IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 220
ARC 19/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	JOHN MATSUOKA Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing: 11 to 14 April 2011
And by written submissions filed on 1, 5 and 18 August 2011
(Heard at Auckland)

Counsel: Rob Towner, counsel for plaintiff
Garry Pollak, counsel for defendant
Timothy Oldfield, counsel for Service and Food Workers Union Nga Ringa Tota Inc as intervener

Judgment: 21 December 2012

JUDGMENT OF JUDGE B S TRAVIS

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[1] At the conclusion of my substantive judgment issued on 18 May 2011[1] which answered the seven questions posed by the parties that arose out of Part 6A of the Employment Relations Act 2000 (the Act), I recorded that remedies and grounds of defence were reserved for further consideration, which might include evidence and submissions. The plaintiff, Mr Matsuoka, had sought declarations as to his employment status, compliance orders, penalties, a disadvantage grievance, compensation, damages and arrears of wages and benefits.

[2] Following the issue of the judgment, the parties provided an agreed timetable for the filing of legal submissions. The plaintiff filed his legal submissions on 1 August 2011, the defendant company responded on 5 August 2011, and the plaintiff replied on 18 August 2011. There the matter rested because of parallel proceedings

[1] [2011] NZEmpC 44, [2011] ERNZ 56.

in the High Court between the defendant company (LSG) and Pacific Flight Catering Limited (PFC) and PRI Flight Catering Limited (PRI), jointly described in this judgment and the High Court judgment as Pacific.[2]

[3] The plaintiff had been previously employed by PRI before his transfer to LSG. The matter was further complicated by the dismissal of Mr Matsuoka by LSG on 11 July 2011. Mr Matsuoka filed personal grievance proceedings in the Employment Relations Authority (the Authority) in relation to his dismissal and those proceedings were later removed to the Court.[3] Those removed proceedings under ARC 23/12 were initially consolidated by the Court with the outstanding remedies in the present matter. These procedural issues are summarised in an interlocutory judgment setting out the reasons why I dismissed an application by LSG for declarations that the plaintiff's solicitors should not continue to act for him and for Pacific.[4]

[4] LSG also made allegations that the figures supplied to it on the transfer of Mr Matsuoka, quantifying his entitlements and previous salary, were incorrect and should not form the basis of his claim for remedies. These issues also arose in the High Court proceedings as my interlocutory judgment sets out. I note that the grounds of defence raised by LSG for further consideration, which involved these issues and claims of misrepresentation, were not expressly referred to in the subsequent legal submissions. No doubt they will be dealt with if remedies are revisited in ARC 23/12.

[5] It was agreed by counsel on behalf of the parties that the only two matters outstanding in ARC 19/11, which could be resolved without the necessity of further evidence or hearings as to the accuracy of the figures supplied to LSG concerning Mr Matsuoka, were:

- his claim for compensation under s 123(1)(c)(i) of the Act for the distress, humiliation and injury to feelings he alleges he suffered as a

[2] *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd & PRI Flight Catering Ltd* [2012] NZHC 2810.
[3] [2012] NZERA Auckland 95.
[4] [2012] NZEmpC 219.

result of the disadvantage in not being transferred to the defendant's employment under Part 6A of the Act; and

- his claim for penalties, which I granted him leave to increase from $10,000 to $20,000.

[6] This judgment now deals with those two outstanding matters.

Compensation

[7] Mr Towner, in his written submissions, contended that the plaintiff was entitled to compensation of $10,000 under s 123(1)(c)(i) of the Act in relation to his disadvantage grievance. Mr Matsuoka claimed that he was disadvantaged in his employment by the unjustifiable actions of LSG in refusing to accept that he was entitled to transfer to its employment, refusing to employ him, refusing to provide him with work in the role in which he was entitled to transfer, and refusing to remunerate him according to the terms of his employment agreement.

[8] Alternatively, Mr Matsuoka claimed damages resulting from what he alleged were the defendant's breaches of contract, including for the distress caused to him by the defendant not employing him in the same role that he had with PRI. Mr Towner cited *Whelan v Waitaki Meats Ltd.*[5] He accepted that the alternative claim for compensatory damages was for the same reasons and in the same amount as could be recoverable under s 123(1)(c)(i) and (ii) of the Act. He was not seeking a double recovery for Mr Matsuoka.

