IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 237
EMPC 361/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TOTAL PROPERTY SERVICES (CANTERBURY) LIMITED Plaintiff
AND	CREST COMMERCIAL CLEANING LIMITED Defendant

EMPC 154/2022

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CREST COMMERCIAL CLEANING LIMITED Plaintiff
AND	TOTAL PROPERTY SERVICES (CANTERBURY) LIMITED Defendant

Hearing:	2–3 May 2023 and submissions filed on 14 June 2023, 3 and 5 July 2023 (Heard at Christchurch)
Appearances:	P McBride, counsel for Total Property Services (Canterbury) Ltd C McGuinness and N Platje, counsel for Crest Commercial Cleaning Ltd
Judgment:	22 December 2023

JUDGMENT OF JUDGE K G SMITH

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[1] Total Property Services (Canterbury) Ltd and Crest Commercial Cleaning Ltd are competitors in the cleaning industry. In August 2019, Total lost the contract that it then held to clean a Christchurch high school. It was awarded to Crest.

[2] The school's decision to change its cleaner meant that Total's employees who worked at that site were entitled to elect to become employees of Crest. The right to transfer between employers is created by pt 6A of the Employment Relations Act 2000 (the Act).

[3] The dispute between those companies was whether Total complied with pt 6A. Crest says the Act required Total to provide to it "full" information, including actual employment records, for all employees who elected to transfer and the failure to do so warranted a compliance order and the imposition of penalties. Total says it was required to provide only so much information as was necessary to ensure that the employees transferred on the same terms and conditions of employment and that what it provided complied with the Act.

[4] At a very late stage the proceedings were blown by an unexpected side-wind. During closing submissions, Total raised an issue about the standing of Crest to challenge the determination.[1] In this new dispute Total queried whether its former employees had transferred to Crest, or to another company in that group of companies.

[5] That turn of events necessitated additional submissions and the Court's consideration as to whether the equity and good conscience jurisdiction in s 189 of the Act should be used to call for further evidence.

The challenges

[6] The Authority investigated a claim by Crest seeking compliance with pt 6A by Total and penalties for its alleged failure to comply. It held that what Total eventually supplied was sufficient, but its tardiness warranted a modest penalty. Total was ordered to pay a penalty of $1,000 to the Crown.[2]

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1 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2021] NZERA 402 (Member Beck).

2 At [61].

[7] Total elected to challenge the determination but only in a limited way. The company sought to overturn the penalty and to set aside certain paragraphs of the determination it perceived breached natural justice where they criticised it and its Managing Director, Paul Emery.

[8] Crest challenged the whole determination after obtaining leave to do so.[3] It sought to establish that Total breached pt 6A, that a compliance order was an appropriate remedy and claimed penalties of $20,000 for each identified breach.

[9] The divergence between challenges resulted in a direction that the whole matter would be considered by the Court.[4]

What happened?

[10] There is little disagreement about what happened.

[11] On 23 August 2019, Total was informed that the cleaning contract it held for a Christchurch high school was to end. The last day of its contract was 27 September 2019.

[12] Crest was the successful new cleaning contractor. On 23 August 2019, it wrote by email to Total requesting information to facilitate the transfer of staff and citing pt 6A of the Act.

[13] Crest's email asked Total for signed elections to transfer to be forwarded as soon as possible. A checklist was attached purportedly based on s 69OB of the Act, which defines individualised employee information.[5]

[14] Among the information Total was asked to supply was the commencement date on the school site for each transferring employee, a copy of the relevant employment agreement and any signed terms and conditions of employment, and for other information referred to in s 69OB. Crest anticipated final employee transfer costs

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3 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2022] NZEmpC 85.
4 Commonly called a de novo challenge. Direction given via minute dated 3 August 2022.
5 Employment Relations Act 2000, s 69OB(1) definition of "individualised employee information", para (a).

would have to be calculated, as provided for under pt 6A. It advised Total that a ten-day timeframe was preferable for the supply of that information.

[15] In the early stages of the transition of the cleaning contract the passage of information moved reasonably smoothly.

[16] Total notified its employees who worked at the school site about the change of the cleaning contract. On 3 September 2019, it sent to Crest a full list of staff at the site, not just those transferring. Crest received contact details, payroll information, time and hours of work information and rates of pay. The following day Crest was sent individual employment agreements for those who elected to transfer.

[17] On 9 September 2019, Total sent Crest a preliminary calculation of the final employee transfer costs and its employee handbook. On the same day, Christina Kelliher, Crest's Payroll Manager, sent an email about the records Crest required, particularly wages and time records, and the holiday and leave records for each employee.

[18] This information was sought for the duration of each employee's employment at the school. An alternative option was proposed if it would be easier to satisfy. Crest would accept payroll summaries accompanied by matching time and attendance records. The explanation given for requesting this information was its importance in "verifying the current terms and conditions", because many of the individual employment agreements did not include hours of work.

[19] Ms Kelliher asked three further questions that arose from reviewing the records provided to that point. Confirmation was sought as to whether the employees had worked for 52 weeks on the school site, about whether the alternative days owing to two named employees were earned from working on public holidays on the site or elsewhere, and if there were any separate documents for the office manual and company policies mentioned in the individual employment agreements.

[20] The following day, 10 September 2019, Total sent Crest holiday and leave records and a summary of earnings for the previous 12 months for each employee who

was transferring. It provided timesheets for the previous two pay periods along with corresponding payslips.

