a Catering Assistant at the time of transfer and following transfer. Ms Alim's rate of pay was not less than the amounts to which she was entitled as a Catering Assistant, and based on an arrangement agreed by her and her Union representatives.

[69] It is next convenient to deal with the personal grievances which were raised in the challenge. In respect of Ms Alim's disadvantage claim, Ms Alim alleges that despite frequent objections from her and her Union, LSG continued to pay her on a basis which amounted to being a unilateral variation of her employment agreement, and did not pay her the terms and conditions of employment which applied immediately before the date of transfer. These actions were unjustified and caused Ms Alim hardship and distress. For its part, LSG says that it paid Ms Alim total wage entitlements and entitlements which were more than those to which she was entitled as a Catering Assistant under the PRI CEA, and that she did not suffer any disadvantage as a result of the interim pay arrangements. LSG asserts that Ms Alim received remuneration which was in excess of her entitlements in the sum of $1,695.06.

[70] Ms Alim also alleges that she was constructively dismissed. It is again asserted that LSG failed to recognise Ms Alim's terms and conditions under the PRI CEA. On each occasion that Ms Alim was not paid her correct entitlements there was a separate breach of her terms and conditions. Ms Alim raised complaints personally and through her Union, which were not rectified or adequately addressed. Further, LSG was put on notice that Ms Alim was suffering stress as a result of the breaches, and a personal grievance was raised. It is alleged in summary that LSG failed to honour Ms Alim's terms and conditions of employment, that it failed to be a good employer and to act in a fair and reasonable manner in relation to her employment, and that it conducted itself in a manner calculated or likely to destroy the relationship of trust and confidence. Consequently Ms Alim had no option but to resign, and she was therefore unjustifiably dismissed constructively. LSG pleaded in response that no pressure was placed on Ms Alim to resign whether intentionally or through its actions; she resigned for her own stated reasons.

[71] Next, it was asserted for Ms Alim that LSG breached its good faith obligations, by failing actively and constructively to address concerns with regard to Ms Alim's terms and conditions upon transfer. A penalty is accordingly sought. LSG pleaded in response that it acted in good faith throughout a difficult transfer process by seeking correct information from PRI, and by consulting the Union.

[72] Finally, it was contended for Ms Alim that despite a request in early 2012 by her then lawyer for wage and time records when working for LSG, LSG failed to provide a full set of those; in particular, it was unable to provide numerous pay enquiry forms which Ms Alim had completed when employed by LSG. A penalty was accordingly sought. LSG pleaded that such wage and time records as it was required to produce, were provided.

[73] Detailed submissions were provided by counsel in support of their respective cases; I shall refer to these as appropriate in the course of my judgment.

[74] Having regard to the pleadings and detailed submissions made by counsel, the key issues which I must consider are:

a) What were Ms Alim's terms and conditions immediately before she transferred to LSG? That issue involves a consideration as to how s 69I of the Act is to be construed; and whether amendments that were considered and enacted by Parliament in 2014 assist in its interpretation and whether Ms Alim was entitled to terms and conditions as expressed by PRI to LSG. It will then be necessary to consider whether Ms Alim's correct terms and conditions of employment under the PRI CEA were implemented.

b) Could Ms Alim have a legitimate expectation that LSG, which had stepped into the shoes of PRI as employer, would continue to pay her at the rate adopted by PRI immediately before the transfer?

c) Whether there was a valid interim arrangement in respect of Ms Alim's terms and conditions for some or all of the period of her employment with LSG.

d) Whether Ms Alim has a valid personal grievance either for disadvantage or for dismissal.

e) Whether any of the remaining causes of action have been established.

f) If any cause of action is established, to what remedies is Ms Alim entitled?

Part 6A of the Act

[75] The circumstances giving rise to the present case were extensively reviewed by the High Court, Court of Appeal and Supreme Court in a claim brought by LSG against PRI with regard to a claim it made for money paid for the use of PRI under compulsion of law.[11] I shall consider the factual findings made in that litigation later in this decision.

[76] In its judgment, the Court of Appeal conveniently described Part 6A of the Act in these terms:[12]

> [9] Part 6A was introduced into the Employment Relations Act in 2004 and subsequently amended in 2006. The object of the regime created by Part 6A is to provide protection to certain categories of employees working in industries such as the cleaning and contract catering industries by providing job security in times when the contractual arrangements under which their employer operates are changed or similar restructurings occur. In situations such as the present, the successful tenderer who takes over the contract (the new employer) is required to allow employees of the previous contracting party (the old employer) to elect to transfer to the new employer with their terms and conditions as accrued with the old employer kept intact. We will refer to these employees as "transferring employees".
>
> [10] Sections 69F and 69I provide that an employee may elect to transfer between employers if, as a result of a "restructuring" as defined in s 69B, the employee will no longer be required to work for the old employer and the employee's work is to be performed on behalf of the new employer. There was no dispute that the termination of Pacific's contractual arrangement with Singapore Airlines and its replacement with the new LSG arrangement was a

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11 *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering* [2012] NZHC 2810; *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] 2 NZLR 1; and *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158.

12 *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd*, above n 11 (footnotes omitted). In *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 153, the Supreme Court dismissed LSG's appeal. The Supreme Court's consideration of Part 6A at [14]-[16] of the judgment was similar to that of the Court of Appeal.

> restructuring for the purposes of Part 6A, and that Part 6A applies to this case.

[77] Mr O'Brien referred to the legislative history of Part 6A, placing reliance on statements made in the explanatory note of the Bill which led to the introduction of that Part in 2004; on statements made by members of Parliament on both sides of the house in the Parliamentary debates at that time; and on statements recorded in the same Parliamentary materials when amendments to Part 6A were introduced in 2006. The various statements, counsel said, emphasised that the purpose of Part 6A is to protect "vulnerable" workers.

[78] This is evident from the language used in Part 6A itself, and elsewhere in the Act. For example, s 237A of the Act provided, at the time of the events under review, for amendments to sch 1A for the purposes of adding, omitting or varying categories of employees for the purposes of that schedule. The section provided criteria for doing so. These were whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently, whether the employees' terms and conditions of employment, and whether the employees concerned have little bargaining power. A consideration of these provisions led Tipping J to observe that subpart 1 of Part 6A "is designed to protect vulnerable employees": *Service and Food Workers Union Nga Ringa Tota Inc v OCS Limited*.[13]

[79] The provisions which are the focus of this proceeding are contained in s 69I and s 69J. Section 69I relevantly states:

> **69I Employee may elect to transfer to new employer**
>
> …
>
> (2) If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee–
>
> (a) becomes an employee of the new employer on and from the specified date; and
>
> (b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and

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[13] *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2012] NZSC 69, [2012] ERNZ 182, at [10].

(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

…

(4) In this section, **specified date** means the date on which the restructuring takes effect.

[80] Section 69J relevantly states:

69J Employment of employee who elects to transfer to new employer treated as continuous

(1) The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

The plaintiff's construction of s 69I(2)(b)

[81] The first submission made for the plaintiff focuses on s 69I(2)(b) of the Act. Mr O'Brien submitted that the new employer must accept those terms and conditions which at face value applied immediately before transfer. It was argued this was to prevent the incoming employer from reducing the transferring employee's terms and conditions; the incoming employer may not question them.

[82] Ms Meechan's submission in response was that a realistic approach should be adopted with regard to any question as to what the terms and conditions were at the time of transfer. Counsel submitted that "terms and conditions … as applied to the employee" is a phrase having a wide meaning, which may include the circumstances and conditions in which a job was performed and practiced, as well as the terms of the written employment agreement.[14] Counsel also submitted that the focus could and should be on the real nature of the relationship, by analogy with the analysis that is undertaken when determining whether there is a contract of service between parties under ss 6(2) and 6(3) of the Act.[15]

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[14] This submission was made with reference to the dicta of Judge Travis in *Tan v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 35, at [95].

[15] As discussed by Judge Couch in *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225, at [37].

[83] It is well established that the analysis of an enactment proceeds by primarily a consideration of text and purpose. As was explained by Tipping J in *Commerce Commission v Fonterra Cooperative Group*:[16]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[84] I begin my consideration of the text of s 69I, focusing first on the words "terms and conditions … as applied to the employee".

[85] In *ANZ National Bank v Doidge*,[17] Chief Judge Colgan considered the phrase "… 1 or more conditions of the employee's employment" as used in s 103(1)(b) of the Act. In doing so he referred to dicta of the Court of Appeal in *Tranz Rail v Rail and Maritime Transport Union*,[18] where the Court referred to phrases which included "terms of employment", and "conditions of work", for the purposes of the antidiscrimination provisions of the Employment Contracts Act 1991.[19]

[86] The Chief Judge said:[20]

> [49] Turning to the expression "terms of employment" the Court of Appeal noted that this was not defined in either the Employment Contracts Act or in human rights legislation. It was described as a "capacious" expression and the Court held that "Parliament must be taken to have intended to go beyond the terms and conditions of the formal collective employment contract or individual employment contract". The Court of Appeal held at para 26:
>
> > Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.

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16 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

17 *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC) at [52].

18 *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA).

19 Employment Contracts Act 1991, s 28(1)(a) provided that the test of discrimination was whether the employer offered or afforded to those employees the same terms of employment, conditions of work, and fringe benefits that were made available to similarly qualified, experienced and skilled employees.

20 *ANZ National Bank Ltd v Doidge*, above n 17.

> [50] This was confirmed by reference to UK case law, *BBC v Hearn* [1978] 1 All ER 111 where, at p 116 Lord Denning said that as the term was employed in employment legislation: "Terms and conditions of employment may include not only the contractual terms and conditions but those terms which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated into the contract". That definition was followed by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366; [1982] 2 All ER 67; at p 402; p 90 where Lord Scarman observed that since *BBC v Hearn* it had been accepted that "'terms and conditions of employment' is a phrase of wide meaning and includes not only the rights but also the customary benefits and reasonable expectations provided by reason of the employment to the employee by the employer".