[9] Mr Towner submitted that the context for the plaintiff's claim for compensation was that the defendant acted unlawfully in denying Mr Matsuoka employment from 23 February 2011 and that thereafter he was out of employment until his dismissal by the defendant on 11 July of that year.

[10] Mr Towner submitted that the defendant's unlawful actions resulted in the plaintiff experiencing stress, extreme anxiety, second only to when he was sent to war, sleeplessness, physical manifestations and a deterioration of what had

[5] (1990) ERNZ Sel Cas 960 at 970-978.

previously been good relationships with his fellow workers. He submitted that these adverse consequences were ongoing and extended over the period of four and a half months during which the plaintiff rightly believed he was entitled to employment with LSG but was denied that opportunity.

[11] Mr Towner submitted that the claim for $10,000 was justified in light of the following:

> (a) the humiliation which the plaintiff would undoubtedly have experienced as a result of the open manner in which the defendant opposed his right of transfer and involved a number of his previous work colleagues to oppose his claim;
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> (b) the loss of dignity which he inevitably would have suffered as a result of having his legal right of transfer denied;
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> (c) the injury to his feelings caused by the manner in which the defendant resisted the plaintiff's right of transfer which involved the defendant lining up his previous work colleagues against him (when in fact he had a valid claim against the defendant); and
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> (d) generally the injury to his feelings caused by the defendant's unlawful actions.

[12] Mr Towner compared the amount claimed to other situations in which compensation awards have been made for approximately $10,000, for example, for inadequate consultation in relation to a genuine redundancy or up to $10,000 for an unjustified warning, citing *Van der Sluis v Health Waikato Ltd*.[6]

[13] Mr Pollak's response was that LSG does acknowledge that the plaintiff has a claim for the distress he suffered as a result of not being employed on 23 February 2011 but that the Court should not award compensation as the parties had a genuine and significant disagreement about the application of Part 6A of the Act. He submitted that because the case was something of a test case, even though it was couched as a personal grievance, the judgment was a significant one affecting not just the current parties but other employees and employers generally, and any amount of compensation awarded should be minimal. He submitted that the plaintiff had merely deposed that he was stressed and had produced no corroborative evidence to establish or confirm his assertion.

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[6] [1996] 1 ERNZ 514 at 537.

[14] Mr Pollak also submitted that, although the plaintiff gave brief evidence about how upset he was at being declined a position with LSG, Mr Matsuoka must surely accept that, given he was a shareholder of LSG's main competitor and in a special relationship with his fellow directors, his situation was something out of the ordinary. He also submitted it was not appropriate for the plaintiff to have referred in submissions to the ongoing consequences of LSG denying him the opportunity to work. He advised that immediately upon the Court issuing its judgment, LSG regarded the plaintiff as an employee and acknowledged that it was by law obliged to employ him from 23 February 2011 and that Mr Matsuoka would be paid by LSG from that date until 11 July of that year, without having to attend work. The amount payable and his entitlement to benefits, however, are still very much in dispute.

[15] Mr Pollak stated that this question of the plaintiff's entitlements is not now before the Employment Court as it is part of the wage arrears and personal grievance being pursued by the plaintiff against the defendant. I presumed that that was a reference to the unjustifiable dismissal grievance being pursued by Mr Matsuoka in the proceedings removed from the Authority to the Court under ARC 23/12.

[16] I had noted in my substantive judgment, under the heading "Impediments to the plaintiff's employment by LSG",[7] that the defendant had raised a number of additional reasons for refusing to accept the transfer of the plaintiff's employment. These included misrepresentation, a potential conflict of interest based on the plaintiff's shareholding and relationship with the managing directors, and his remuneration package. I reserved these for further consideration, possibly in the context of the plaintiff's personal grievance. I presume that the proceedings under ARC 23/12 will now be the context in which those defences will be dealt with. However, to preserve the respective positions of the parties in relation to remedies and defences, I record that this judgment will not dispose of the other issues raised in ARC 19/11 so that, if necessary, they can be dealt with at the same time as the removed proceeding in ARC 23/12.

The evidence

[7] At [94].