[21] Total answered Ms Kelliher's questions. She was informed that the employees only worked 48 weeks on the school site, the alternative days for the two named employees were not earned from working public holidays, and the only relevant separate document was the employee handbook that had already been supplied. It explained the alternative days by saying that since the employees in question were transferring, all their leave should be transferred, regardless of the site on which it was earned.

[22] Crest was not satisfied with this information. It wanted "complete records for each employee", not just 12 months summary data and recent timesheets, because in its view there needed to be sufficient information that would provide the same level of detail as a wages and time record. Total was informed that it did not have a discretion about what to supply.

[23] It is apparent that by about mid-September a stand-off began to emerge over what information to supply. Total considered it had supplied sufficient information to establish the terms and conditions of continuous employment including those relating to annual leave. Crest considered that insufficient information was supplied and criticised the impasse as "ridiculous".

[24] In mid-September, Total provided some additional timesheets for two employees who were transferring only part of their work which was, again, criticised by Crest as deficient.

[25] Two other issues emerged in correspondence between the parties during September that may have had an impact on the exchange of information. The first of them was a concern Mr Emery developed, after speaking with staff who might transfer, that Crest intended to impose a policy of pre-employment drug testing. Total did not administer such drug tests and had no policies providing for them. The second was over Crest's training requirement for staff who would transfer, including whether it would be paid and when it would be conducted. He raised these matters with Crest.

[26] On 10 October 2019, Total's final summary of annual leave and sick leave entitlements was provided to Crest. Having provided this information, it requested from Crest bank account details or an invoice so the final employee transfer costs could be paid.

[27] Throughout October 2019 and into November 2019, Total and Crest exchanged correspondence in which requests were made for, and answered about, access to further information or records. It emerged that Crest believed Total's calculations regarding certain entitlements were incorrect; Total's response was to request Crest's calculations, which Crest was not willing to provide in the absence of information to verify those calculations.

[28] On 30 October 2019, Ms Kelliher advised Total that without the wages and time records Crest could not verify the final transfer costs calculations provided by Total earlier.

[29] On 31 October 2019, Total provided further timesheets for two employees who were transferring only some of their work. Crest identified that timesheets for some of the pay periods for those two employees were missing and they were provided on 5 November.

[30] On 7 November 2019, Crest lodged a statement of problem in the Authority seeking orders against Total. On 13 November 2019, Total reiterated its request for Crest's calculations of the transfer costs or, alternatively, for that company to provide bank account details so that payment could be made. Crest's response was to advise that it was still waiting for the complete records for six employees who transferred.

[31] Later in November, Total offered to pay to Crest the greater sum of the available calculations which was approximately $150. That offer was not accepted and the final employee transfer costs have never been established or paid.

The issues

[32] The challenges and associated disputes gave rise to the following issues:

(a) Was there a breach of natural justice in the Authority's criticisms?

(b) Is Crest properly a party to the proceedings?

(c) What information is to be supplied under pt 6A by an outgoing employer in Total's position to an incoming employer in Crest's position?

(d) What did Total supply and was that sufficient to comply with the Act?

(e) If what Total supplied was insufficient is a penalty justified and, if so, in what amount?

Natural justice

[33] This part of Total's challenge is about paras [13] and [35] of the determination and a concern that both it and Mr Emery were unfairly criticised in them. Total's concern about para [13] was that it contained a quote relied on to provide pertinent context to the dispute. The quote attributed to Total comments that it was a nationwide company coupled with statements about its approach to the employment and payment of staff.

[34] Mr Emery explained, and I accept, that the quote and the website it came from were not raised during the investigation meeting and, consequently, there was no opportunity to explain that the website belonged to another company with a similar name. Total's case is that the quote wrongly coloured or influenced the Authority's approach to the problem it was resolving.

[35] In para [35], the Authority attributed to Mr Emery a mixed motive and a "reticence to being openly cooperative" in how his company dealt with Crest. In the paragraph Mr Emery was described as having a jaundiced view of Crest's business methods and may have had a degree of bitterness at losing the cleaning contract.

[36] Mr Emery said that there was no discussion with him, or anyone else from Total, during the investigation in which it was suggested he held the motives attributed to him. I accept his evidence.

[37] Mr McBride's submission was that both paragraphs depart from what is required by s 173(1)(a) of the Act, namely that in conducting investigations the Authority must comply with the principles of natural justice. He referred to the well-known line of cases about a decision maker providing an opportunity to be heard to any person who might be the subject of adverse comments before any are made.[6] He submitted that s 188(4) of the Act, preventing the Court from advising or directing the Authority, does not bar an observation from being made that what happened was inappropriate.

[38] It is regrettable that the quote was not raised with Total during the investigation meeting. If that step had been taken the error, which must have played some part in the final decision, could have been avoided.

[39] The position about para [35] is more nuanced. The issue is not about the Authority's ability to make adverse comments if they are warranted, but that before such a step is taken the person who may be criticised is placed fairly on notice of that risk and given an opportunity to respond.

[40] Mr Emery should have been provided with an opportunity to address the Authority's concerns before any comment was made. It follows that in the absence of such an opportunity they ought not to have been made.

[41] Having made those observations, the subjects referred to in paras [13] and [35] of the determination did not resurface in these proceedings.

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6 *Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) [*Re Erebus Royal Commission*]. And see, for examples, *O'Regan v Lousich* [1995] 2 NZLR 620 (HC); and *Campbell v Mason* [1990] 2 NZLR 577 (HC).

Is Crest Commercial Cleaning a proper party in these proceedings?

[42] Throughout the Authority investigation, and for almost the whole of these proceedings, the parties presented their cases on the basis that the dispute was between Total and Crest Commercial Cleaning Ltd. That understanding of the identity of the parties took a dramatic and unanticipated turn at the end of the hearing.

