IN THE EMPLOYMENT COURT
AUCKLAND

AC 45/08
ARC 4/08

	IN THE MATTER OF	proceedings removed from the Employment Relations Authority
	BETWEEN	ADRIENNE OLSEN Plaintiff
	AND	CARTER HOLT HARVEY IT LIMITED Defendant

Hearing: 18, 19 and 20 August 2008
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge C M Shaw
Judge A A Couch

Appearances: Jim Roberts and Genise Luen, counsel for plaintiff
Peter Kiely and Daniel Erickson, counsel for defendant

Judgment: 24 November 2008

JUDGMENT OF THE FULL COURT

Introduction

[1] In 2004 an amendment to the Employment Relations Act 2000 ("the ER Act") introduced provisions giving employment protection to employees affected by the transfer of undertakings. A key aspect of this case concerns the interpretation and application of the provisions of Part 6A which apply to employees who are not what are commonly known as "vulnerable employees".

[2] Because it appears this is the first case in which those provisions of Part 6A of the ER Act have been relied on, the Authority removed the matter to the Court for hearing in the first instance and a full Court was convened to hear it. By agreement,

the initial hearing was limited to the issue of liability. If liability is established, the question of remedies is to be the subject of a separate hearing.

[3] Adrienne Olsen was employed by Distribution Management Systems Limited ("DMS"). The business of DMS was sold to a new company, Distribution Management Solutions 2005 Limited ("DMS 2005") which has since changed its name to Carter Holt Harvey IT Limited ("CHH IT")[1]. In the course of these transactions, Mrs Olsen's employment came to an end. She was aggrieved by that and made a claim against CHH IT. That claim comprised five causes of action including unjustifiable dismissal and breach of the obligations imposed by Part 6A of the ER Act.

[4] CHH IT denied it was ever in an employment relationship with Mrs Olsen and said that it therefore had no legal obligations to her.

Applicable legislation

[5] The events in question occurred after Part 6A was inserted into the ER Act in 2004 but before that part of the Act was further amended in 2006. The references to section numbers and parts of the ER Act used are those which applied at that time and not those which now apply as a result of the 2006 amendment. It may be noted, however, that s69O of the ER Act, which was the operative provision relied on by Mrs Olsen, remains unamended as the current s69OK.

The issues

[6] The plaintiff alleges five causes of action.

1 Breach of the defendant's obligations under s69O of the Employment Relations Act 2000

[7] Section 69O of the ER Act provided:

> ***69O Affected employee may choose whether to transfer to new employer***
> *If an employer, in relation to a restructuring, arranges for an affected employee to transfer to the new employer, the affected employee may—*

[1] For convenience, and for consistency with contemporary documents, we refer to CHH IT in most cases as DMS 2005 or "the defendant".

(a) choose to transfer to the new employer; or

(b) choose not to transfer to the new employer.

[8] The principal issues arising out of the first cause of action are the nature and extent of the rights and obligations imposed by s69O when a business is transferred. That gives rise to an issue of fact whether CHH IT complied with any obligations imposed on it by s69O.

2 & 5 Unfair bargaining by non-compliance with s63A(2) of the Employment Relations Act 2000

[9] Section 63A of the ER Act deals with bargaining for an individual employment agreement. In the context of this case, the relevant part of s63A is:

> *(2) The employer must do at least the following things:*
> *(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and*
> *(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and*
> *(c) give the employee a reasonable opportunity to seek that advice; and*
> *(d) consider any issues that the employee raises and respond to them.*

[10] Mrs Olsen says that CHH IT offered her employment on two occasions in November and December 2005. Her second and fifth causes of action are that CHH IT failed to do some or all of the things required by s63A(2) on those two occasions.

[11] Both of these causes of action principally raise issues of fact.