[87] In the case before him, the Chief Judge concluded that the phrase in s 103 should bear the same broad meaning as the Court of Appeal concluded should apply in the discrimination grievance section of the Employment Contracts Act 1991.[21]

[88] The question for this Court is whether the same conclusion should be reached in respect of the language used in s 69I(2)(b). Since there is no express indication to the contrary, I conclude that Parliament adopted language which has often been employed elsewhere in this Act and, which has a well established plain and ordinary meaning. The interpretation that has been applied to similar sections within the statute must apply here – subject to any contrary indication when later considering purpose. In the language of the Court of Appeal, the concept used is "necessarily wider than the terms of an employment contract"[22] and includes "customary benefits and reasonable expectations" of the employment.[23]

[89] As already mentioned, Mr O'Brien submitted that the "face value" approach was to ensure an incoming employer could not question the transferred terms and conditions of an employee. For the purposes of the present case counsel in effect submitted that the language should be understood as referring to *apparent* terms and conditions as represented by the outgoing employer.

[90] If terms and conditions, whether or not they are incorporated in the relevant employment agreement, are described by the outgoing employer in good faith and

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21 *ANZ National Bank Ltd v Doidge*, above n 17 at [52] referring to the Court of Appeal judgment in *Tranz Rail Ltd*, above n 18.

22 *Tranz Rail Ltd*, above n 18, at [26].

23 At [27].

accurately, there may well be no problem. The difficulty is where the employee's rights and reasonable expectations are not described accurately, whether by mistake or intentionally. The prospect of such problems arising cannot be ruled out when it is acknowledged, as it must be, that relevant terms and conditions may be partly written, partly oral and partly established by a pattern of evolving conduct over time.[24]

[91] Whilst a vulnerable employee might consider that he or she will obtain an advantage if terms and conditions were misstated in his or her favour, equally a vulnerable employee in a weak bargaining position could suffer disadvantage if his or her terms and conditions were misstated in favour of the employer. Under the "face value" appraisal there could be no enquiry as to the actual terms and conditions whatever the situation. In both instances, it would be appropriate to be able to question the description of terms and conditions provided by the outgoing employer.

[92] The words "terms and conditions … as applied to the employee" must be construed in the particular context of s 69I(2). Does that context require this phrase to be construed in a way that differs from its plain and ordinary meaning? That question requires a consideration of the other words used in the sub-section.

[93] Mr O'Brien submitted that the words "immediately before the specified date" should be taken to mean "the day before" that date. He did so in reliance of dicta from the English Court of Appeal decision of *Secretary of State for Employment v Spence.*[25] There, the claimants were dismissed three hours before the subject business was sold. The next day they were engaged by the purchaser. Were they entitled to a redundancy payment? At issue was reg 5 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. Those regulations provided that a transfer of a business would not operate so as to terminate a relevant contract of employment, if the affected employee was employed "immediately before" the transfer. The regulations had to be construed in light of a Directive of the Council of the European Communities which provided that a transfer of rights and obligations arising from a contract of employment or from an employment

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[24] As recognised by Lord Hoffman in *Carmichael v National Power Plc* [1999] UKHL J1118-2, [1999] 4 All ER 897.

[25] *Secretary of State for Employment v Spence* [1987] QB 179 (CA).

relationship existing on the date of transfer, would be transferred to the transferee. The Court of Appeal held that the regulations, construed in a manner which was consistent with the Directive, required an assessment of whether the contracts of employment existed at the moment of transfer. On the facts, that was plainly not the case.

[94] In the course of the leading judgment, Balcombe LJ referred, with approval, to the judgment of *Premier Motors (Midway) Limited v Total Oil Great Britain Limited* where an Employment Appeal Tribunal explained that the Regulations implement the Directive and should be construed in a manner which was consistent with it.[26] The Regulations stipulated that if a business was transferred, the employees would be automatically transferred irrespective of the wishes of the transferee or of the employees. If the transferee did not continue to employ the employees, the transferee employer will be liable for any redundancy payment, not the transferring employer.[27] For those purposes the question was whether the employee was employed at the moment of transfer.

[95] In the present case, the question has a somewhat different focus. The subsection requires a consideration as to the totality of the terms and conditions which are being transferred: those terms and conditions are to be assessed with reference to the position as it was just prior to the transfer.

[96] In *State Insurance Office v Scott*[28] the Court of Appeal reviewed cases where the words "immediately", "immediately after" and "forthwith" had been used. It unsurprisingly observed that such words must be construed with reference to the particular object of the statutory provision, and according to the circumstances of the case.

[97] The language used here, in my view, means that the applicable terms and conditions must be those which in fact applied just prior to the transfer. Parliament did not use the expression "the day before", although the relevant analysis may often

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26 *Premier Motors (Medway) Ltd v Total Oil Great Britain Ltd* [1984] 1 WLR 377; [1984] ICR 58 at 380.

27 Approved in *Spence* above n 25, at 194-195 by Balcombe LJ.

28 *State Insurance Office v Scott* [1982] 1 NZLR 717 (CA).

focus on the position which existed on the day prior to a restructuring. However, the circumstances of a given case will dictate whether, in order to achieve the object of continuity of employment, it is appropriate to focus on the position which existed "the day before". How the phrase "immediately before" should be interpreted will depend on the particular circumstances.

[98] But the real issue is whether Parliament intended that the words "immediately before" should qualify the words "terms and conditions … as applied to the employee", so as to restrict them to a "face value" meaning. In my judgement, such a conclusion is not available. It was intended that the time for assessing the transferring terms and conditions would be just before the transfer. This is as would be expected. That does not suggest, however, that the presence of those words means that the preceding words should be modified so as to limit the transferred terms and conditions to those which were apparent at "face value". Such a conclusion would require the language to be construed in an artificial way; it would require a deviation from the plain and ordinary use of the words which were adopted, for instance by implying the word "apparent".

Purpose

[99] This view is supported by a consideration of purpose. The purpose of s 69I is to provide for continuity of employment, which would not otherwise be the case were a business enterprise to be transferred from one entity to another. The common law position is that the transfer of an undertaking from one employer to another automatically determines a contract of service, unless that principle is abrogated by statute.[29] As the Court of Appeal observed in *Pacific Flight Catering Limited v LSG Sky Chefs New Zealand Limited*, the ongoing employment of vulnerable employees at the time of the restructuring is to be preserved, if at all possible, and that this preservation is to be undertaken "in a way that is seamless from the employees' point of view."[30] What is required is an assessment of the terms and conditions which could properly be described as current. It is these which are to be transferred.

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[29] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] A.C 1014; [1940] All ER 549; *Wellington City Council v Rasch* [1995] 2 ERNZ 91 (CA) at 96.

[30] *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd*, above n 11, at [32].

The general context: form or substance?

[100] I recorded earlier that Ms Meechan submitted that the statutory language requires an understanding of the actual or real terms and conditions. Mr O'Brien submitted this was to prefer substance over form. By contrast, the essence of the plaintiff's case is that form is to be preferred to substance.

[101] In his oral submissions, Mr O'Brien agreed that the effect of his submission was that terms and conditions relating to hourly rates or leave provisions could be quadrupled just prior to the transfer; and if the outgoing employer represented that these were indeed the terms and conditions, the employee and the incoming employer would be bound by them. Indeed he accepted that if those terms and conditions were increased by any multiplier at all and the outgoing employer represented that they were the applicable terms, they would be binding. Such scenarios might well reflect anti-competitive conduct on the part of an outgoing employer. It is inherently unlikely that Parliament would have intended such an absurd outcome because of reliance on form.

[102] Consideration of examples is useful when assessing Parliamentary intent. The starting point, as observed earlier, is the "capacious" phrase which has been adopted. Thus, it may be necessary to establish whether there are terms which were recorded in an employment agreement, but also whether there were other terms that were "understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorp[or]ated into the contract",[31] for instance if the outgoing employer has made no reference to these.

[103] A specific example as to how an analysis may need to proceed relates to fixed-term contracts. Section 69K deals with this situation by allowing an employee on a fixed-term employment agreement to transfer if the transfer is a "contracting out"[32] or a "subsequent contracting".[33] Parliament intended that s 66 will continue to apply to such employment agreements once they have been transferred. The effect of s 66 in these circumstances is that the terms and conditions as transferred will be

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31 *BBC v Hearn* [1978] All ER 111, at 116.
32 Employment Relations Act 2000, s 69K(3)(a).
33 Section 69K(3)(c).

subject to the underlying requirement that any statement in the employment agreement to the effect that it will end in one of the specified ways, will have to be capable of a justification; there will continue to be a question as to whether the stated reason for ending the agreement is founded on "genuine reasons" based on "reasonable grounds". That question may require an inquiry where substance may prevail over form.

[104] General principles relating to the proper interpolation of an employment agreement will continue to apply. It is well established that it is legitimate to consider contextual matters, evidence of which is admissible in certain situations, so that the agreement can be properly interpreted: *Vector Gas Limited v Bay of Plenty Energy Limited*.[34] Similarly, if there is an issue as to whether the transferring person is an employee or a contractor, the real nature of the relationship will have to be considered under s 6(2) of the Act.[35] Again, substance may prevail over form.

[105] There are numerous other examples where the underlying basis of an employment agreement may require analysis, such as where there is a breach of the fair trading provisions of the Fair Trading Act 1986,[36] or where the agreement has been entered into fraudulently.[37] A particular example which will be considered more fully shortly, relates to the situation where documents or acts are a sham. In all these instances, substance may prevail over form.

[106] Section 162 of the Act provides that in any matter relating to an employment agreement, any order that the High Court or a District Court may make under any enactment or rule of law relating to contract, can also be made by the Authority. Section 190 of the Act extends s 162 to apply the same powers to the Employment Court.[38] In some specific instances, the generality of that provision is expressly

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34 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444; *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2010] NZCA 317, [2010] ERNZ 317, the Court of Appeal confirmed that the principles which were outlined in *Vector Gas* apply to employment agreements.

35 For example, as in *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56. Judge Travis found that the real nature of the relationship was such that the plaintiff was entitled to transfer under s 69I.

36 Section 9 or s 12.

37 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand*, (4th ed, LexisNexis, Wellington, 2012) at 13.4.1.

38 Employment Relations Act, s 190.

modified or excluded.[39] There is no such modification or exclusion of the wide ranging jurisdiction relating to the application of rules regarding contracts as described in s 162, for the purposes of Part 6A and in particular for the purposes of s 69I(2) or s 69J. Parliament has not stipulated that rules relating to the law of contract cannot be applied where terms and conditions are transferred because they can only be assessed "at face value".