[43] During closing submissions, Mr McBride raised as an issue whether the transfer of employees was to another company, called Crest Commercial Services Ltd. He described this issue as being a fundamental jurisdictional point that was only identified at the end of Ms Kelliher's evidence.

[44] In answering a question from Crest's counsel during re-examination, Ms Kelliher explained the entities within the Crest Group for which she provided payroll services. They were Crest Commercial Cleaning Ltd, Crest Commercial Services Ltd and Master Cleaners Training Institute.

[45] Mr McBride cross-referenced Ms Kelliher's answer to a payslip for one of the employees who had transferred from Total, bearing the name of Crest Commercial Services Ltd.[7] The payslip was in evidence as part of Total's allegation that Crest was creating barriers in an effort to discourage employees from transferring.

[46] The submission was that the combination of Ms Kelliher's evidence, and the payslip, raised an issue as to the proper defendant in EMPC 361/2021 and plaintiff in EMPC 154/2022. The intended consequence of the submission seemed to be that Crest's claim in EMPC 154/2022 must fail, although the anticipated outcome for EMPC 361/2022 was not immediately apparent.

[47] Mr McGuinness had no advance warning about this turn of events and he was given an opportunity to address the subject. He took up that opportunity and subsequently filed submissions arguing that the passage from Ms Kelliher's evidence was taken out of context. That was because the question she was asked in re-

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[7] The payslip in question disclosed a deduction from final pay due to a lack of notice prior to a resignation, which this judgment should not be taken as endorsing.

examination was about payroll services and her answer needed to be considered in that light. She was discussing the complexity of those services and not intending to address the creation of new employment agreements or otherwise explain the structure and operation of companies in the Crest Group. I agree.

[48] Mr McGuinness also submitted, correctly in my view, that when Ms Kelliher was cross-examined the questions touched on the formation of the employment agreement with Crest not Crest Commercial Services Ltd. Her evidence was to the effect that the employment agreement for transferring employees was formed with Crest and that there was a cover sheet in that company's name verifying the terms and conditions of employment.

[49] The common bundle of documents contained the cover sheet in Crest's name and, while Ms Kelliher was not taken to it when giving evidence, that was obviously the document to which she referred.

[50] It follows that the transferring employees were employed by Crest and it is therefore properly a party to both proceedings. While that conclusion leaves a potential difficulty because another company's name is on the payslip, all that does is suggest some fluidity in how companies within the Crest Group were managed.

[51] This analysis means it is not necessary to consider the possibility of exercising the Court's jurisdiction in s 189 of the Act to call for further evidence.

What information must be supplied?

[52] Total and Crest accept that they are in an industry employing what are often referred to as vulnerable employees entitled to protection under pt 6A of the Act.

[53] Before considering the parties' submissions it is necessary to make some preliminary comments about pt 6A. Part 6A was introduced to the Act in 2004.[8] It

[8] By s 30 of the Employment Relations Amendment Act (No 2) 2004.

was amended in 2006.[9] Initially, it was divided into four sub-parts and then, in 2015 further amendments were made.[10]

[54] These proceedings concern only sub-pts 1 and 2. Sub-part 1 specifies categories of employees to which it applies and who are entitled to transfer between employers when a commercial transaction in identified industries means a restructuring of employment will occur.

[55] The object of sub-pt 1 is to provide protection to specified categories of employees as listed in sch 1A.[11]

[56] The categories in sch 1A are there because:[12]

(a) the employees work in sectors where business restructuring occurs frequently;

(b) their terms and conditions of employment tend to be undermined by that restructuring; and

(c) they have little bargaining power.

[57] Sub-part 2 provides for disclosure of information relating to transferring employees.

[58] The protection conferred by pt 6A gives the employees affected by a restructuring in the identified industries the right to elect to transfer to become employees of the new employer on the same terms and conditions of employment.[13] While not relevant to these proceedings, pt 6A provides a mechanism which would allow those employees who exercised the right to transfer to bargain for redundancy provisions in certain circumstances.[14]

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9 By s 6 of the Employment Relations Amendment Act 2006.
10 Employment Relations Amendment Act 2014. Section 48 repealed sub-pt 4.
11 Employment Relations Act 2000, s 69A.
12 Section 69A(2)(b).
13 Section 69A(3)(a).
14 Section 69A(3)(b).

[59] What triggers the application of this sub-pt is dealt with in s 69F. The section specifies that it applies to an employee where:[15]

> (a) the work is specified in sch 1A; and
>
> (b) as a result of a proposed restructuring the employee will no longer be required to perform work for the employer, and that work is then be undertaken by or on behalf of another person.

[60] The first step in this process of enabling an employee to transfer is to give notice of that right to the affected employees.[16] The notice must provide certain information, including whether the employees have a right to make an election to transfer, provide an opportunity to exercise that right, and information about the date by which it must be exercised. Importantly, the information supplied must be sufficient so that an informed decision can be made.[17]

[61] The right to transfer belongs exclusively to the employees. Under s 69I(2) a transferring employee becomes an employee of the new employer on and from the specified date, on the same terms and conditions as applied to the employee immediately before the specified date. However, s 69I(2)(c) precludes any entitlement to redundancy compensation from the previous employer because of the transfer.

[62] Part 6A recognises that as a result of exercising this right an employee may have more than one employer.[18]

[63] Continuity of service appears in s 69J. Under s 69J(1) a transferring employee is to have his or her employment "treated as continuous" including for the purposes of service-related entitlements whether they are legislative or otherwise. In s 69J(2) the Act contains provisions to avoid doubt, dealing specifically with entitlements earned under the Holidays Act 2003 and the Parental Leave and Employee Protection Act 1987.