3 Misleading and deceptive conduct

[12] This claim is brought under s12 of the Fair Trading Act 1986 which provides:

> ***12 Misleading conduct in relation to employment***
> *No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.*

[13] Mrs Olsen says that, by making certain representations to her about redundancy and transfer of her employment, CHH IT engaged in conduct which was misleading and deceptive. This cause of action also raises principally issues of fact.

4 Unjustified dismissal

[14] Mrs Olsen says that, although she was offered and accepted employment by DMS 2005, she was not permitted to take up that employment. She says that this was an unjustifiable dismissal. The issues raised by this cause of action are again essentially factual. They centre on whether, an offer having been made, Mrs Olsen accepted that offer so that she became an employee of DMS 2005 before she was sent away.

The facts

[15] Mrs Olsen was employed by DMS as a company accountant in June 2003. Later that year, her position was changed to Business Services Manager. In that role she was responsible for the company's finance and human resources functions.

[16] DMS was formed as a joint venture between Carter Holt Harvey Limited ("CHH"), the Electronic Company of New Zealand (1971) Limited ("ECONZ") and Dynes Management Limited ("Dynes"). The purpose of DMS was to develop a wood management system for CHH's timber operations. The joint venture was originally intended to end on 31 March 2005 but that did not occur. Throughout 2005, the joint venture partners negotiated a sale of DMS to a new company wholly owned by CHH. That new company was DMS 2005 which later became CHH IT.

[17] Mrs Olsen reported to Andrew Peddie, a contractor who was Acting General Manager of DMS. She also reported to the representatives of the joint venture parties on the DMS Board. Initially, they were Roland Rogers (ECONZ), Derek Dumbar (Dynes), and Owen Trumper (CHH). From 5 May 2005, Mr Trumper was replaced as the CHH representative on the Board by Paul van der Voort. Mrs Olsen attended meetings of the DMS Board and of the joint venture parties.

[18] In December 2004, at a time when the future of DMS was uncertain, Mr Peddie told all the DMS staff, including Mrs Olsen, that "*all jobs are safe there are to be no redundancies*".

[19] At the beginning of 2005, the joint venture discussed options for its future and that of DMS. These included extending the joint venture for a further 2 years, closing it down in March 2005, or selling it. The possibility of employees being made redundant was raised. Mrs Olsen was asked to prepare a paper regarding the joint venture's liability for redundancies in each of the options. She also prepared calculations of the potential costs of providing staff with redundancy compensation.

[20] When the DMS board met to discuss the redundancy compensation proposals, Mr Trumper gave assurances that CHH was going to transfer all existing employees to CHH or a subsidiary on their existing terms of employment. After that statement was made, the redundancy compensation proposal was not discussed any further.

[21] From these meetings Mrs Olsen realised that CHH was looking to buy DMS and, relying on Mr Trumper's assurance that all employees would be transferred, took no steps to protect her position or negotiate any redundancy compensation.

[22] In June 2005, Mrs Olsen was formally appointed to the team responsible for handling the sale of the DMS business and assets to CHH. This included work associated with the formation of DMS 2005 as a wholly owned subsidiary of CHH. Throughout this time it was generally understood that Mrs Olsen's employment would transfer to DMS 2005 where she would be employed as a management accountant.

[23] Negotiations between the joint venture partners resulted in a draft sale and purchase agreement dated 5 August 2005. This covered the termination of the DMS joint venture and the sale of its business and assets of DMS to DMS 2005. The completion date was not recorded in that draft but was initially agreed to be 17 September 2005. Clause 8.1 and 8.2 of the draft sale and purchase agreement were:

> ***8.1 Offer of employment***
>
> *The Joint Venture Parties must procure that the Company, immediately after this Agreement becomes unconditional, consults with each of the Employees, as required by its employment agreements, prior to giving notice of termination. Upon receiving notification from the Joint Venture Parties that the Company has*