[17] I found in my substantive judgment that the plaintiff was interviewed by Marie Park, the Human Resources Manager of LSG, on 23 February 2011.[8] The plaintiff's name had appeared on a list of persons who had elected to transfer to LSG. The plaintiff and three others were represented by Mr Mann who advised Ms Park that he was being paid by PFC to represent the plaintiff.

[18] I found that it had become immediately apparent to Ms Park at the meeting on 23 February 2011 that the plaintiff's description of his duties as a ground steward was quite different to those of the other ground stewards and that he could not properly describe his duties. He also told Ms Park that he reported to Mr Hay and to the managing directors of Pacific and was "independent" from the other employees. I noted that Ms Park found the plaintiff to be very personable and that his role was different to every other employee at PFC. I found that after the plaintiff left the meeting, Mr Mann told Ms Park that she had three options. She could employ the plaintiff, dismiss him, or she could settle and the plaintiff was due a large redundancy payment which could be settled for $75,000 as a net payment, which did not include holiday pay, which would be considerably in excess of that figure.

[19] I found that, after correspondence with Mr Mann and an agreement to hold another meeting, Mr Mann advised Ms Park on 25 February 2011 that the plaintiff would turn up to work on the morning of 28 February 2011. Ms Park responded that it was not appropriate for the plaintiff to be at work until a decision had been reached by LSG. I found that reply provoked a response from Mr Towner, whose firm was Pacific's solicitors and who had been involved in the High Court proceedings, and that the plaintiff duly arrived at LSG on the morning of 28 February 2011.

[20] On that day there was a brief discussion with Ms Park regarding his wages. Mr Matsuoka said that as PFC had lost the High Court injunction, he was therefore an employee of LSG. Ms Park did not accept that. I found that it was "an amicable meeting".[9] Mr Matsuoka then left the LSG premises, and has not been back since.

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[8] At [28].
[9] [2011] NZEmpC 44, [2011] ERNZ 56 at [35].

[21] I accepted Ms Park's evidence and noted that it was not greatly in conflict with Mr Matsuoka's account.

[22] Mr Matsuoka was asked by Mr Towner during his oral evidence-in-chief whether he was affected in any way by LSG's refusal to accept him as an employee. He replied:

> **A.** Yes. Really stressed about the whole situation. I think the only time I was this anxious with a lot of anxiety was when I was shipped to Vietnam War.
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> **Q.** Excuse me when you?
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> **A.** When I was 19 and I was shipped to Vietnam as my capacity as a US soldier so my similar time of anxiousness and sleepless nights and you know upset stomach you know is in the same type categories. I have been financially I don't know I am basically running my savings pretty rapidly down trying to just keep up. Had to tell my wife we got to pull back from financially trying to help her father who is in health care in Hawaii. My wife has been my rock she knows when I get all anxious and she will grab me and you know lets go for a walk just to keep me grounded I guess. Yea. I am definitely feeling it.

[23] Mr Matsuoka also gave evidence that reading the affidavits from ex-employees filed by LSG was unsettling for him because he felt they had had a great relationship previously. They always helped each other and it was a family type operation at PFC. He gave one example in relation to one of the persons who gave an affidavit in support of LSG and concluded:

> That's why so when I read the affidavits I was a little bit unnerved but I accepted it what they are doing, loyal to their current employer and they had to do what they had to do to I guess you know survive whatever.

[24] In cross-examination he accepted that it was awkward that he had been caught in the middle of a disagreement between PFC and LSG.

[25] Mr Matsuoka admitted that he turned up to work on 28 February 2011 on the advice of Mr Mann. With some reluctance, he also accepted that the second meeting that had been agreed to by Mr Mann did not go ahead because his lawyer advised him not to attend.

[26] I also find that, when Ms Park saw Mr Matsuoka on 28 February 2011 and they had a brief discussion about his wages and Ms Park repeated a number of things she had previously told Mr Mann, she was still considering the matter of his right to transfer employment. I find that she assured him that if LSG was liable for anything financially, they would reimburse him and that he should keep his receipts. I also find that she expressed concern about the accuracy of the information she was receiving and said words to Mr Matsuoka to the effect that people had been lying.