[107] Throughout Part 6A, the focus is on the reality of the employment relationship. I find that Parliament intended this to be the case also in s 69I(2). If need be, substance will prevail over form. In an Act that focuses on employment relationships, the ascertainment of the real nature of the relationship is a legitimate enquiry.

2014 amendments to Part 6A

[108] In 2014, Part 6A was amended in a number of respects. One of those was the introduction of s 69LC, which provides:

> **69LC Implied warranty by employer of transferring employees**
>
> (1) This section applies if 1 or more employees of an employer elect to transfer to a new employer, as provided for in section 69I.
>
> (2) There is an implied warranty by the employees' employer to the new employer that the employees' employer has not, without good reason, changed–
>
> (a) the work affected by the restructuring; or
>
> (b) the employees who perform the work affected by the restructuring (for example, replacing employees with employees who are less experienced or less efficient); or
>
> (c) the terms and conditions of employment of 1 or more of those employees.
>
> (3) The warranty implied by this section applies in relation to changes occurring in the period–
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> (a) beginning on the day on which the employees' employer is informed about the proposed restructuring; and
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> (b) ending on the day before the specified date.

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[39] See Employment Relations Act, s 149(3)(ab) where the terms of a settlement agreement under s 149 of the Act may not be cancelled under s 7 of the Contractual Remedies Act 1979; s 163 restricting the Authority's power in relation to collective agreements; s 164 placing qualifications on when the Authority may exercise its power under s 69(1)(b) or s 162; and s 192(1) addressing the Court's power to cancel or vary a provision of a collective agreement.

> (4) If the employees' employer breaches the implied warranty, and that breach adversely affects the new employer, the new employer may commence proceedings for damages, in any court of competent jurisdiction, against that employer.
>
> (5) For the purposes of subsection (2), whether a reason is a good reason is to be determined on an objective basis.

[109] Mr O'Brien submitted that the new section ensures that an employee retains any increased terms and conditions; if there is a breach of the implied warranty because there is no good reason for the increased terms and conditions, then damages can be sought. But the employee would not be disadvantaged by having to participate in an inquiry which went beyond the "face value" of the transferred terms and conditions.

[110] Counsel argued that the only thing that changed at the time of the amendments was that the new employer now has a specific remedy in damages against the outgoing employer. Mr O'Brien's argument in summary is that by enacting the new provision, Parliament impliedly reinforced the plaintiff's interpretation of s 69I; where terms and conditions are transferred without good reason the incoming employer now has a remedy, thus addressing the lacunae identified in the civil litigation which took place between PRI and LSG.

[111] Ms Meechan submitted in reply that the lens through which the Court must interpret Part 6A cannot be "tinted" by subsequent legislation. She referred to *TerraNova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Inc*, where the Court of Appeal stated that where "two statutes have a single subject matter, so it can be assumed that uniformity of language and meaning was intended."[40]

[112] The issue raised in the present case, however, relates to the effect of amendments in a *single* statute, and/or whether it can properly be concluded that Parliament proceeded on the basis of a particular understanding of s 69I.

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[40] *TerraNova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 at [194]. This is sometimes called the *in pari materia* principle.

[113] Generally, statutory amendments are not regarded as being of assistance in construing an earlier provision unaffected by that amendment. So, in *The Commissioner of Inland Revenue v Chester Trustee Services Limited*, Baragwanath J stated:[41]

> While subsequent legislation may offer a possible interpretative option for consideration when construing its predecessor, to treat the latter legislation as indicating a particular legislative policy could be said to beg the essential question of whether the amendment was intended to confirm or to change the earlier policy as deduced on conventional principles.

[114] In any event, I was not referred to any particular passages in the Parliamentary materials which would confirm that Parliament expressly considered s 69I(2) or that it considered the subsection should be interpreted in a particular way. Parliament did recognise that an employer should have an indemnity for unfair increases in employee costs, or where there was a change in the employees who perform the work effected by the restructuring, or where terms and conditions which were changed without good reason.[42] It thereby addressed a lacunae as to remedies. But there is no evidence that it did so on the basis that it was understood and agreed that s 69I(2) should be construed in a strained way.

[115] Accordingly, I consider this to be a case where the subsequent amendments are not an aid to the proper interpretation of s 69I.

Sham employment agreements

[116] A particular example where form must yield to substance is where the apparent terms and conditions are properly regarded as sham. It is well established that orthodox sham principles apply to contracts,[43] including employment agreements.[44]

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41 *The Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [38]. See also *Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66 (CA) at [22], and *Tebbs v R* [2013] NZCA 523 at [67].

42 Explanatory note, Employment Relations Amendment Bill 2013, page 5; Commentary of Transport and Industrial Relations Committee to Employment Relations Amendment Bill, 11 December 2013, page 9.

43 *Mills v Dowdall* [1983] NZLR 154; *NZI Bank v Euro-National Corporation Ltd* [1992] 3 NZLR 528.

44 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA).

[117] Such an analysis is required in this case, having regard to the case advanced for LSG. When giving her submissions, Ms Meechan did not mince her words when describing the manner in which PRI "promoted" Ms Alim increasing her hourly rate and leave balances. She said there was a "cynical attempt by PRI to skew the commercial pitch on which it and LSG were playing"; that PRI did not in fact transfer the "true" terms and conditions which applied to Ms Alim; that it indulged in "skulduggerous activity", and adopted "sinister tactics". Later, when declining to provide wage and leave records, she submitted that PRI "obfuscated the truth". Finally, in her reply address, Ms Meechan submitted that the terms and conditions were "so inimical to the interests of the community that it [offended] almost any concept of public policy". In short, LSG asserted that the transferred terms and conditions were far from genuine, and that Ms Alim was party to the charade. The essence of the submission for the defendant was that the transferred terms and conditions, as portrayed by PRI and Ms Alim, were a sham. Mr O'Brien's response to this was that PRI's role in the matter was irrelevant to the issues before the Court.

[118] The classic description of sham was given by Diplock LJ in *Snook* in these terms:[45]

> … It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing I think is clear in legal principle, morality and the authorities … (citations omitted) that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties there too must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

[119] This is clearly the position also in New Zealand: *Ben Nevis Forestry Ventures Limited v Commissioner of Inland Revenue*.[46]

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[45] *Snook v London West Riding Investments Ltd* [1967] EWCA Civ J0117-1, [1967] 2 QB 786, at 12.

[46] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289, at [33].

[120] Recently, the Court of Appeal in *Clayton v Clayton* referred to sham transactions in these terms:[47]

> [61] To determine whether a particular transaction constitutes a sham, the court will focus on the actual intentions of the parties to the transaction and compare them with the acts done or documents created. In doing so, the court will not be restricted to the legal form of the transaction, but will examine its substance in light of all the relevant evidence relating to the parties' intentions. As the issue will be whether the transaction was intended to be genuine, the focus will be on the actions and words of the parties, both contemporary and subsequent.
>
> [62] This approach reflects equity's preference for substance over form and the conceptual basis of the sham doctrine which "lies in the court's ability to see through acts or documents" intended to disguise or conceal the truth of the matter.

[121] One of the leading New Zealand decisions on the requirements for intention for sham purposes is *Official Assignee v Wilson.*[48] There the Court of Appeal made it clear that intention may be established by considering a variety of circumstances, not only an express intention not to act on the actual rights and obligations the parties intended to create. So, complicity, ignorance or recklessness may establish the requisite intention.[49] Although the Court in that case considered whether a particular trust was a sham, these principles are of general application. Intention is a factual inquiry gleaned from all the circumstances of the case.[50]

[122] The authorities also establish that even if parties have a common intention to sham, they do not need to share the same motivation for doing so: *Chase Manhattan Equities Limited v Goodman*.[51]

[123] It is these principles which must be considered in the present case.

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47 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [61]-[62].

48 *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45.

49 At [114] per Glazebrook J.

50 I leave for another occasion, where a sham analysis is not required, the question of whether the approach adopted by the UK Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 should apply. In that case it was held that rather than a strict *Snook* analysis, it may be appropriate in an employment situation to consider whether the apparent terms and conditions of employment are real.

51 *Chase Manhattan Equities Ltd v Goodman* [1991] BCC 897, at 932, per Knox J.

What were Ms Alim's terms and conditions immediately before transfer?

PRI's position

[124] The evidence given to the Court by Ms Alim as to her employment circumstances prior to transfer must be considered alongside the information which is before the Court as to PRI's acts and omissions. The starting point for this assessment is provided by the findings made by Woolford J following the High Court trial in 2012 when LSG claimed that PRI was liable for increased employment costs which it had been compelled by law to pay.[52] The figure claimed was in excess of $250,000.

[125] In his decision the Judge found:[53]

> [8] The figure of $257,890.05 was calculated on the basis of leave balance information provided to LSG by Pacific on the date of transfer of the 40 staff. The evidence at trial however established that the information provided to LSG on that date had been deliberately inflated. Pacific now accepts that shortly before the 40 staff transferred to LSG, it altered the pay records of all but two or three of the staff (in large part without the employees' knowledge) to increase their leave balances by between 240 and 100 hours. It also increased their hourly pay rates, again without consultation or formal notification.

[126] Later, when dealing with costs, Woolford J said:[54]

> [14] It was established that the leave balance information provided to LSG by Pacific was deliberately inflated, although no formal factual findings were made as quantum was left to the parties to consider. Pacific accepted that it altered the pay records of all but two or three of the staff to increase their leave balances by between 40 and 100 hours, as well as their pay rates. No explanation for this was ever given. I infer however that this was done out of commercial spite for having lost the contract to a rival, in order to make the contract financially disadvantageous for LSG.

[127] The Court of Appeal stated that Pacific's conduct "appears to have been reprehensible", although that fact did not have any bearing on the issues which that Court was required to consider.

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52 *LSG Sky Chefs New Zealand Ltd v Flight Catering Ltd* [2012] NZHC 2810.
53 *LSG Sky Chefs New Zealand Ltd v Flight Catering Ltd*, above n 52.
54 *LSG Sky Chefs New Zealand Ltd v Flight Catering Ltd*, [2015] NZHC 685.