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15 Sections 69F(1)–(2).
16 Section 69G.
17 Section 69G(1)(c).
18 Section 69I(3).

[64] The final sections in sub-pt 1 relevant to these proceedings are ss 69LA and 69LB. Section 69LA deals with the apportionment of liability for costs of service-related entitlements belonging to the transferring employee. Section 69LB contains a mechanism to resolve disputes about apportioning that liability.

[65] Disclosure of information relating to transferring employees is dealt with in sub-pt 2. The sub-pt has a separate object; to make provision for the disclosure of employee transfer costs information and individualised employee information where an election to transfer has been made.[19]

[66] Both employee transfer costs information and individual employee information are defined terms.[20] The definition of individualised employee information is in s 69OB. It is central to the dispute and is therefore set out in full:

> **individualised employee information—**
>
> (a) means information about an employee kept by the employee's employer for employment-related purposes, including—
>
> (i) any personnel records relating to the employee; and
>
> (ii) information about any disciplinary matters relating to the employee; and
>
> (iii) information about any personal grievances raised by the employee against the employer; and
>
> (iv) information about an employee that the employee's employer is required to keep under this Act or any other enactment, for example,—
>
> (A) the employee's individual employment agreement, the current terms and conditions of employment that make up the employee's individual terms and conditions of employment, or the relevant collective agreement (as the case may be); and
>
> (B) a copy of the wages and time record; and
>
> (C) a copy of the holiday and leave record; and
>
> (D) a copy of the employee's tax code declaration; and
>
> (E) details of any employer contribution (as defined in section 4(1) of the KiwiSaver Act 2006) and any deductions of contributions from the employee's wages for the purposes of the KiwiSaver Act 2006; and

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19 Section 69OA.

20 Section 69OB.

(F) details of any deductions from the employee's wages made under section 36 of the Student Loan Scheme Act 2011; and

(G) details of any deductions from the employee's wages made under Part 10 of the Child Support Act 1991; but

(b) does not include any information about the employee that is subject to a statutory or contractual requirement to maintain confidentiality.

[67] Section 69OEA deals with the disclosure of employee information in the following way:

> **69OEA Disclosure of individualised employee information**
>
> (1) This section applies if an employee elects to transfer under section 69I to a new employer.
>
> (2) The employee's employer must provide the new employer with individualised employee information about the employee.
>
> …

[68] Individualised employee information must be provided as soon as practicable but no later than the date when the restructuring takes effect or on a later agreed date.[21]

[69] There was no disagreement between Total and Crest over the procedural steps required to be taken and no dispute that adequate notice containing relevant information was given to the employees entitled to elect to transfer. Where they disagreed was over the ambit of what Total had to supply to comply with ss 69OEA and 69OB(1)(a).

Crest's case

[70] Mr McGuinness' submissions emphasised that the purpose of pt 6A was to preserve the ongoing employment of vulnerable employees and needed to be considered accordingly. He drew on observations to that effect by the Court of Appeal in *Pacific Flight Catering v LSG Sky Chefs New Zealand Ltd*, which while decided before amendments were made to pt 6A in 2015, still captures its purpose.[22]

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21 Section 69OEA(3).

22 *Pacific Flight Catering v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386.

[71] Mr McGuinness submitted that the required information must be supplied promptly, unless there was agreement otherwise, which had not happened in this case.[23]

[72] Turning to the definition of individualised employee information, the submission was that its unlimited and broad opening words required information kept for employment-related purposes to be provided, stressing that it includes "any personnel records relating to the employee". On this analysis, the only circumstance that might excuse a company in Total's position from having to comply is where confidentiality is to be maintained.[24]

[73] To support this broad reading, attention turned to the scope of the information described in the four sub-sections of the definition introduced by the word "including", to show that what follows is not exhaustive. The sub-sections differentiate between personnel records, disciplinary matters, personal grievances and information kept by operation of law.

[74] Particular weight was placed on the fourth sub-section, s 69OB(1)(a)(iv), because it was very broad, incorporating any statutory requirement to keep records. Examples relied on included providing the employment agreement, the wages and time record, holiday and leave record, tax code information and details maintained under the KiwiSaver Act 2006, Student Loan Scheme Act 2011 and Child Support Act 1991.

[75] Mr McGuinness' point was that the definition is directed at ensuring all information is provided.

[76] Two specific points were made about the scope of the wages and time records mentioned in the definition. The first point was that the phrase should be interpreted in accordance with s 130 of the Act, which defines those records. The introductory words to s 130 stipulate that every employer "must at all times keep a record" and the

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23 As highlighted by the timeframes in the Employment Relations Act 2000, s 69OEA(3).

24 Employment Relations Act 2000, s 69OB definition of "individualised employee information", para (b).

section lists what must appear in, or be addressed by, the wages and time record. The other prescriptive element referred to is s 130(1A) under which records must be kept in a written form or in a manner that allows the information recorded to be easily accessed and converted into writing.