[27] I find that Ms Park was referring to the fact that the information that had been supplied to LSG in relation to wage and time records was incorrect and that she told Mr Matsuoka that if he was to transfer, she would need to get him to sign a wage and time records permission to check that everything was correct because some of the information supplied had been incorrect. I accept her evidence that it was a friendly meeting. I find, from the context, that Mr Matsuoka should have appreciated that the reference to lying was to the supplying of incorrect wage and time records and not a response to anything he had told Mrs Park. It therefore should not have distressed him.

[28] Having found that both meetings between Ms Park and Mr Matsuoka were amicable and that Ms Park found Mr Matsuoka to be very personable, it is difficult to accept Mr Matsuoka's claim that the situation created anxiety for him similar to his being shipped to Vietnam in his capacity as a US soldier when he was 19 years of age. I also find that he was being supported in his claim by his previous employer and because of his relationship with Pacific, he would have been aware that he could have returned to his prior employment as a fall-back position. That is what I have been informed has subsequently occurred.

[29] As to his alleged injury to feelings caused by LSG's involvement of his former work colleagues at Pacific, his evidence satisfied me that at most he found this a little bit unnerving.[10]

Discussion on compensation

[10] See [23] above.

[30] Mr Towner's submissions concentrated on what he alleged was the unlawfulness of LSG's position in not accepting Mr Matsuoka's transfer of employment. In *Air New Zealand Ltd v Johnston*[11] the Court of Appeal dealt with an appeal against a decision of the Labour Court which had taken into account the strong attitude of the appellant company against the reinstatement of Mr Johnston as an element that could be taken into account in assessing compensation. In setting aside an award of $135,000, and replacing it with one of $25,000 for distress and loss of future earnings, the Court of Appeal stated:[12]

> It was open to the Labour Court to conclude that the company's strong opposition to the employee's reinstatement would be likely to influence other possible employers against him adversely. To that extent the reasoning of the Labour Court is supportable. To the extent, too, that humiliation and the like was occasioned to the employee, it was proper to compensate him under that head. But it is impossible to read the decision without thinking that to a significant extent the employer was being penalised or punished because it opposed reinstatement. That is no part of the purposes of the unjustifiable dismissal jurisdiction. As counsel for the appellant rightly puts it, there was an error of principle in penalising the company for raising its opposition and raising it strongly. A lesser error of principle lay in allowing something for the distress to the worker's family, though this may be more a matter of wording than substance.

[31] At the time of the second meeting on 28 February 2011, when Mr Matsuoka unilaterally turned up to work against the advice of Ms Park, there was no binding finding that the refusal to accept him as an employee was unlawful. LSG had substantial grounds for distinguishing Mr Matsuoka's position on transfer from at least 36 other employees from PFC. It was entitled to have its position determined as a matter of law and this could have been done in the context of a dispute. It was open to the plaintiff to challenge it, as he did, by way of a personal grievance and allegations of breach of the statutory requirements. That did not, however, provide any licence to award substantial compensation for distress and humiliation for unlawful behaviour in what was clearly a legitimate difference of opinion.

[32] In the hearing Mr Pollak had contended that the defendant was legally correct and that would have defeated the unjustified disadvantage claim if the defendant's submissions had been upheld. It is only because they were not that the plaintiff can

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[11] [1992] 1 ERNZ 700 (CA).
[12] At 707.

proceed to claim compensation for being unjustifiably disadvantaged. The situation is not unlike that considered by the Court of Appeal in *Sky Network Television Ltd v Duncan*,[13] where the issue was the disobedience of a lawful order, where the grievant had disputed the legal position. The Court of Appeal found that the legal position was not clear-cut even though ultimately it was held that Sky was right in its assessment of the contractual provisions. In such a situation there was a genuine dispute. The Court of Appeal stated:[14]

> In these circumstances the dispute cried out for an attempt at resolution either by resort to the disputes procedure referred to in the contract or, if that was considered too long-winded, by a speedier means. Such an approach to the issue which had arisen between the parties may well have resolved it without matters reaching a point at which the mutual confidence or trust of the parties, often said to be an essential of the employment relationship, had been destroyed.

[33] The summary dismissal of Mr Duncan was found to be unfair and unjustified.