> *consulted with each of the Employees (such notification to be no later than 5 Business Days after this Agreement has become unconditional). DMS 2005 must immediately make to each of the Employees a written offer on terms overall no less favourable than the Employees' current terms of employment with the Company, which offer is to remain open for acceptance until 5 Business Days before the Completion Date, offering to employ each Employee with effect from the close of business on the Completion Date. The Purchaser shall treat service with the Company as if it were service with DMS 2005 and as if such service was continuous.*
>
> ***8.2 Reasonable endeavours***
>
> *Each of the Joint Venture Parties and DMS 2005 are to use reasonable endeavours to persuade all of the Employees receiving an offer under clause 8.1 to accept employment with DMS 2005 on the terms specified in the offer. DMS 2005 must give notice to the Company of all Employees who have accepted its offer of employment 5 Business Days before Completion.*

[24] Clause 8.5 was an exclusion clause which provided:

> ***8.5 No third party rights***
>
> *Nothing in clause 8 creates any third party beneficiary rights (for the purpose of the Contracts (Privity) Act 1982) in any Employee.*

[25] The HR manager for CHH, Helen Roach, advised on the procedure to be followed for advising DMS staff of the change of ownership. In an email to Mrs Olsen she said:

> *"The key point to make to staff is that it is business as usual. You also need to make the point that the staff are being transferred and any service entitlements etc are being carried across to the new business."*

[26] DMS 2005 was incorporated on 16 September 2005. The completion date of 17 September 2005 for the sale could not be met and negotiations continued throughout September and October 2005.

[27] On 29 September 2005, Mrs Olsen applied to Mr Peddie for leave without pay for a period in May and June 2006. Mr Peddie referred this request on to Mr van der Voort saying that he would "*leave it for DMS 2005"*. Mr Peddie explained to Mrs Olsen that he had done this because she would be employed by DMS 2005 by the time she wanted to take this leave. Subsequently, the leave was approved by Mr van der Voort who, by then, was administering the business of DMS 2005.

[28] During October 2005 Mrs Olsen was instructed by Mr Peddie to draft employment agreements for DMS 2005 based on the existing DMS employment agreements.

[29] The final agreement for sale and purchase was executed on 3 November 2005. Clauses 8.1 and 8.2 were unchanged from the draft. On 4 November, Mr van der Voort announced to all DMS staff, including Mrs Olsen, that they would be offered employment by DMS 2005 on the same terms and conditions as they had at DMS. He said that employment agreements were being prepared by Mrs Olsen and would be coming out shortly. At that meeting Mrs Olsen distributed a letter which confirmed the offer of new employment with DMS 2005 and set out a timetable:

> …
>
> *1. DMS 2005 Limited contracts offered to employees under same terms and conditions. Thursday 10 November*
>
> *2. Contracts signed and returned Wednesday 16 November*
>
> *3. Contemporaneously transfer staff from DMS Limited to DMS 2005 Limited at 5.00 pm on Friday 18 November*
>
> *4. Trading as DMS 2005 Limited from 5.00 pm on Friday 18 November 2005*
>
> …

[30] That letter was signed by Mr van der Voort on behalf of Mr Peddie in his capacity as acting general manager of DMS.

[31] On 8 November 2005, Mrs Olsen spoke to Mr Peddie about a salary increase. This had been an issue which she had taken up with DMS earlier and she wished to have it resolved before her employment was transferred in case she had to wait another year. Mr Peddie told the Court that the salary was a key issue for Mrs Olsen who told him she would be taking advice on the possibility of taking a personal grievance on the issue of her pay. He advised her to put her claim in writing so that it could be discussed at the 16 November board meeting. Mrs Olsen denies that she said that she would bring a personal grievance but it is clear she spoke about taking legal advice. Her pay issue was subsequently resolved with DMS.