[77] Mr McGuinness' second point arose from s 130(2), under which an employee must on request be granted access to the wages and time records. The requirement to keep the record and the right of access to it, he submitted, meant the whole record needed to be available to Crest from the beginning of the new employees' employment. The six-year record keeping requirement and the fact that a failure to comply may attract a penalty in the Authority, were also said to point towards the individualised employee information being comprehensive.[25]

[78] Similar observations were made about the scope of information that must be retained by an employer under the Holidays Act. Section 81(2) of that Act requires the employer to keep a record of the number of hours worked each day in a pay period and the pay for those hours, and the employee's current entitlement to annual holidays. The record must also be kept for not less than six years.[26]

[79] Rounding out these submissions, Mr McGuinness argued that the breadth of the information to be supplied is further illustrated by an employer being required to keep, for example, tax-related information under the Tax Administration Act 1994 which requires its retention for seven years.[27]

[80] Mr McGuinness argued that the information to be provided was cast in broad terms deliberately. The breadth of the definition, he said, demonstrated that Parliament was concerned to ensure that more, not less, information accompanied the transferring employee.

[81] Providing this information was said to serve a practical purpose as well. The Act not only allowed the new employer to understand and be informed about the new

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25 Section 130(4).
26 Holidays Act 2003, s 81(4).
27 Tax Administration Act 1994, a 22AA, including relating to the Income Tax Act 2007, Child Support Act 1991, Student Loan Scheme Act 2011 and Accident Compensation Act 2001.

employee, but it prevented a disgruntled former employer, by definition a competitor, from disrupting and/or delaying a smooth transition of the workforce.

[82] In summary, therefore, Crest's case was that the text of s 69OB was "plain on its face" and what Total had to supply was essentially codified. There was no ambiguity in sub-pts 1 and 2 to lead to any other outcome and that interpretation was supported by the purpose of sub-pt 1.

Total's case

[83] Total's case was that:

(a) the purpose of pt 6A is the preservation of transferring employee's current terms and conditions of employment; and

(b) the information transferred is only properly to identify and support the purpose of pt 6A and its extent is informed by that purpose.

[84] Mr McBride cautioned against seeing the statutory requirement as extending to providing so much information that it would allow an unjustified window through which the new employer could observe how an outgoing employer conducted its business.

[85] Total was said to have adopted an industry practice to the necessary disclosure and the disagreement which emerged was largely about extraneous matters, exemplified by Crest's demand for timesheets. Crest's intention to audit Total's compliance with its legal obligations was criticised as excessive and misplaced.

[86] In Mr McBride's submissions, Total saw the interrelationship between ss 69I, 69OB and 69OEA as supporting a narrower approach to what must be supplied than delivering all information about an employee it possessed. In this analysis the driver for what must be supplied is establishing continuous employment on the same terms and conditions.

[87] Mr McBride argued that the relevant terms and conditions to be established are those that existed just before the commercial transaction resulting in the transfer of staff. This proposition was derived from the conclusions in *Nisha v LSG Sky Chefs New Zealand Ltd*.[28] In that case, the Court analysed s 69I and held it meant those terms and conditions that could be properly described as current so that, depending on the circumstances of the case, the focus may be on the position that existed the day before the transfer.

[88] Given the outcome in *Nisha*, the submission was that the definition in s 69OB did not dictate the scope of what must be provided, it went no further than listing or demonstrating the types of information that may be relevant. What determined relevance was, therefore, the connection to establishing the employee's continuing terms and conditions of employment as they stood immediately before the transfer.

[89] That proposition was advanced as a common-sense way of identifying what individualised employee information must be supplied. To illustrate this approach Mr McBride referred to the lack of connection between an employee's current terms and conditions and some information that an outgoing employer in Total's situation may possess, perhaps for no other reason than it was at one time pertinent. As examples he called into question the relevance of purely historical tax information, or details of fines previously deducted from wages but which were no longer owed, redundant child-support payments where a legal obligation to pay them no longer existed, or other lawful deductions that had ceased to be required because the commitment was satisfied.

[90] In the same category, Mr McBride classed historical and spent disciplinary records and personal grievances. They were argued to have no bearing on the existing employment relationship immediately before the transfer and could not therefore have any relevance to the new employment relationship created by the election to transfer. He submitted that the need to preserve confidentiality, referred to in s 69OB(1)(b), illustrated that not all disciplinary and personal grievance records were intended to be supplied.

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[28] *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171 at [97]–[99].

[91] Turning to Crest's submissions about s 81 of the Holidays Act, and s 130 of the Act, Total's position was that they do not assist in this analysis. It acknowledged that those records must be kept for up to six years but pointed out that there is no limit on the actual length of time for which the record can be maintained. In any event, those records are able to be accessed by the employee, that person's representative or a Labour Inspector. An employer in Crest's position is not referred to in either section as having a right to access the entire record and there is nothing in s 69OB, it was said, that specifies the span of time over which the information must be supplied to comply with it.

[92] That analysis led to a submission that where the records sought were irrelevant to the immediate terms and conditions of employment as at the specified date of transfer s 69OB did not require the information to be provided. That meant, it was said, that there was no valid basis for any records to be provided beyond the maximum of one year required to calculate wages and holiday entitlements.

[93] Lastly, Mr McBride submitted that there is no statutory right for Crest to request original timesheets, as it had done, because they were not part of the wages and time record.

Analysis

[94] The starting point is the Legislation Act 2019, requiring that the meaning of legislation must be obtained from its text in light of its purpose and context.[29]

[95] In *Commerce Commission v Fonterra Co-Operative Group Ltd*, the Supreme Court held that ascertaining the meaning should always be cross-checked against purpose and regard may be had to the immediate and the general legislative context, and the social, commercial, or other objective of the enactment may also be relevant.[30]

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29 Legislation Act 2019, s 10.

30 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22], in the context of the Interpretation Act 1999, s 5 (now repealed).