[34] In the present circumstances the legal position was not clear-cut for the following reasons advanced by the defendant:

a) This was a unique and new situation and the law was yet to be tested;

b) Mr Matsuoka, at the interview with Mr Mann present, responded inadequately to the questions Ms Park was entitled to put and she had every reason to be concerned about the true nature of the work he carried out for Pacific;

c) Ms Park had grounds for concluding that Mr Matsuoka acted in the nature of a manager and was the eyes and ears of the managing director, a shareholder in the holding company of Pacific and that he could be in a conflicted situation;

d) his legal entitlements as provided by Pacific were allegedly incorrect and inflated and therefore the terms upon which Mr Matsuoka was going to transfer were very much in issue.

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[13] [1998] 3 ERNZ 917 (CA).
[14] At 924.

e) LSG's General Manager in New Zealand gave evidence of the sensitivity of proprietary operational processes, quality systems and financial information which together constituted sensitive commercial information. LSG had concerns that this information might be at risk if Mr Matsuoka was employed by LSG.

[35] I also accept Mr Pollak's submission that LSG did everything to expedite the hearing as to Mr Matsuoka's entitlement to transfer, including the agreement to put remedies to one side.

[36] At the substantive hearing, LSG had advanced compelling arguments that Mr Matsuoka was not a vulnerable employee who required the protection of Part 6A. It was supported in that by the submissions made on behalf of the Service and Food Workers Union. Recently, the Supreme Court in *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd*,[15] has stated:[16]

> We reach this conclusion while fully recognising, as Mr Cranney emphasised, by reference to s 237A, that subpart 1 is designed to protect vulnerable employees.

[37] The provisions of s 237A deal with amendments to schedule 1A and include reference to the criteria to be applied for the adding to, or omitting or varying the categories of employees entitled to the protection of Part 6A. I noted in my substantive judgment[17] that the word "vulnerable" does not appear in schedule 1A or in Part 6A but, as the decision of the Supreme Court indicates, it may well be that an alternate interpretation may have been appropriate.

[38] Mr Matsuoka succeeded in his claim for a legal right to transfer to LSG under Part 6A and for that reason only can argue that he was unjustifiably disadvantaged by the delay in having his legal position determined. However, as the matters of justification were not argued, and as I have noted above, Mr Pollak did acknowledge that the plaintiff has a claim for the distress that he suffered as a result of not being employed on 23 February 2011, I turn now to determine the amount.

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[15] [2012] NZSC 69, [2012] 3 NZLR 799.
[16] At [10].
[17] At [52].

[39] Nothing took place in the meetings with Ms Park which would have justified an award of compensation for distress and humiliation. If Mr Matsuoka was experiencing such distress, he did not demonstrate it to Ms Park.

[40] Because of my findings that the meetings were amicable and Mr Matsuoka was found to be very personable, I considered his claim for compensation to be excessive and not borne out by compelling evidence. LSG was entitled to involve Mr Matsuoka's former work colleagues to establish whether he was a person entitled to be transferred under Part 6A. I do not consider there was any actionable loss of dignity or injury to feelings caused by LSG's actions in testing Mr Matsuoka's entitlements to be transferred.

[41] I accept, however, that Mr Matsuoka was left in a state of uncertainty as to whether he would be accepted by LSG as an employee, although, as I have found, he had a clear fall-back position. The position that LSG took, which I eventually found to be incorrect in law, therefore did occasion a degree of distress and anxiety which I find warrants a modest award of compensation which I set at $1,000.

Penalties

[42] The plaintiff accepted that a penalty cannot be recovered in relation to the defendant's breach of subpart 1 of Part 6A of the Act. That no doubt was because penalties cannot be recovered for a breach of any provision of the Act unless the penalty is provided for in the particular provision. Section 133 provides:

> **133 Jurisdiction concerning penalties**
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> (1) The Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act—
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> (a) for any breach of an employment agreement; or
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> (b) for a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.
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> (2) Subsection (1) is subject to—
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> (a) sections 177 and 178 (which allow for the referral or removal of certain matters to the Employment Court); and
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> (b) any right to have the matter heard by the court under section 179.

> (3) Subject to any rights of appeal under this Act, the court has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act for a breach of any other provision of this Act for which a penalty in the court is provided in the particular provision.