[128] Apart from Ms Alim, no other employee who may have had knowledge of the real position at PRI was called by Ms Alim. Nor did she call any director of that company.

[129] LSG, however, did call Mr Cyril Belk. Mr Belk had been employed as a Production Sous-Chef from 2005 to 2012. His responsibilities included managing kitchen staff and the preparation of rosters. In that capacity Mr Belk had a close working relationship with supervisors. He said that Ms Alim was not, to his knowledge, a supervisor but rather a Senior Catering Assistant. Ms Alim was very skilled and appreciated as a result. She was cross-trained over several benches such as Special Meals, Business Class Cold, and the assembly of hot and cold meals. She also worked in the Halal Kitchen, under the guidance of a supervisor or a chef. Mr Belk recalled that prior to the transitioning of staff to LSG, Ms Alim was working on the condiments bench and in the Halal kitchen. He said he would have known if she had been promoted to Supervisor. This was because he prepared the roster for the various benches and in doing so he was required to include reference to the employees who were to supervise. Up to the date when employees transferred to LSG, Mr Belk was never told Ms Alim was a Supervisor, and he never recorded in a roster that she was to undertake such a role. There was only one Supervisor per shift.

[130] Mr Belk stated that an aspect of his duties related to the leave arrangements for staff. He was required to receive leave reports and make sure staff took leave and within appropriate timeframes. He produced a leave balance report for 1 February 2011 which showed Ms Alim as having 222.65 holiday pay hours. The next leave report dated 9 February 2011 stated that her holiday pay entitlement had increased to 264.64 hours. Mr Belk said he noticed that there were similar increases for other transferring staff. He took the issue up with the two employees who were responsible for payroll issues, since he was not aware of any legitimate reason for the increases. He was told that they had been "following instructions" when inputting the increases.

[131] In answer to questions from Mr O'Brien, Mr Belk confirmed that as a former employee he was not authorised to retain the leave balance schedules without

authorisation from PRI. Mr O'Brien submitted that this meant Mr Belk's evidence could not be relied on. I disagree. Any issue as to whether the leave balance reports were or were not to be retained by Mr Belk is a matter between him and his former employer. In any event, from a legal perspective he may well have been justified in retaining the documents given the controversial circumstances, including for the purposes of any relevant rights under the Protected Disclosures Act 2000.

[132] Mr Belk was asked to comment on evidence from Ms Alim to the effect that in late 2010 or early 2011 an Executive Chef had told her that she was "in charge". Mr Belk stated that the only person who could have made such a statement had ceased to work for PRI well before December 2010; thereafter PRI was without an Executive Chef for a period so that such a person could not have made such a statement to Ms Alim in December 2010 or January 2011.

[133] The totality of Mr Belk's evidence is consistent with the conclusions expressed by Woolford J in the proceedings involving PRI and LSG. It is well established that PRI increased the leave balances of all but three persons who transferred to LSG; this included Ms Alim. Pay rates were also increased in early February, including Ms Alim's.

Ms Alim's position

[134] Ms Alim's case is that her apparent promotion, her increased pay rate and increased leave balances some three weeks prior to transfer to LSG were genuine variations to her previous terms and conditions of employment.

[135] I begin my assessment of Ms Alim's evidence by considering her assertion that she was promoted to the position of Supervisor.

[136] Ms Alim filed two briefs of evidence as required under directions issued by the Court. In the first of these she said that another Supervisor had been training her in different jobs. She did acknowledge that she was not told she was being trained so as to become a Supervisor, but she herself thought it could happen.

[137] In the same brief of evidence she said that in about December 2010 or January 2011, Mr Belk told her she was "in charge". In her second brief of evidence, which was filed by the time it was apparent that LSG proposed to call Mr Belk as a witness, Ms Alim amended her brief of evidence to state that she now recalled the person who told her she was in charge was not Mr Belk, but an unnamed person who had a "black scarf" – that is an Executive Chef. I find that this alteration in Ms Alim's evidence was because she knew Mr Belk had not told her she was in charge; and that she knew he was aware of the correct facts regarding her alleged promotion and that she had not worked as a Supervisor prior to the transfer to LSG.

[138] When giving her oral evidence, Ms Alim said that although she would have expected others to be told she was in charge; she had no idea as to whether anyone knew this. Nor did anyone come to her and inform her that she was now a Supervisor.

[139] To be contrasted with the evidence as to the statement which Ms Alim says was made by an Executive Chef, is the information she conveyed to Ms Park who interviewed her on 29 December 2010. Ms Park recorded that Ms Alim told her she was a Catering Assistant on an hourly rate of $15.96. Although she was recorded as saying she had "excellent references", there is no evidence that she referred to the fact that she now had a role where she was "in charge", or that she anticipated a pay increase to recognise her seniority, or team leadership role, or supervisor role (as she was later to assert). I find that the information she provided to Ms Park is inconsistent with her evidence to the Court.

[140] PRI had four existing Supervisors in 2011. It would not have made any sense to promote Ms Alim just before she was to cease working for that employer. There was no evidence of a vacancy for a Supervisor, or of any need for an additional Supervisor just as PRI's workforce was about to contract significantly.

[141] Ms Alim said that status changes were not usually notified in writing. However, the Court is asked to accept that in this instance, the employee was not notified of a promotion at all, except via a payslip; and that no one else was notified of her new status either. It is illogical to assert that no one would know an employee

was now a Supervisor, as others would need to be aware of the fact that supervision would be undertaken by the promoted person.

[142] A yet further fact pointing to the conclusion that such a promotion did not occur relates to the timing of events in February 2011. The first written reference to Ms Alim being paid as a Supervisor on a rate of $17.68 per hour was on her payslip of 6 February 2011. The same payslip recorded enhanced leave balances, as I shall describe more fully shortly. Mr Belk's evidence confirmed that the increases which were made in respect of Ms Alim's terms and conditions occurred at the same time as leave balances were increased with regard to all but three of the 40 staff who were to transfer to LSG; pay rates of some, including Ms Alim were increased at the same time. These steps were taken by PRI without any consultation with the affected employees. Nor were they told why the increases were implemented. I find that in Ms Alim's case and indeed in the case of other transferees the increases related to the upcoming transfer of employees to LSG, and not to the previous conversation where Ms Alim was apparently told she was "in charge".

[143] When Ms Alim completed an application for employment at LSG on 14 February 2011, she did not say that she sought a role as Supervisor. Had she been genuinely promoted to such a position, it is more likely than not that she would have referred to that status in her application for employment.

[144] When meeting with Ms Kome on 14 February 2011, Ms Alim told her that her hourly rate had changed; but she did not say that she had been promoted to the position of Supervisor, accordingly to the email Ms Kome sent to Ms Park soon after the meeting. When interviewed by Ms Park two days later on 16 February 2011, she was recorded as stating that her pay rate had increased as a "team leader", which was not a position which was described in the PRI CEA. She did not say she had been promoted to the position of Supervisor. In oral evidence Ms Alim said she did inform Ms Park that she had been promoted to the role of Supervisor. That however is not what was recorded. I find that had she referred to such a role, Ms Park would have recorded it as such. It was at this stage that she also told Ms Park that Ms Alim had been fighting for an increase in her terms and conditions. That may have been

the case, but it does not mean that the steps taken by PRI in early February 2011 were in response to prior attempts to have her hourly rate increased.

[145] Ms Alim said it was unfair that a co-worker's "promotion" had been recognised by LSG. It was unfair, she said, that her promotion was not. However, the circumstances relating to the co-worker were quite different. The co-worker was able to satisfy LSG that in 2010 she had been paid $17.35 as a team leader. PRI reduced her pay to just over $15 per hour in response to her joining the Union. Then her rate was increased to $17.68 with her title being described as Supervisor on 6 February 2011. Ms Park concluded this was genuine and that it was linked to her actual duties.

[146] By contrast I find that Ms Alim was not promoted to the position of Supervisor, and did not work in such a role. The increased hourly rate recorded in her payslip was an aspect of PRI's attempts to create financial difficulties for LSG.

[147] Ms Alim's evidence conflicts with Mr Belk's clear account. He confirmed that PRI had not employed an Executive Chef in the relevant period; thus such a person could not have told her she was "in charge". Nor was he informed that Ms Alim had been promoted to the position of Supervisor, a fact he would need to have known about for rostering purposes.

[148] Mr Belk gave his evidence carefully and obviously recalled the relevant circumstances without any indication of self-interest. By contrast, Ms Alim's evidence was implausible in the respects I have discussed; it was in my view, affected by self-interest. I am satisfied that Mr Belk's evidence is to be preferred over that of Ms Alim on this point. That is why I have found Ms Alim did not work as a Supervisor, and was not promoted to that position.

[149] The next aspect of the pre-transfer circumstances requiring consideration relates to Ms Alim's increased leave balances. I have already recorded that Ms Alim said she was not informed of the increased pay rate; I infer that the same was the case for her leave balances, since there is no evidence that she – or any other

employee – was consulted about or informed of the fact that their leave balances would be increased.

[150] I accept the submission made for LSG that the most reliable documentation for the purposes of assessment of leave balances is Ms Alim's payslip for the period ending 26 December 2010, which shows a balance at that stage of holiday pay of 209.23 hours. There is no dispute that at that stage the balances were reliable. Ms Alim's payslip of 6 February 2011 showed the figure had increased to 264.64 hours; this was confirmed by the second schedule produced by Mr Belk which had been printed on 9 February 2011.

[151] Finally, Ms Alim suggested that the sum of $500 was paid to her, also on account of overtime entitlements which she said were due to her. On 11 July 2011, Mr Richards recorded, in the context of a meeting he and Mr Dasgupta held with Ms Park and Mr Dempsey, that eight transferred employees had been paid this amount by Ms Gorgner on the basis they would withdraw the authorities they had signed which sought wage and time records from PRI. Mr Richards noted that eight employees accepted the payment, but four did not. He confirmed that Ms Alim was one of the eight employees who accepted the sum which was offered. It was these four employees who, along with the Union, obtained compliance orders from the Authority, which were unsuccessfully challenged in this Court.[55]

[152] I do not accept Ms Alim's explanation that $500 was paid to her for unpaid overtime, for several reasons. First, Ms Alim would have to have been owed a very significant number of hours for overtime, if the value of that overtime was $500. There is no evidence that she raised a complaint to this effect with the Union – or with PRI. Having regard to the way in which Ms Alim raised her other concerns, I find it is probable she would have raised such an overtime issue with the Union, if such wages were actually owed. Secondly, there is no evidence that when it was paid, she was provided with appropriate documentation such as a payslip, or any other relevant documentation as would be expected so as to verify the hours of overtime worked for which payment was being made, and details of any PAYE deduction. Thirdly, at the meeting of 4 August, when Ms Park referred to the fact

[55] See [43] above.