The text

[96] The text of ss 69OEA and 69OB may favour the disclosure of all information held by an employer about a transferring employee.[31]

[97] Section 69OEA is mandatory, the outgoing employer "must provide" individualised employee information. The language of the section does not suggest that what is to be supplied is subject to any evaluation about relevance, or that the record may be edited or summarised before being supplied.

[98] Section 69OB(1)(a) introduces the definition of individualised employee information so that it means information kept for "employment-related purposes". After referring to what might be seen as general information about an employee, the balance of the definition appears as further sub-paragraphs of s 69OB(1)(a)(iv), expressed as examples of what must kept under the Act or any other enactment. The definition is not exhaustive, indicated by "including" being used in the introduction and given the ambit of sub-para (iv), which uses general words followed by examples.

[99] The only stated exception is in s 69OB(1)(b), excluding information that is confidential.

[100] Some support for a broad reading of the text flows from the scope of the reference to "any personnel records relating to the employee". What is meant by personnel records is not defined and the phrase is not repeated in pt 6A. The phrase suggests, at first blush, everything that has been kept by the outgoing employer about the transferring employee.

[101] However, reading the section in the broad way invited by Crest overlooks two potential qualifications. The first one arises from the expression itself. The other comes from considering other sections in pt 6A (in particular ss 69A, 69I and 69J) and in the Act as a whole.

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[31] The Act contains two s 69OB(1)(a), the first one deals with transfer costs information while the second defines individualised employee information.

[102] Although not overly precise, the words "employment-related purposes" may indicate some limitations by potentially excluding information that has ceased to fulfil that function or purpose.

[103] Additionally, the definition read in conjunction with the object in s 69A, and the language in ss 69I and 69J may suggest a potentially narrower meaning of what must be supplied. Section 69I vests the right to transfer in the employee and when it is exercised the same terms and conditions apply while s 69J refers to that employment being treated as continuous.

[104] The linkage to on-going terms and conditions of employment and continuity of service may reduce the ambit of what must be supplied by excluding information having no bearing on those matters.

[105] There is one other section of pt 6A which could support a broad interpretation. Section 69G deals with the notification an outgoing employer must provide to an employee in relation to the right to make an election to transfer. That section prescribes information that must be provided to the affected employees. The employee must be notified in writing that their individualised employee information includes *any* disciplinary matters and *any* personal grievances raised by those employees against the employer.[32]

[106] There is, therefore, some tension between two potential interpretations based on the text alone.

The purpose

[107] While the Act does not use the term "vulnerable employees" that expression has become a shorthand to refer to the types of employees whose work is identified in sch 1A.[33] In a slightly different context, in *Pacific*, the Court of Appeal noted that the purpose was to provide for a seamless transition from the transferring employees'

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32 Section 69G(2)(e)(ii) (emphasis added).

33 See, for example, *Service Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2012] NZSC 69 at [10].

point of view.[34] In that case, Holiday Act entitlements were in issue but the expression of purpose is applicable to the balance of part 6A.

[108] There are no Parliamentary papers that might assist any greater description of the purpose of pt 6A beyond the stated objects in sub-pts 1 and 2; namely the protection of the specified categories of employees. When the Employment Relations Amendment Bill 2013 was introduced its explanatory note referred to Government policy aiming at creating an employment relations framework that increased flexibility and choice, balanced fairness for employers and employees, and reduced compliance costs for genuine small to medium-sized enterprises.[35] A brief comment was made in the explanatory note about continuity of employment and that the proposed changes were to address issues of lack of clarity and certainty for employers while maintaining key benefits for employees. The note referred only to the provision of detailed information, in order to assist the new employer in providing continuity of employment for transferring employees, and went no further.

[109] At the Committee stage of the Bill, a brief comment by the Minister of Workplace Relations and Safety reiterated the explanatory note by stating that the amendments were to provide clarity about the obligations of the outgoing employer and incoming employer under a restructuring. The Minister said that employees would have enough time to consider their options and the incoming employer would have a clear understanding of the timeframe for getting that information and an understanding of what employees were being taken on.[36]

Discussion

[110] There is a clear intention to ensure that employees in industries subjected to the risk of frequent changes, such as cleaners, are not disadvantaged when businesses restructure. That is to be achieved by ensuring that when an election is made they continue to enjoy the terms and conditions of employment applicable immediately

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34 *Pacific Flight Catering Ltd*, above n 22, at [32]; unsuccessfully appealed in *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158.

35 Employment Relations Amendment Bill 2013 (105–1), Explanatory Note.

36 (22 October 2014) 701 NZPD 166. While Total provided copies of Cabinet papers they have not been reviewed in this analysis; See *Sky City Auckland Ltd v Gambling Commission* [2007] NZCA 407 at [39]–[42]; *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [51].

prior to the commercial transaction being completed, but that analysis stops short of being a complete answer to this problem.

[111] That raises as an issue what is contemplated by continuous employment and the extent to which obligations are assumed and transferred. Ordinarily, employment agreements can only be changed when the parties agree.[37] They cannot be the subject of an assignment or novation without that agreement.[38] In the absence of clear words indicating something else was intended, it seems unlikely pt 6A was intended to significantly alter the position at common law.

[112] While some information will easily be identified as relevant to continuous employment, some of the matters listed in s 69OB(1)(a) are less obviously connected to that outcome. An employment agreement will usually establish when employment began and its terms such as pay or contractual entitlements including those benefits tied to the length of service.

[113] Less obviously relevant to continuous service are disciplinary matters and personal grievances. Neither of them are likely to have any bearing on establishing the terms and conditions of employment. It is notable, however, that the notice given to employees under s 69G(2)(e)(ii) alerts them to the fact that the information that will be provided includes disciplinary matters and personal grievances.