[32] On 10 November 2005, Mr van der Voort confirmed to Mrs Olsen that he had received authority from CHH to sign the letters to DMS employees offering them

employment by DMS 2005. Mrs Olsen then placed a copy of the signed letter of offer on each employee's file including her own. The letters said:

> …
>
> *Further to the letter that you received on 4 November 2005 on DMS Change of Ownership, we are pleased to be able to offer you new employment DMS 2005 Limited.*
>
> *A new employment agreement, is offered to you under the same Terms and Conditions and will come into effect as from 5.00pm on Friday 18 November 2005.*
>
> *Please find two copies of Individual Employment Contracts with attachments.*
>
> *Included with your package is your existing Contract with attachments so you are able to see your existing terms and conditions.*
>
> *Please can you read all parts and take the opportunity to get independent advice on the terms of this new Agreement.*
>
> *Please can I have the two copies signed and returned to me by Wednesday 16 November 2005.*
>
> *If you have any questions, queries or comments can you please contact me on* [number] *or* [number].
>
> …

[33] Although the letter referred to copies of individual employment contracts being attached, this did not happen in most cases. Agreements were included with only 3 of the letters and it appears these were subsequently retrieved.

[34] The day after receiving this offer, Mrs Olsen was instructed by Mr van der Voort to prepare an action sheet for DMS 2005 listing work to be done during the period 10 to 30 November. The list included a number of actions for employees including herself to complete during that period.

[35] On 11 November 2005, Mr Peddie participated in a conference call with Jeremy Fleming, the chief executive officer of CHH Forests Limited, and Edmund Lawler CHH's in-house counsel. They discussed reducing DMS 2005's costs by having CHH perform the finance and human resources functions for DMS 2005. This would mean that Mrs Olsen and her part-time assistant, Ms Erutoe, would not be required by DMS 2005. It was also agreed that the draft employment agreements that had been prepared by Mrs Olsen were not to be distributed. Rather, they were to

be redrafted in a form more consistent with those used in other parts of CHH's business.

[36] Mr Peddie told the Court, that he and Mr van der Voort tried to find a position for Mrs Olsen in CHH if she did not transfer to DMS 2005, but there were no positions available. Mrs Olsen was not consulted about this at any stage.

[37] On 14 November 2005, Mrs Olsen phoned Mr Peddie to discuss her pay review and asked for her employment agreement. Mr Peddie told her that CHH wanted to amend some clauses and they would be sent out shortly. He did not tell her that her employment would not be transferred.

[38] The next day Mrs Olsen wrote to the directors of DMS about her claim for a pay rise including a remuneration survey to support her claim.

[39] The joint venture met on 16 November 2005. Mrs Olsen had always taken the minutes of these meetings but was told by Mr Peddie that she was not to attend this one. Mr Peddie was the only witness called to give evidence about this meeting. He said that the CHH proposal to provide finance and human resources services to DMS 2005 had to go before the DMS board because it involved a variation of clause 8.1 which had to be ratified. Mr Peddie said that Mrs Olsen's request for a pay rise was also discussed. The non-CHH directors said that if CHH wanted to provide these functions for DMS 2005 they could, but that the other joint venture parties would take no responsibility for the consequences.

[40] This evidence was apparently given by Mr Peddie in an effort to establish that the terms of the sale and purchase agreement were varied to exclude Mrs Olsen from the scope of clause 8. We find that the evidence fell well short of doing that. Under cross-examination, Mr Peddie was referred to the formal minutes of that meeting and his hand written notes of it. The comparison between Mr Peddie's oral evidence and the written materials revealed inconsistencies in his evidence. It was also clear that there was no record of any suggestion that Mrs Olsen would not transfer to DMS 2005. Further, there was no evidence of a formal resolution to vary

the agreement by any of the parties to it or even any record of what the purported variation was.

[41] In any event, we are satisfied that, as at 11 November CHH had advised DMS that it would provide human resources and financial services to DMS 2005 and that this would affect the ongoing employment of Mrs Olsen and Ms Erutoe. On 16 November 2005, the fact that they would not be employed by DMS 2005 was discussed by Mr Peddie with the joint venture board. Shortly after that meeting, Mr Peddie discussed with CHH human resources staff how to handle the staff who would not be taken into DMS 2005.