Ms Alim had received $500 and that this was paid so she would withdraw her authority, there is no record or other evidence that Ms Alim denied that this was the reason for the payment. Significantly, she did not say it was on account of overtime worked.

[153] The better explanation is that the payment was made by PRI so that authorities given by former employees would be withdrawn and records which could incriminate PRI would not thereby be provided to LSG. I find that Ms Alim received the sum of $500 from PRI on the same basis as did the seven other co-workers. She regrettably succumbed to what Mr Dasgupta had described as Ms Gorgner's "intimidating tactics". The denial of the true reason for the payment of the $500 does Ms Alim no credit. I also find that the subsequent withdrawal of the authority to uplift records made it even more difficult to establish the truth as to her actual terms and conditions at the time of transfer. This incident reinforces the conclusion I have reached that aspects of Ms Alim's evidence are incorrect.

[154] In short, Ms Alim's account regarding her alleged promotion, increased hourly rate and enhanced leave entitlements is unreliable. I find that the enhancement of Ms Alim's terms and conditions, and those of most other transferring employees, was instigated by PRI shortly before the transfer as part of its anti-competitive strategy, with the intention of causing significant financial disadvantage to LSG.

[155] Although schedules and letters were provided by Ms Gorgner to Ms Alim and/or Ms Park, these have to be assessed as being part of the strategy just described. Such documents are unreliable, and do not record genuine employment arrangements.

[156] I also conclude that in the context of Ms Alim's impending transfer to LSG, she knew the increases were fictional. Her subsequent attempts to justify them are not plausible. Ms Alim knew she had not worked as a Supervisor entitled to be paid on a higher rate, and that the "promotion" could not be regarded as genuine. I find Ms Alim also knew that her explanation that she was entitled to more than 40 hours of additional leave as outstanding overtime was contrived, since PRI never said the

increase was on account of unpaid overtime, and her increases were credited at the same time as other transferring employees received increases that were not genuine. Some employees acknowledged to Ms Park – prior to the transfer – that the increases were not justified. I find it was common knowledge that the increases were artificial.

[157] Ms Meechan submitted that it was significant that Ms Alim had called no person from PRI to corroborate her assertion that she was promoted to the role of Catering Supervisor in response to persistent assertions of entitlement to promotion. It is well established that a negative inference can be drawn by the failure of a party to call a witness who might be expected to provide relevant evidence which would support an issue in the action.[56] I have reached a clear view that Ms Alim's statement that she was promoted and was working as a Supervisor is wrong, having regard to the factors which I analysed earlier. The absence of any supporting evidence simply reinforces my earlier conclusion.

[158] The result is that Ms Alim's arrangements which PRI represented were the applicable terms and conditions immediately before the transfer were a sham. PRI's representations were an attempt to disguise Ms Alim's actual terms and conditions. Ms Alim not only went along with PRI's statements as to her terms and conditions, but became complicit in representing them as real when she attempted to justify them. There was by the time of transfer a common intention to portray her terms and conditions on a basis which was different from those which the parties had hitherto agreed and worked to.

[159] Whilst it is the case that an employer may choose to provide more generous terms and conditions to an employee without negotiation or advice, such an employer nonetheless has an obligation to deal with that employee in good faith. This did not occur here. PRI made misleading and deceptive representations to LSG regarding Ms Alim's terms and conditions. As Woolford J found in the High Court litigation, this was "in order to make the contract financially disadvantageous for

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[56] *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, [1998] Lloyd's Rep. Med. 223, 240; *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731, at [153] to [155].

LSG".[57] From Ms Alim's perspective she wished to obtain the advantage of the enhanced terms and conditions, and she promoted the fiction.

Application of these facts to s 69I

[160] I have found that PRI deliberately inflated Ms Alim's terms and conditions, and that the representations which it made to LSG in that regard were fictitious. The schedules and letters provided to LSG by PRI did not accurately represent Ms Alim's employment arrangements, as assessed immediately before transfer. I have held that Ms Alim not only went along with the charade, she promoted it.

[161] An assessment of Ms Alim's employment arrangements following transfer must proceed on the basis of her actual employment arrangements, not those which were represented as being applicable. That is, immediately before the restructuring, Ms Alim's real terms and conditions were that she was a Catering Assistant on $15.96 per hour, not a Supervisor on $17.68 per hour. Her leave entitlements were those which applied prior to the artificial inflation of those by PRI in early February 2011.

Alternative argument

[162] In the alternative, it was submitted by Mr O'Brien that the applicable terms and conditions as at the date of transfer were those which PRI were apparently providing, so that they fell within the broad scope of s 69I(2). It was contended that the Court should find the increases became terms and conditions of employment capable of being breached through non-performance. Counsel argued that Ms Alim had a legitimate expectation that the increases would continue (in the case of the hourly rate) or be honoured (in the case of leave entitlements). This could be tested by the proposition that had Ms Alim changed her mind and not transferred to LSG, she would have been able to bring a successful claim in respect of the increases against PRI. Since the incoming employer replaces the outgoing employer, LSG is bound by the "legitimate expectations" which were created.

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[57] *LSG Sky Chefs New Zealand Ltd v Flight Catering Ltd*, above n 52 at [14].

[163] First, this alternate argument fails for the same reason as does the primary argument. Ms Alim's actual terms and conditions immediately before the transfer were not as represented, and she knew this was the case.

[164] As to whether there was a "legitimate expectation", I observe that this is a phrase often used without it being necessary to describe what it means, because this is usually obvious. For example, an employee on a series of fixed-term employment agreements may have a legitimate expectation of permanent employment. An employee could reasonably anticipate from the circumstances that the employment would continue, having regard to the nature of the employment relationship.

[165] But any such expectation must actually be legitimate. It cannot be founded on an unreasonably held premise or belief. And an expectation in this context is to be distinguished from a mere hope that the course of action will be pursued or that a particular outcome will take place.

[166] Having regard to circumstances where the increases affecting Ms Alim and most of the other transferring employees were obviously artificial, I find that Ms Alim could not have had a legitimate expectation that her employer had provided her with anything other than fictional increases; and that her apparent promotion was fictional also, since she was not working as a Supervisor and she was not entitled to be paid as one. I have found that she knew this was the case. She could not reasonably have expected that her employer – whether PRI or LSG – would continue to provide those increases.

[167] There can only be speculation as to what may have happened had she changed her mind about transferring. She may have been made redundant. She may have been deployed to a new role. Had she remained at PRI it is conceivable she could have raised an unjustified disadvantage against that entity for the unfair way in which she was treated. But such a claim would not have been for enforcement of the purported increases, since they were not genuine and she knew this, but for the way in which PRI unilaterally attempted to take advantage of her for its own purposes. Although I have found that she became complicit in the charade, I also consider that Ms Alim was a vulnerable employee who was a victim of PRI's anti-competitive

strategy. However, whether she could have pursued such a claim is hypothetical since Ms Alim did not remain at PRI; and speculation as to such a scenario does not establish Ms Alim has a valid alternative claim for the purposes of the challenge.

[168] For completeness, I refer to the authorities which were relied on for Ms Alim on this point: *Owen v McAlpine Industries*[58] and *Cook v MagnumMac Limited.*[59] Both cases concern situations where an oral offer of increased terms was made. There was no suggestion in either instance that the offer to the affected employee was not genuine, in the sense that it bore no real relationship to the work in question. Neither authority is of assistance with regard to a consideration of the provisions I am required to construe in Part 6A of the Act.

Did LSG recognise Ms Alim's terms and conditions as to monetary payments?

[169] The first cause of action pleads that LSG failed or refused to pay Ms Alim in accordance with the terms and conditions set out in the PRI CEA throughout her employment with LSG. This allegation is also relevant to other causes of action, such as the constructive dismissal claim, the breach of good faith claim, and the allegation that LSG refused to recognise and apply Ms Alim's terms and conditions of employment immediately before transfer, including her entitlements to sick, annual and alternative leave.

[170] LSG's Payroll Supervisor, Ms Manuatu, provided a comparative analysis as to Ms Alim's rate of pay, comparing ordinary hours and overtime hours, together with leave entitlements, calculated first according to the amount LSG actually paid which produced a total of $37,694.10 for her gross pay. Secondly, adopting the rates prescribed in the PRI CEA, it is clear Ms Alim would have been entitled to total earnings of $35,999.04. The latter analysis assumed that if Ms Alim had been paid $15.96 plus service pay (calculated with reference to a 28 April 2011 entitlement date), plus overtime of time and a half for hours worked over eight hours per day as per the PRI CEA, she would have earned less than the payment she received at the

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58 *Owen v McAlpine Industries Ltd* [1999] 2 ERNZ 819

59 *Cook v MagnumMac Ltd* [2012] NZERA Christchurch 186.

rate of $17.68 for all hours worked. On that basis, Ms Manuatu's analysis established that Ms Alim was overpaid by LSG in the sum of $1,695.06.

[171] Ms Alim's case does not proceed on the footing that the arithmetical analysis is incorrect. It proceeded on the basis of four challenges. The first is that Ms Alim's correct hourly rate was $17.68 per hour plus a KiwiSaver entitlement making a total of $18.03 per hour, an assertion which I have already rejected.[60] Secondly, it was asserted that the qualifying date for the assessment of her service pay entitlements was not correct. Thirdly, it is said that she was not correctly paid for overtime worked at LSG. Finally, it is suggested incorrect leave entitlements were adopted by LSG. I deal now with each of the remaining issues.