[114] However, pt 6A does not expressly state that the new employer may take into account the employee's performance with the outgoing employer, for example in dealing with work performance or to allow a warning for poor performance given by the outgoing employer to be relied on by the new employer.

[115] The only section of pt 6A that deals with liabilities is s 69LA, which provides for apportionment of costs for service-related entitlements. Under s 69LA(3)(a) the examples of the types of costs being apportioned are for unused annual holidays or alternative holidays. Under s 69LA(3)(b) the new employer becomes liable for the

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37 *United Food and Chemical Workers Union of NZ v Talley* [1992] 3 ERNZ 423 (EmpC).

38 *Wellington, Marlborough, Westland, Nelson and Taranaki Local Bodies' Officers' IUOW v Feilding Borough Council* [1983] ACJ 629 (Arbitration Court); and *Southern Distribution Workers Union v Tourist Souvenirs Ltd* [1989] 1 ERNZ 952 (LC).

accumulated cost in certain circumstances, for example in relation to available sick leave.[39]

[116] What s 69LA does not do is make the new employer liable for any other debts or legal obligations that may have accrued as between the employee and the outgoing employer. An employer in Crest's position is not, for example, responsible for unpaid or underpaid wages that accrued when the employee worked for the outgoing employer. Nor does s 69LA make the new employer liable for any compensation that may flow from a personal grievance that arose while the employee worked for the outgoing employer.

[117] Had Parliament intended an employer in Crest's position to assume more extensive liabilities than those for service-related entitlements it is reasonable to conclude that more would have been included in pt 6A.

[118] While that analysis may assist Total, the difficulty it faces is in the text of s 69OB, the interpretation of which is not affected by considering the purpose of pt 6A.

[119] While there is an attractiveness to Mr McBride's submissions, confining what must be supplied, they run into some difficulty in the text of ss 69OB(1)(a)(iv)(B) and (C). Those sub-sections incorporate into the definition records that are required to be kept by law which are prescriptive and extensive. It is difficult to see what records the definition might be referring to if not for those held by the outgoing employer, for the obvious reason that until the transferring employee starts work that employee will not have a wages and time record, or holiday and leave record, with the new employer.

[120] Likewise, the plain language of sub-section (D) requires the provision of the tax code declaration. There is the potential for some leeway in the balance of the sub-section where it refers to deductions made under the KiwiSaver Act, Student Loan Scheme Act and Child Support Act. Reading together the introduction to the definition referring to what is kept for employment-related purposes combined with the sub-

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39 Employment Relations Act 2000, s 69LA(2).

sections referring to "any deductions" under those sections suggest that only current deductions or payment are intended.

[121] The conclusion I have reached, therefore, is that insofar as s 69OB(1)(a) is concerned what must be supplied to satisfy subs (i)–(iii) may be qualified by the information being current in the sense that it provides to the new employer information relevant to establishing the terms and conditions of employment that will continue. It follows that disciplinary letters that are no longer relevant, or resolved personal grievances, do not form part of the information to be provided because they are no longer kept for employment-related purposes. If an employee remains employed after having raised a personal grievance, it follows that resolution of it was reached which is likely to have been reflected in a confidential settlement perhaps under s 149 of the Act. If the settlement terms are not to be disclosed, it follows that the original problem may now be spent.

[122] There is, however, no leeway when it comes to the information to be supplied under ss 69OB(1)(a)(iv)(B) and (C). Where what is in issue are the wages and time records or holiday and leave records the definition is clear. The records that must be kept under s 130 of the Act and s 81 of the Holidays Act must be supplied.

What was supplied and was that sufficient?

[123] By 9 September 2019, Total had sent to Crest:

(a) Written elections to transfer by 11 employees.

(b) Individual employment agreements for the transferring employees.

(c) A spreadsheet showing set hours of work, rates of pay and leave balances.

(d) Total's employee handbook.

(e) A preliminary final employee transfer costs spreadsheet conditional on updated balances being provided at the time of transfer.

[124] On 10 September 2019, Total supplied the following further information for the transferring employees:

(a) Holiday and leave data.

(b) Summaries of the previous 12 month earnings and calculations.

(c) Payslips and timesheets for two pay periods.

[125] On 12 September 2019, Total supplied further employee timesheets for three pay periods. Around this time, Total also provided copies of disciplinary letters, tax code declarations and KiwiSaver information. On 16 September 2019, it supplied some redacted timesheets for the two employees working across multiple sites.

[126] On 25 September 2019, Total sent to Crest further sick leave information.

[127] On 10 October 2019, Total sent Crest its calculation of the final employee transfer costs spreadsheet. On 31 October 2019, it sent Crest the full timesheets for the two employees working across multiple sites, with some previously missing timesheets being supplied on 5 November 2019. It emerged during the hearing that, in relation to one employee, instead of providing further information Total inadvertently duplicated copies of material sent earlier.

[128] Mr Emery described what Total had supplied as being consistent with industry practice. Mr McBride submitted that eight weeks of timesheet records and full wages and time record summaries for up to 12 months for the six staff who worked on the site would have been sufficient. That is, it would have confirmed that those employees worked on the site, their normal hours of work, and provided enough information to calculate leave balances.

[129] I accept Mr McBride's submission that from the information supplied Crest ought to have been able to assess that the transferring employees had worked on the site and their hours of work for all but one employee. As Mr McGuinness pointed out,

information relating to that one employee was confined, apparently due to an administrative error, to four weeks of timesheets.