[42] 18 November 2005 was the date that employees of DMS had been told their employment would be transferred to DMS 2005. That day, Mrs Olsen had been away on a course but noted to herself at 5.30pm that she was now employed by DMS 2005. She telephoned Mr Peddie to talk about the distribution of the employment agreements to all of the staff and told him she would pick up her agreement on Monday 21 November. Mrs Olen's evidence was that, in reply, Mr Peddie said *"Oh yes, OK. I'll see you on Monday."* Although it is clear that Mr Peddie knew that DMS 2005 was not intending to employ Mrs Olsen, he said nothing about this to her in that conversation. He told the Court that he was conscious of uncertainty around Mrs Olsen's position and felt that it was inappropriate and insensitive to tell her this on the phone.

[43] On 21 November 2005, Mrs Olsen went to work believing her employment had now been transferred to DMS 2005. She rang Mr van der Voort to arrange a meeting at 12.30pm for her to pick up her employment contract. At about 10am she met with Mr van der Voort and Mr Peddie. Initially, they discussed the final settlement of the assets of DMS. Mr Peddie then told Mrs Olsen she would not be receiving a pay rise. After a brief discussion about this decision, the meeting ended. Mrs Olsen was very surprised by this decision. After the meeting ended, she asked Mr Peddie to put the decision about the pay rise in writing. He did this in a very brief letter. Throughout these discussions with Mrs Olsen, neither Mr Peddie nor Mr van der Voort told Mrs Olsen that she was not to be employed by DMS 2005.

[44] At about 12.30pm that day, Mrs Olsen met with Mr van der Voort again. Mr Peddie was also there. Mr van der Voort told her that her position was not going to transfer to DMS 2005 because CHH had decided to carry out all the finance and HR work in-house. Mr van der Voort said they had looked for another position for her but could find nothing suitable. The meeting lasted about 5 minutes, leaving Mrs Olsen shocked.

[45] Later that day, Mrs Olsen e-mailed Mr Rogers, the ECONZ representative on the DMS board, to let him know what had happened and to express her concern and dismay. This prompted Mr Rogers to send an email to Mr van der Voort pointing out that clause 8.1 of the sale and purchase agreement required DMS 2005 to make Mrs Olsen an offer of employment. Mr van der Voort replied that it was a decision of CHH Forests Limited and no fault of the joint venture. In a later e-mail on 2 December 2005 Mr Rogers confirmed that it was CHH that had backed out of the agreement to arrange for Mrs Olsen's continued employment.

[46] Mr Peddie's evidence was that, on 21 November 2005, he and Mr van der Voort made a proposal of fixed-term employment to Mrs Olsen and invited her to suggest alternative options. Mrs Olsen did not recall any mention of such an offer on 21 November 2005 and Mr Peddie agreed that, although he said that a fixed-term agreement for Mrs Olsen had been prepared on the morning of 21 November 2005 it was not shown to her at the meeting. The offer of fixed-term employment was formally presented to Mrs Olsen on 22 November in a letter dated the previous day which said:

> …
>
> *re Proposed Business Services Manager Role in DMS 2005*
>
> *Dear Adrienne*
>
> *To confirm the conversation of today,*
>
> 1. *Your letter of 4 November 2005 stated that you would be offered new employment with DMS 2005.*
> 2. *Since that letter was issued, a review has been undertaken of the various roles and structures of the business going forward. That review has led to a finding that the HR, payroll and financial services functions in DMS could be undertaken by existing resource capabilities of Carter Holt Harvey. Under this proposal, the implications for your role is (sic) that while there is work in the short term in a*

transition role to complete the transfer of functions to CHH and to wind up the Joint Venture, there would be no ongoing Business Services Manager role.

3. *As per your letter of 4 November, you are invited to transfer to DMS 2005 but the role will only exist for a period of up to 2 Months. During that time, alternative roles will be sought for you, but in the event none are found, your employment, should you transfer to DMS 2005, is likely to terminate on 1 February 2006.*

The process from this point is that you need to consider the proposal and give feedback of your thoughts and suggestions by close of business Thursday 24th November. Please let me know if you required additional time or any further assistance in respect of the foregoing.