Service pay entitlements

[172] In the statement of claim, it was pleaded for Ms Alim that she had not received her correct service pay entitlements from LSG, having regard to the obligations contained in cl 7 of the PRI CEA which relevantly provides:

> Full-time workers who have completed four years current continuous service with the same employer or in the same establishment shall be paid an additional $5.02 per day for each day worked.
>
> Full-time workers who have completed five years current continuous service with the same employer or in the same establishment shall be paid an additional $6.25 per day for each day worked.
>
> Full-time workers who have worked six years current continuous service with the same employer or in the same establishment shall be paid an additional $7.64 per day for each day worked.
>
> …
>
> Part-time workers shall be entitled to pro rata of the allowance according to the hours worked in any one week. Entitlement will be based on hours worked not calendar year with one (1) year of service being 1880 hours worked.

[173] It was alleged that as Ms Alim began employment with PRI on 10 November 2005 and completed 1880 hours in her first year of employment, as at the transfer date she had completed five years "current continuous service", so that she was entitled to be paid an additional $6.25 per day from the transfer date until 10 November 2011. It was further pleaded that from 10 November 2011 until the

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[60] At [161].

cessation of her employment with LSG, she was entitled to an additional $7.64 for each day worked.

[174] I deal first with an interpretation issue. In my view the first three sentences of the above extract from cl 7 apply where a worker has been employed full-time on a continuous basis. Such a conclusion is warranted by the language used; and it accords with commercial commonsense. It does not apply, as appeared to be submitted for Ms Alim, to an employee who has completed the specified number of years of current continuous service, but not necessarily on a full-time basis except at the time of payment.

[175] Consequently I must determine the question as to when Ms Alim became a full-time worker. The evidence sourced from PRI does not support Ms Alim's claim. First, the schedules which were sent by PRI to LSG both before and after transfer recorded Ms Alim's start date, or "holiday anniversary date" as being 10 November 2005. That was in fact correct. Secondly, the sample of Ms Alim's PRI payslips for the period June 2010 to February 2011 show she was entitled to service pay at a daily rate based on four years' service at $5.02. This was consistent with her service entitlement anniversary date being after February 2006.

[176] Ms Alim said in her evidence that when she commenced working at PRI, she was working "nearly every day". She said she had at the time a part-time role at a rest home. She commenced with an afternoon shift, and then was transferred to a morning shift.

[177] Evidence produced from the Department of Inland Revenue (IRD) showed gross income as follows:

November 2005	$342.00
December 2005	$939.00
January 2006	$736.00
February 2006	$1,073.00
March 2006	$2,068.00

April 2006 $2,520.00

[178] Income thereafter never fell below the gross amount of $2,100, whilst Ms Alim was working for PRI.

[179] Mr Belk confirmed that Ms Alim had not initially started in the kitchen; he said she had commenced with a cleaning role, after which she was transitioned to kitchen work.

[180] There was an inconclusive discussion on this topic at the meeting attended by Ms Alim and Mr Richards with Ms Park on 25 August 2011. Mr Richards had been told at the meeting held a few days previously with Ms Alim and three other co-workers, that her "start date" was 10 November 2005. Whilst that may have been a correct indication as to when Ms Alim began her employment with PRI, it did not clarify when she became a full-time employee for the purposes of cl 7.

[181] At the meeting of 25 August 2011, a date for the commencement of full-time employment was discussed, namely 28 April 2006. The selection of this date was an attempt to resolve the question of when Ms Alim's full-time employment began, because it had not been possible up to that point to obtain relevant records from PRI, despite numerous requests.

[182] This date is consistent with the reasonably detailed earnings information which has been obtained from IRD; and is also consistent with the approach which had been adopted by PRI itself as to the payment of service pay to Ms Alim as evidenced by all the available payslips from PRI – particularly those which were provided to Ms Alim well before any question of transfer to employment to LSG arose.

[183] In the course of her evidence, Ms Park said that on the basis of the IRD information, she could have concluded that full-time status was achieved in March 2006. That was a fair concession which may have meant she had originally underestimated the relevant date by one month; but as was submitted by

Ms Meechan, that was not significant given the timing of Ms Alim's resignation in January 2012, that is, before a service milestone or anniversary date.

[184] LSG's case proceeded on the basis that an ordinary hourly rate of $17.68 provided adequate compensation for service pay, assuming that Ms Alim had four years continuous service from the date of transfer until 28 April 2011; and five years full-time continuous service thereafter. I find that a correct assumption was made by LSG, and that there had been no losses on this issue is confirmed by Ms Manuatu's evidence, to which reference has already been made.

Overtime claim

[185] Ms Alim alleged that based on a correct hourly rate of $18.03, she should have been paid overtime when working for LSG at time and a half, being $27.05. Having regard to her payslips, she claims she was underpaid by $467.41.

[186] Because I have found that her PRI hourly rate was $15.96, I accept having regard to Ms Manuatu's comparative analysis that payment at the rate of $17.68 per hour inclusive of overtime ensured she was properly compensated for the overtime which she undertook when required to do so. The same applies in respect of her claim that she was not properly compensated for two eight-hour call-back shifts where she alleged she should have been paid $486.81 but was only paid $282.88.

[187] There was a second category of overtime claimed where there were a number of days in which she was paid no overtime, no call-back or the incorrect amount; this totalled 14.75 hours, for which she claimed $398.91.

[188] For its part, LSG produced overtime authorisation timesheets, from which it is evident there was a manual system for the proper authorisation of overtime on a daily basis. An employee working overtime was required to sign the relevant timesheet, as was the appropriate supervisor. That in turn was subsequently approved by relevant managers. Such a system was consistent with the provisions of the PRI CEA, cl 5 of which made it clear that employees had to be "called upon to work … overtime"; that is, overtime was to be authorised.

[189] Ms Alim claimed there were 18 occasions over seven months when she said she worked overtime for which she was not paid. LSG was able to locate the relevant overtime records for all but four of those dates. Save for one entry, for 25 October 2011, the documentary evidence does not confirm Ms Alim worked overtime on any of the days she alleges she did. I am satisfied that LSG's process for authorising overtime was systematic and reliable. In particular, when an overtime timesheet needed to be completed for the Halal department in which Ms Alim primarily worked, it was – such as on 25 October 2011.

[190] On the basis of this material I am not satisfied that Ms Alim worked overtime on the dates to which she referred.

[191] The timesheet for 25 October 2011 records Ms Alim as working call-back and overtime for two and a half hours; she and her supervisor have countersigned the relevant entry, as have the appropriate managers. Her payslip records payment for two hours only. No allowance appears to have been made for 30 minutes. There is also doubt as to the few occasions for which LSG has not been able to locate the relevant authorisation records. These total 2.15 hours. Given the total earnings paid to Ms Alim by LSG, she has suffered no loss.

Non-payment for hours worked

[192] Ms Alim alleges that she was not paid for hours on certain days which she worked – namely 5 March 2011 (eight hours); 13 April 2011 (paid for 5.5 hours but worked for eight hours); 14 April 2011 (eight hours); 2 July 2011 (eight hours) and 3 July 2011 (eight hours). The total of hours allegedly unpaid is accordingly 34.5 hours. She also says that she submitted pay query forms every fortnight, but when she requested that personal information from LSG, she was provided with some only of those forms. Further, on one pay query form she recorded that she had previously filled out a query form which in relation to overtime, which had not been dealt with.

[193] The difficulty which arises with this particular aspect of Ms Alim's claim is that none of the pay query forms which LSG has retrieved from its archives relate to

any of the dates for which a claim is made. Mr Dempsey explained the process of checking which would be undertaken when a pay query form was submitted by an employee, if necessary checking the information contained in that form against automatic clocking records, the discussion of any issues with the employee involved, the approval of the claim and the subsequent archiving of the paperwork, which is held for seven years. A number of pay enquiry forms which Ms Alim had completed were produced, and Ms Park showed that the queries had been considered and had resulted in appropriate payments as verified by her payslips.

[194] Ms Alim stated that she had found one of her pay query forms in the bin, and she assumed Ms Park placed it there. Ms Park denied that this occurred. Such a possibility is inherently improbable since there is no evidence that Ms Park dealt with these authorities, and LSG's systems were, I find, reliable.

[195] I am not satisfied that Ms Alim's claim for unpaid work is established.

Other claims

[196] Next, I consider Ms Alim's claim that LSG did not allow for the fact that she did not wish to pay KiwiSaver contributions. She said she should have been paid $18.03 per hour instead of $17.68 per hour. Under the PRI CEA, the correct hourly rate without the employer paying KiwiSaver for a Catering Assistant was $15.96. The amount paid by LSG, $17.68 per hour obviously allowed for the fact she did not want the contribution to be paid.

[197] Finally, Ms Alim takes issue with a PAYE deduction which was made when she took bereavement leave on 14 and 15 August 2011. She says $27.55 per day was deducted rather than $14 per day. That is an issue between her and IRD.

Leave balances

[198] A claim in respect of the annual leave balance not recognised by LSG was premised on an assertion that PRI's inflated figure of 270.78 leave hours was correct. I have found that it was not.

[199] Ultimately, Ms Park dealt with this issue following Ms Alim's resignation. On 6 March 2012, she undertook a calculation as to the annual leave which should have been transferred by PRI, by taking the entitlement as per her wage slip of 26 December 2010, and calculating on the basis of wages worked until the date of transfer what the entitlement would have been at the date of transfer: 221.03 hours.

[200] Ms Park also made an adjustment for sick leave, on the basis that the PRI sick leave entitlement should have been five days; and for alternate leave, on the basis that the figure should have been 24 hours at the date of transfer. She concluded that for these two items there had been an overpayment of 16 hours.

[201] From the starting annual leave figure of 221.03 hours, Ms Park deducted 160 hours for which Ms Alim had been given a payroll credit on 8 September 2011, and the further 16 hours overpaid to produce a net figure of 45.03 hours, that is 5.63 days. This figure was introduced into the payroll system as an adjustment for annual leave. I am satisfied these were appropriate adjustments given the fact that PRI had artificially inflated Ms Alim's entitlements (I have previously found that she was not entitled to these for overtime), and that a statement of accurate entitlements as at the date of transfer were unavailable.

[202] The leave activity report produced by Ms Manuatu showed that the final pay entitlements were:

- Seven days alternative leave which at $141.44 per day resulted in a gross figure of $990.08.
- 10.09 days annual leave not taken which on the same basis totalled $1,435.18.
- 20.7 days holiday pay owing (as accrued leave) which on the same basis totalled $2,937.30.