[43] Section 69G does provide for a penalty by the Authority for any breach of that section which deals with the obligations of the employer of the employees who would be affected by the restructuring. That does not apply in the present case.

[44] Instead Mr Towner relied on breaches of the parties' employment agreement which included: refusing to employ the plaintiff; refusing to provide him with work and refusing to remunerate him according to the terms of his employment agreement. The plaintiff sought an order that any penalty received be paid to him. It is alleged that the breach of the defendant was not of a "one-off" nature but was repeated and ongoing. It is contended that the defendant could have reconsidered its initial refusal to employ the plaintiff after receiving representations from the plaintiff's solicitors as to the reasons why the plaintiff was entitled to transfer to employment with the defendant but it did not reconsider its position. The plaintiff also claims the defendant could have reconsidered its position after receiving the plaintiff's statement of problem and application for urgency on 3 March 2011 but it did not. It is also submitted that the plaintiff could have reconsidered its position following the hearing which ended on 14 April 2011, as it is contended that the defendant should have seen that the claim was likely to succeed. It is submitted that the claim for $20,000 in these circumstances is reasonable.

[45] Mr Towner cited *Xu v McIntosh*[18] where the Employment Court said of penalties in general:

> [47] … A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching ... an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
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> [48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the

[18] [2004] 2 ERNZ 448.

> breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. ...

[46] Mr Towner submitted that the defendant's conduct in refusing to accept the plaintiff's transfer to its employment and in refusing to employ him, was such that punishment and deterrence were appropriate and the breaches were not technical and inadvertent. In support of that submission, the plaintiff relied on the following:

a) LSG acted unlawfully in its breaches of the employment agreement which also involved breaches of the provisions of the Act which were intended to be protective in nature;

b) The defendant's breaches of contract continued over the course of 4.5 months;

c) A number of the grounds upon which the defendant opposed the plaintiff's right of transfer were not recognised in subpart 1 of Part 6A and was specious. These included his alleged conflict of interest, the representations he had made to the defendant and issues of the mistaken view of Mr Matsuoka's motives;

d) LSG adopted a more restrictive view of who was entitled to transfer from Pacific at the hearing. Mr Towner submitted it was a reasonable inference from the evidence that the defendant had already decided not to accept the plaintiff as an employee prior to its meeting with him.

[47] Mr Pollak in response contended that the breaches alleged were not repeated or ongoing but that the defendant had maintained its position because of the serious concerns it had as to the right of Mr Matsuoka to transfer and the incorrect information that had been supplied by Pacific. This consistent position, it was submitted, should not affect the issue of whether or not to award penalties.

[48] Mr Pollak submitted that this is not an appropriate case for the Court to award penalties because there were significant legal test issues and this was a test

case which affected other employees in New Zealand. He submitted that there was no deliberate attempt to breach the law and the breaches were neither flagrant nor deliberate.

[49] For the reasons set out in dealing with the issue of compensation, I accept Mr Pollak's submission that the defendant's breaches could not be said to be flagrant or deliberate and the steps that it took to resist the transfer, in what was a new area of law, were reasonable. LSG had a number of seriously arguable issues upon which it was entitled to seek a ruling and, once that ruling was obtained, LSG accepted the transfer of Mr Matsuoka's employment. In terms of *Sky Network*, this matter should have been regarded as a genuine dispute, not a case for penalties.

[50] Further, there may also be a very real issue as to whether ss 69I and 69J clearly constituted the employment agreement as at 23 February, when the transfer had yet to be accepted because of the outstanding issues.

[51] However, be that as it may, I am satisfied that this is not an appropriate case for the imposition of penalties, where so many issues were legitimately arguable. This was in the nature of a test case and it was heard as a matter of urgency with the full co-operation of the defendant. For these reasons, the claim for penalties is dismissed.

[52] Costs are reserved. If they cannot be agreed they may be the subject of an exchange of memoranda, the first of which is to be filed and served by 4 pm on Friday 8 February 2013. Any memorandum in response should be filed and served by 4 pm on Friday 1 March 2013.

B S Travis
Judge

Judgment signed at 1.30pm on 21 December 2012