…

[47] After receiving that letter, Mrs Olsen e-mailed Mr van der Voort to ask for a copy of the proposed fixed term employment agreement and for an extension of time to consider it. Mr van der Voort replied that he could not provide an agreement as they were still in consultation but he agreed to extend the time for her to consider the fixed term proposal until 1 December 2005. On that date she raised her employment relationship problems with DMS and DMS 2005 by writing to Mr van der Voort.

[48] It was not until after the close of business on Friday 16 December 2005 that DMS 2005 provided Mrs Olsen's solicitor with a proposed fixed term employment agreement. She was asked to confirm by the close of business on Wednesday 21 December 2005 whether she would accept the agreement. Mrs Olsen did not receive a copy of the employment agreement from her solicitor until 20 December 2005. That evening she injured her back at a DMS 2005 staff function and was unable to attend work the following day. She told Mr van der Voort that she would not be at work and he signed a leave slip for her absence. She returned on 22 December 2005.

[49] At 11.20am on Friday 23 December 2005, in the course of an e-mail exchange between solicitors, DMS 2005 withdrew its offer of fixed term employment. Mrs Olsen went to see Mr van der Voort to tell him what had happened and to explain that she needed more time to consider it. Mr van der Voort said to her *"Well you've had a couple of weeks to look at it. It's your own fault"*. He refused to discuss it any further.

[50] On 31 December 2005, all of the DMS employees except for Mrs Olsen and her assistant, were formally transferred to DMS 2005.

[51] Mrs Olsen's personal grievance with DMS was resolved in mid-February 2006. She agreed to continue in its employ until 28 February 2006, following which she pursued her claims against DMS 2005 which are the subject of this hearing.

Discussion

[52] We consider that the personal grievance claim is the most factually comprehensive of the causes of action. The inquiry falls logically into two parts. The first question is whether Mrs Olsen was employed by DMS 2005. If so, the second question is whether what DMS 2005 did was justifiable. That question must be answered by applying the test in s103A of the ER Act:

> ***103A Test of justification***
>
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[53] The answers to these questions also provide most of the findings of fact necessary for the other causes of action. We therefore begin by deciding the fourth cause of action alleging unjustifiable dismissal.

Unjustified dismissal

[54] The elements of this claim require findings as to whether Mrs Olsen was an employee of DMS 2005, whether she was dismissed and, if so, whether the dismissal was justified.

1. Was Mrs Olsen an employee of DMS 2005?

[55] The defendant says that at no stage did Mrs Olsen accept employment with DMS 2005 and denies there has ever been an employment relationship between her and DMS 2005 or between her and CHH.

[56] Section 6 of the Employment Relations Act defines an employee as any person employed by an employer to do any work for hire or reward under a contract of service and includes*" a person intending to work"*. Section 5 defines a person intending to work as a person who has been offered and accepted work as an employee.

[57] An employment relationship is commenced by the acceptance of an offer of employment. Although the ER Act requires every employer to provide every prospective employee with an agreement in writing, the absence of a written agreement does not affect the validity of an agreement reached by other means.

[58] Mr Kiely, for the defendant, submitted that, although Mrs Olsen had received the letter of 10 November 2005 from DMS 2005, it was not an offer capable of acceptance by her because:

- She was not given an employment agreement by DMS 2005 with that letter.
- The letter stipulated that the offer was to be accepted by signing and returning an employment agreement, which Mrs Olsen did not do.
- The method by which Mrs Olsen purported to accept the offer lacked the certainty required to create legal relations between her and DMS 2005.

[59] The first point is explicitly dealt with by s63A(4) of the ER Act which provides:

> *(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.*

[60] It follows that whether or not Mrs Olsen was provided with a proposed employment agreement in writing is immaterial to the question of whether an offer

of employment was made and accepted. That is to be determined by applying well established legal principles.