[203] Accordingly, she was entitled to a final gross sum of $4,822.56, less PAYE. This is the amount of her final pay, as verified by her last payslip.

[204] As indicated earlier, this final position meant that on the basis of the terms and conditions which actually applied at the date of transfer to LSG, Ms Alim was overpaid by LSG in the sum of $1,695.06. Accordingly, the claims made as regards annual leave, accrued leave and alternative leave are not established.

Variation of agreement/interim agreement in relation to pay rate and leave totals

[205] It is common ground that there was no formal variation of pay rates as contained in the PRI CEA. It is accordingly unnecessary to deal with that topic further.

[206] Ms Meechan submitted that in the face of the unreliable and inaccurate information which LSG received from PRI at the time of transfer, it entered into a pragmatic arrangement by paying her an "elevated composite hourly rate", which she was not as a matter of fact entitled to, but which was to apply until LSG could get to the bottom of Ms Alim's true terms, conditions and entitlements.

[207] Initially, the decision to proceed in this way was taken unilaterally by Ms Park. Later, when Mr Richards became involved in May 2011 as Ms Alim's Union representative, he was informed of the arrangement. He did not oppose it, although he did support the efforts which were being made to obtain wage and time records from PRI; he also attended meetings to discuss possible resolutions of the issue. It is plain that Ms Alim wanted these issues to be finalised promptly and Mr Richards actively supported this by attending meetings and emailing Ms Park as requested by Ms Alim.

[208] Mr O'Brien submitted that if there was no variation, then there was no concept at law such as an "interim arrangement". An "arrangement" that fundamentally altered the terms and conditions of employment and the amounts paid to an employee even on an interim basis could only constitute a variation, there being no other legal concept. It was also argued that there was in fact no actual evidence of an "interim arrangement".

[209] Even if, however, the Court was to conclude that the interim arrangement was entered into which amounted to a breach of the PRI CEA, loss would have to be proved. Because Ms Alim was in fact overpaid, there is no loss. Consequently there can be no breach of contract claim on this basis and Ms Alim's claim in this respect is not established. That is not to say, however, that there are not concerns as to the process adopted by LSG to finalise the outstanding matters in relation to the rate of pay and leave entitlements; that, however, is better considered when assessing whether there was a personal grievance, a subject to which I now turn.

Does Ms Alim have a personal grievance?

[210] The first asserted personal grievance is pleaded as one of unjustified disadvantage. Ms Alim alleges that on 23 February 2011, LSG unilaterally varied the terms and conditions of her employment, that despite frequent objections from both her and her Union, LSG continued to apply its unilateral variation unlawfully, and failed to provide her with the terms and conditions of employment which had been transferred. On 28 July 2011, she raised a personal grievance for that unjustified disadvantage. A meeting was held on 4 August 2011 to discuss the grievance, following which payments continued on the same basis as before.

[211] For LSG it is submitted that as a matter of arithmetic this analysis cannot be sustained. Ms Alim was paid more by LSG than she was entitled to receive on the basis of her true terms and conditions. It was submitted that no evidence had been given with regard to any additional financial commitments which Ms Alim made in reliance of the increases in any event, whilst at LSG she was paid at a rate which was consistently higher than that she had received at PRI.

[212] I accept the submission made for LSG. The unjustified disadvantage grievance is raised on the basis that Ms Alim's transferred terms and conditions of employment were as stated by PRI. I have found that those were not Ms Alim's actual terms and conditions. The basis on which the grievance is raised is not made out, and the claim is not established.

[213] A claim for constructive dismissal was also raised. It was submitted that Ms Alim's resignation was the culmination of a series of actions intended by LSG to cause her to resign or to put improper pressure on her to accept changed terms and conditions.

[214] The particulars of this claim are threefold. First, it is asserted LSG failed to recognise Ms Alim's terms and conditions under the PRI CEA, and that on each occasion when she was not paid her correct entitlements there was a separate breach of her terms and conditions.

[215] Secondly, it is asserted that throughout Ms Alim's employment with LSG, she raised complaints herself, and through her Union representative about the breaches of her contractual entitlements. It is alleged that LSG failed to rectify these breaches or adequately address its concerns with her.

[216] Thirdly, it is alleged that on 28 July 2011, Ms Alim put LSG on notice that she was suffering stress as a result of LSG's breaches, and raised a personal grievance.

[217] It was argued that LSG consistently failed to honour Ms Alim's terms and conditions of employment, that it failed to be a good employer and act in a fair and reasonable manner in respect of its dealings with Ms Alim; and that it conducted itself in a manner calculated or likely to destroy the relationship of trust and confidence between her and LSG. As a result, Ms Alim had to seek attention for conditions that she had never previously suffered. She had no option but to resign and was accordingly dismissed constructively without justification.

[218] Mr O'Brien submitted that this claim fell within the third category of conduct which may be relied on in order to establish a constructive dismissal claim: that there had been a breach of duty which caused the employee to resign.[61] Mr O'Brien also emphasised the necessity of undertaking a two-step enquiry to determine whether there had been a breach of duty. The first question in such an enquiry was whether

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[61] *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA), at 139.

the resignation was "caused by a breach of duty on the part of the employer"; the second question was whether the breach of duty was sufficiently serious to make the resignation reasonably foreseeable.[62]

[219] Amplifying the pleaded grounds, Mr O'Brien submitted that there were a number of contractual entitlements over the entire period of Ms Alim's employment with LSG which caused her to resign. They were:

(a) Failed to recognise PRI's CA and its terms and conditions:
    (i) Failure to pay service pay entitlements (223 separate occasions).
    (ii) Incorrectly paying Ms Alim at the "non-KiwiSaver" rate (30 separate occasions).
    (iii) Failure to pay overtime (46 separate occasions).
    (iv) Failure to pay call back (2 separate occasions).
(b) Deducted incorrect PAYE rate on bereavement leave.
(c) Failed to pay Ms Alim for 40 hours per week in accordance with the PRI CA.
(d) Underpaid annual leave, accrued leave and alternative leave.
(e) Failing to recognise Ms Alim's position as supervisor throughout her employment with LSG of 223 days.

[220] It is submitted that Ms Alim received 30 payslips during her employment with LSG and she completed 30 pay query forms. The submission of each pay query form was an opportunity to correct past mistakes and properly record Ms Alim's terms and conditions, but it failed to do so. It is submitted this was a deliberate and intentional cause of conduct. Despite complaints being raised, breaches were not rectified.

[221] Mr O'Brien went on to submit that recognising the question of whether a breach was sufficiently serious is a question of fact and degree depending on the circumstances.[63] He submitted that LSG made it clear that it intended to perform the terms and conditions of Ms Alim's employment only as it pleased. Its actions were not what a fair and reasonable employer could have done. Concerns could have been

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62 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at 172.

63 *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* [1990] 2 NZILR 438, (1990) ERNZ Sel Cas 791.

raised, but Ms Alim was left in the dark for the duration of her employment about LSG's underlying concerns. Mr O'Brien emphasised the significance of the letter Ms Alim wrote on 28 July 2011, the unsatisfactory outcome of the meeting on 4 August 2011 and the inadequate follow-up thereafter. It was submitted that as a result Ms Alim became ill, seeking medical attention. Despite notifications from Ms Alim's representatives on 25 August, 16 September and 16 December 2011, issues were not resolved. Unsurprisingly Ms Alim then resigned.

[222] LSG denies these allegations. Ms Meechan submitted that Ms Alim – on whom the onus to establish the elements of the constructive dismissal cause of action lay – had not established any course of conduct or plan on LSG's part that was intended to procure her resignation. LSG submitted that its payments to Ms Alim exceeded what it was obliged to pay. Far from conducting itself in a manner calculated to destroy or seriously damage the relationship with Ms Alim, LSG had adopted a course of action, it says with the approval of the Union, to ensure she was not financially disadvantaged by the uncertainty that existed. It had taken that approach for many months. As far as the meeting on 4 August 2011 was concerned which took place after Ms Alim's personal grievance letter had been sent, LSG genuinely believed that matters were resolved. It continued to pursue PRI for accurate information thereafter through the High Court proceedings it had initiated. Ms Alim did not tell LSG, or even her Union, that she was contemplating resignation. She had not advised LSG she was suffering from depression or undertaking counselling. There was nothing that could have led LSG reasonably to foresee that Ms Alim would choose to leave her job.

[223] I begin my consideration of the constructive dismissal claim by finding that it is based on a core assertion which is not established. For the purposes of this cause of action Ms Alim asserts again that LSG did not respect her terms and conditions as transferred at face value. I have earlier in this judgment considered each of the respects in which it was asserted that LSG had failed to meet particular requirements of the PRI CEA. None of them have been upheld, and I have found that Ms Alim was paid more than her PRI CEA entitlements to the extent of $1,695.06.

[224] With regard to the allegation that Ms Alim's position as Supervisor was not recognised throughout her employment with LSG, if that is a contention that she should have worked as a Supervisor, I do not accept it. The "promotion" to the position of Supervisor was fictional. She had never worked in that role. I have found that her actual terms and conditions as transferred meant that she was a Catering Assistant.

[225] In any event, Ms Alim was offered a Bench Coordinator's role – which meant she would supervise a bench on which there were two to six catering assistants. Mr Richards, as Ms Alim's Union representative, considered that Ms Alim was one of six persons who should remain on their current rates and not transfer onto the LSG CEA in the meantime, but that an alternative arrangement should be worked out for them. Subsequently Ms Alim was offered the opportunity of working as a Bench Coordinator on an IEA; she says she was told about this by Mr Dasgupta when he came to her house in August 2011. Her evidence was that he advised her that if she were to sign this agreement she should be aware that she would not be paid overtime and that if she made mistakes she could be demoted or "fired on the spot". In her evidence Ms Alim went on to explain that Mr Dasgupta pressured her to accept one of the two choices which were being offered by LSG. Mr Dasgupta was not called to confirm this evidence, which was implausible. Further, there is no evidence that LSG prompted Mr Dasgupta to make statements of the kind referred to by Ms Alim. Nor is there evidence that LSG would have treated Ms Alim as she says Mr Dasgupta described. Rather, as was submitted for LSG, it is more likely she knew she did not have the experience or qualities to act in a supervisory role and she did not want to work under the IEA for that reason. I do not accept this element of Ms Alim's constructive dismissal claim.