[130] Mr McGuinness' point was that industry practice Total relied on had not in fact been adhered to and, since that employee had also taken periods of sick leave during those four weeks, the information supplied was insufficient to show a pattern.

[131] Having made that observation, I am not persuaded that there was any deficiency in Total's refusal to supply timesheets to Crest. The definition in s 69OB cannot be read as requiring that and, in any event, the reason for seeking that information was not compelling. Crest acknowledged that it was planning to undertake a sort of audit in which an assessment was made about whether Total had properly paid its employees.

[132] Ms Kelliher explained the desire to do so in two ways; by being satisfied about the accuracy of the information Crest received and to prevent what was described as a daisy-chain effect. That is, to avoid a previous error being passed on to successive employers. Since Crest is not liable for any wage-related debt Total may owe to its former employees, including in relation to any inadequate record-keeping for their period of employment with Total, Ms Kelliher's concern was misplaced.

[133] While Crest was entitled to be satisfied that the terms and conditions were properly identified, that is different from auditing Total to ensure its records and historical wage payments were correct. That function is something that can be undertaken by the employee or their representative, or by the Labour Inspector if any concerns are raised.[40]

[134] At one point, when Total was declining to supply further information, it was concerned that the record being sought stretched back six years to coincide with the statutory timeframe in which some records were required to be kept. At that time there were two employees whose service was extensive, one who had worked for over four years and the other for more than a year. The method by which Total kept the

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[40] Employment Relations Act 2000, s 130(2).

information being sought, if it was to be supplied, would have involved a substantial administrative task in pulling together the required record.

[135] As it transpired, Total's employee with the longest length of service did not transfer and it appears that of those who did one had about 59 weeks' worth of service.

[136] While what Total supplied was reasonably comprehensive the various documents that were supplied, even when read together, did not comply with requirements 130 of the Act in some respects. Technically the age of employees had to be recorded if they were younger than 20 years old.[41] Total had employees aged under 20 so that information should have been provided. For Total's employee who had been employed for about 59 weeks at the time of transfer it supplied payroll information for 52 weeks, meaning that there were seven more weeks of payroll information that should have been disclosed.[42]

[137] Although the issue was not free from doubt, it is likely that the spreadsheet Total provided in early September 2019, disclosing information about when the employees began, their usual days of work, pay rate and hours of work did not comply with s 130. That was because it did not specifically identify the number of hours worked each day, as required by s 130(1)(g).

[138] Total had responses to these concerns. It did not pay youth rates, and therefore saw no utility in keeping the information. In fact, Crest could not have taken advantage of any youth rates for the simple reason that it was required to employ staff on continuous terms and conditions. Further, the missing payroll information ought not to have disadvantaged it in establishing terms and conditions of employment.

[139] The position about the spreadsheet is more equivocal because it turns, at least partly, on the nature of the information required to be kept under the section. While it is possible, and Total acknowledged, that there were occasions where employees worked slightly different hours from those referred to in the spreadsheet the information ought to have been sufficient to enable Crest to undertake the work

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41 Section 130(1)(b).
42 Section 130(1)(h); and see s 130(2).

required to establish the relevant terms and conditions of employment and to understand the employees it was to engage.

[140] So far as the holiday and leave record is concerned, what was supplied complied with s 81 of the Holidays Act with one exception. The information did not disclose the number of hours worked each day in a pay period and the pay for those hours as is required by subs (2)(c). That requirement in fact, mirrors s 130(1)(g) of the Act. However, in relation to one employee for whom only four weeks of information was supplied the calculation of holiday pay was potentially compromised.

[141] In summary, therefore, there has been what I regard as minor or technical breaches of pt 6A because what was supplied fell short in respect of s 81 of the Holidays Act for the holiday and leave records and s 130 of the Act for the wages and time records.

A penalty?

[142] Both companies are competitors in this industry. Both of them had strong views about what was required demonstrated by the nature of the communications between them at the time. Both had legitimate concerns about the application of pt 6A. Neither company backed down and it is, perhaps, regrettable that the impasse between them was not able to be resolved without resorting to litigation.

[143] Despite the conclusion that Total did not comply with pt 6A, I am not persuaded that the circumstances are such that a penalty is warranted. While two breaches have been established, in reality the information could be kept in common to comply with both s 81 of the Holidays Act and s 130 of the Act and ought to be seen as effectively one breach.[43] That breach arose from a mistaken view of what had to be done, which was not assisted by Crest's insistence that more had to be supplied than was required and the use it intended to make of the information.

[144] There was no evidence that the transferring employees suffered any actual disadvantage from what happened. Crest did not suffer any disadvantage in

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43 Holidays Act 2003, s 81(5).

establishing the terms and conditions of employment for transferring employees or in engaging new staff. Nor was there any financial loss; there was no evidence that any transferring employee was paid more than his or her actual entitlements by Crest and Total had offered to pay the higher of the possible amounts due as the final transfer cost.

[145] Those circumstances did not lend themselves to seeing the breach as being of a such a nature or quality that a penalty is warranted.

Other matters

[146] These conclusions mean it is not necessary to consider objections taken to Ms Kelliher's evidence where she expressed certain opinions about the Act or industry practice. In the end that evidence was not material.

Outcome

[147] For the foregoing reasons the challenges are successful and the Authority's determination is set aside.

[148] Costs are reserved. Given the test nature of this litigation my preliminary view is that costs should lie where they fall. If the parties disagree memoranda may be filed.

K G Smith
Judge

Judgment signed at 1 pm on 22 December 2023