[226] Nor do I accept that Ms Alim has established that she submitted 30 pay query forms. This is an exaggeration which is not sustained on the evidence. I do not accept that LSG acted in a way which was intended to cause Ms Alim to resign or to put improper pressure on her to accept changed terms and conditions. It acted responsibly in the face of inappropriate behaviour from PRI. I am not satisfied that Ms Alim has established the key elements of her constructive dismissal claim.

[227] However, there is one aspect of the constructive dismissal claim which is of concern. It arises from the question as to how the issues regarding Ms Alim's leave entitlements were resolved, in the face of regular requests to attend to these matters.

[228] I repeat the relevant chronology by way of summary. On 29 June 2011, Ms Alim and others provided a letter to the Union which was forwarded to Mr Dempsey raising concerns on several matters, which included a concern that a correct hourly rate was not being paid and that holiday and special leave entitlements were not appearing on payslips. Ms Alim herself returned to this issue when she wrote her personal grievance letter of 28 July 2011 to Ms Park.

[229] This resulted in the meeting of 4 August 2011, where amongst other things Ms Park told Ms Alim that she did not accept the alleged promotion, but she had agreed to pay her at a higher rate until the issue was sorted, and that letters were being prepared for employees with regard to entitlements, with the intention that an interim amount would be credited to their accounts whilst the issue was being resolved. Ms Park apologised to Ms Alim for the difficulties which had arisen with regard to her leave entitlements.

[230] A letter regarding outstanding balances was indeed sent to Ms Alim on 12 August 2011, in which Ms Park explained that she would like to go meet with Ms Alim and review such payslips as she had with a view to undertaking the relevant calculation. This resulted in Mr Richards becoming involved, supporting Ms Alim at a meeting of 25 August 2011. It is apparent that there was a discussion about the possibility of Ms Alim transferring onto the LSG CEA at $17.68 per hour. There was also discussion to the effect that the balance of her entitlements at transfer were approximately 220 hours for annual leave, 24 hours for alternate leave and eight days for sick leave. It is apparent that the parties agreed to meet again in early September. This did not occur.

[231] Twenty days leave was subsequently entered into the LSG payroll system on 8 September 2011, and this was reflected on Ms Alim's payslips as from 14 September 2011. This was an interim arrangement. There is no evidence that LSG told Ms Alim it had taken this step, or what it proposed to do next, or when.

[232] As far as Ms Alim's hourly rate and future role was concerned, LSG offered her two alternatives by its letter of 21 November 2011. The key term of the first was that she would agree to work under an IEA at the rate of $17.68 per hour, until the LSG CEA Catering Assistant rate exceeded that rate, at which time her rate of pay would be reviewed. The second option was that she agreed to transfer to the LSG CEA at $16.35 per hour gross. In both cases, other entitlements were offered so as to transition Ms Alim to one of the offered documents. The offer was open until 28 November 2011, and if she did nothing, her employment would continue under the PRI CEA. There was no response, so the status quo continued.

[233] Finally, on 16 December 2011, shortly before Ms Alim's resignation, Mr Richards sought confirmation from Ms Park as to Ms Alim's holiday entitlements. On 22 December 2011, Ms Alim asked for leave. This was followed by her resignation.

[234] From the foregoing summary it is evident that:

a) Ms Alim remained on the PRI CEA. In August she was offered a Bench Coordinator's role and in November she was offered a transitional arrangement as a Catering Assistant. In my view, LSG acted reasonably by offering these alternatives.

b) Also of concern is the fact that various issues as to her leave balances were not finalised prior to her decision to resign. The matter was under active discussion until late August; and an interim allowance was credited to payroll on 8 September 2011, although there was no specific consultation with Ms Alim to the effect that this would occur, or that it had happened. More significantly, there was no progress on this issue thereafter. In December 2011, Mr Richards told Ms Park he was unsure whether an "interim amount" had been agreed for Ms Alim. Yet it was an issue that was resolved in a straightforward and pragmatic way by Ms Park when she prepared a reconciliation for final pay purposes in March 2012.[64]

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[64] See [201] above.

[235] One of the elements of Ms Alim's constructive dismissal claim was the fact that she consistently sought resolution of the outstanding issues as to what her correct terms and conditions should be, and that this issue was never resolved. She alleged she was entitled to the advantage of the balances which PRI said existed as at the date of transfer. Whilst I have rejected that claim, there remains an issue as to whether the uncertainties as to her leave entitlements could have been resolved in a more timely fashion.

[236] At the hearing, I invited submissions from counsel on the question of whether the Court should assess these concerns as an unjustified disadvantage grievance, noting that the Court has the power under s 122 of the Act to make a finding that a personal grievance is of a type other than that alleged. The availability of such an approach was recently confirmed by the Court of Appeal in *Nathan v C3 Limited.*[65]

[237] Counsel addressed this possibility in their closing addresses. Mr Nicholson, junior counsel for Ms Alim, submitted that such an option was indeed available to the Court.

[238] Ms Meechan submitted that whilst it was possible to find that the issues took time to resolve, what LSG did was nonetheless reasonable in very difficult circumstances. There had been a significant effort to obtain relevant records from PRI, which had not succeeded. An aspect of this issue was that Ms Alim had been paid $500 to withdraw her authority for provision of copies of wage and time records. Counsel also submitted that if the grievance was to be characterised as one of unjustifiable disadvantage, the Court would need to determine the nature of that disadvantage – was the stress which Ms Alim suffered sufficient to meet this requirement?

[239] It is well established that the concept of disadvantage caused by unjustifiable action on an employer's part is a broad concept which can take many forms. It is not merely limited to material loss or demonstrable financial loss: *Alliance Freezing Company (Southland) Limited v New Zealand Engineering Workers*

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[65] *Nathan v C3 Ltd* [2015] NZCA 350, at [35].

Union.[66] In *Matthes v New Zealand Post Limited*, it was made clear that the Authority or Court may consider the actual effect of the employer's actions on the employment and is not confined to the employer's knowledge of the consequences of its actions at the time; whether there is a disadvantage "necessarily involves focusing on the present employment, considering the changes that have occurred, and assessing their impact on the employee".[67]

[240] I have already referred to the medical certificate which Ms Alim had received from her GP in mid July 2011 confirming workplace stress. There is also reliable evidence that in September and October 2011, Ms Alim attended a psychologist at the Counties Manukau District Health Board who diagnosed depression for which medication was prescribed. By early November 2011, she was described as being in "partial to full remission". Ms Alim also referred to the fact that she had attended counselling, and that it was a counsellor who suggested to her that she should resign. LSG was aware of the letter from her GP, but was unaware of any of the later consultations.

[241] I find that Ms Alim's stress, as verified by her GP in July 2011, and subsequent depression as verified in the Counties Manukau District Health Board's report of 31 October 2011 related to her employment issues.

[242] Whilst the situation in which LSG found itself was not of its making, it nonetheless had an obligation to resolve the uncertainties of the situation in a timely way. The ultimate solution which was adopted by Ms Park in March 2012 wherein she calculated Ms Alim's likely entitlements could easily have been adopted earlier, and would have relieved elements of the uncertainty which was affecting Ms Alim.

[243] I find that the undue delay in this respect were not the actions which a fair and reasonable employer could have taken.

[244] It is appropriate to award modest compensation for this established unjustified action grievance, which I fix in the sum of $3,000. I am required to

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66 *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering Etc IUOW* [1990] 1 NZLR 533 (CA) at 580.

67 *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 (CA) at 997-998.

consider the issue of contributory conduct under s 124 of the Act. There was a significant contribution to the situation created by Ms Alim's own assertion that there was indeed justification for her increased hourly rate and leave balances; and by her decision to accept the sum of $500 and withdraw her authority requiring PRI to provide wage and time records. I assess contribution at 50 per cent. Accordingly, LSG is to pay Ms Alim compensation in the sum of $1,500.

[245] I find that there is no other proven loss arising from the established personal grievance which could entitle Ms Alim to the award of any other remedy.

[246] Ms Alim sought a penalty on the basis that LSG breached its good faith obligations. This cause of action was based on the same allegations as were pleaded for the alleged constructive dismissal. Since that claim has not been established, this cause of action must also fail. For completeness, I find that although I am satisfied Ms Alim has a disadvantage grievance, the facts which support that finding do not justify a conclusion that there has been a breach of good faith entitling Ms Alim to a penalty.

Failure to provide wage and time records

[247] Ms Alim pleaded that on 8 February 2012 her then lawyer had requested copies of her wage and time records from the defendant. It was alleged that LSG had failed to provide "a full set of records". The pleading went on to assert that throughout her employment, Ms Alim submitted numerous pay query forms, and that copies of all of these had not been kept or produced. A penalty was sought.

[248] In the closing submissions for Ms Alim, additional breaches were asserted, such as a failure to enter into its payroll system the title and expiry date of the PRI CEA, and Ms Alim's classification under that CEA as Supervisor. It was submitted that these breaches were sufficiently serious as to warrant the imposition of a penalty.

[249] It has not been established to my satisfaction that pay query forms other than those which were produced to the Court were in fact completed and submitted to LSG by Ms Alim. Consequently the Court should not consider the possibility of

imposing a penalty for not producing such documents. The other alleged irregularities, although not pleaded, are minor and could not justify the imposition of a penalty.

Conclusion

[250] I am satisfied that Ms Alim has a disadvantage grievance for which she is entitled to a payment by LSG of compensation for $1,500 for humiliation, loss of dignity and injury to feelings, after allowance for her contributory behaviour.

[251] All other causes of action are dismissed.

Costs

[252] I reserve costs. Any party wishing to make an application for costs has 21 days within which to file and serve a memorandum, supported if need be by evidence; the other party will then have a further 21 days within which to respond. If required I shall resolve the costs issue arising from the interlocutory issues; any applications in that regard should be filed accordingly to the same timetable and should identify the quantum of actual costs associated with particular interlocutory applications. I shall resolve Ms Alim's de novo challenge as to costs at the same time; Ms Alim is to file and serve her submissions in that regard within 21 days; LSG is to respond within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 3.15 pm on 30 September 2015