[61] We find that, notwithstanding the failure of DMS 2005 to include the employment agreements and other items referred to in the letter of 10 November 2005, the content of that letter was an explicit and unequivocal offer of employment which was capable of acceptance. The statement that future employment was to be on *"the same terms and conditions"* could only reasonably be understood as referring to the terms and conditions of Mrs Olsen's existing employment agreement with DMS. Coupled with the statement that the proposed employment would *"come into effect as from 5.00pm on Friday 18 November 2005"*, there was nothing about the offer which was uncertain or conditional. It was clearly capable of acceptance.

[62] Mr Kiely's second and third points arise out of the principles of law succinctly summarised by the authors of *Law of Contract in New Zealand*, Burrows Finn and Todd 3rd edition LexisNexis 2007 where, at paragraph 3.4.3, they say:

> *Clearly if the offeror has insisted that a reply should be sent by some particular means, and by that means only, an offeree is not free to reply in some other manner, because the acceptance is not accepting the terms of the offer. An offeror will need to use very clear words to insist that only the prescribed means of communication may be used.*
>
> *If the offeror has stipulated for a particular means of communication, without going so far as to make it mandatory, the offeree may respond either by using the stipulated method or by using any other reasonable means of communication which is no less advantageous to the offeror.*

[63] Applying those principles to the facts of this case, Mr Kiely submitted that the letter of 10 November 2005 stipulated an exclusive method of acceptance of any offer of employment made in it, namely by signing a written employment agreement. In the alternative, he submitted that acceptance by conduct was less advantageous to DMS 2005 than acceptance by signing a written agreement.

[64] The first of those submissions is plainly unsupportable. To the extent that the letter of 10 November 2005 provides for a particular method of acceptance, it does so in the form of a polite request. It certainly does not stipulate acceptance by signing a written agreement as the only method available to Mrs Olsen.

[65] Mr Kiely's second submission only falls to be considered if we find as a matter of construction that the letter of 10 November 2005 did effectively stipulate a particular method of acceptance. We have already observed that the reference to signing a written agreement was by way of a request. As DMS 2005 failed to provide the agreement Mrs Olsen was asked to sign it was effectively impossible to comply with that request. Such a request cannot be regarded as a stipulation and it was open to Mrs Olsen to accept the offer by any effective means. On this analysis, Mr Kiely's second submission cannot succeed.

[66] In any event, we find that the manner in which Mrs Olsen did accept the offer contained in the letter of 10 November 2005 was no less advantageous to DMS 2005 than acceptance by signing a written agreement. It is clear from the evidence that DMS 2005 never provided Mrs Olsen with a written employment agreement consistent with the offer made in the letter of 10 November 2005. This meant it was never possible for Mrs Olsen to accept the offer by signing a written agreement. That being so, it cannot be said that any other method of acceptance was less advantageous to DMS 2005.

[67] On this issue, Mr Kiely also submitted that DMS 2005 required the offer made in the letter of 10 November 2005 to be accepted by Wednesday 16 November 2005 and that Mrs Olsen's failure to do so rendered any subsequent purported acceptance ineffective. This submission fails for the same reasons we have given regarding the mode of acceptance. It is clear from the letter itself that this time was part of the request to sign a written employment agreement and return it to DMS 2005. By failing to provide the written agreement, DMS 2005 made it impossible to comply with that request at any time. It was therefore open to Mrs Olsen to accept the offer by other means at any time while it remained open.

[68] The most common way in which an agreement is formed is by the use of words such as "I agree" or "I accept" or by signing acceptance of a written offer. In this case, there was no evidence that Mrs Olsen accepted the offer made by DMS 2005 in such a specific manner. Mr Roberts submitted, however, that acceptance by Mrs Olsen of the offer made by DMS 2005 could also be inferred from the conduct of the parties. This has long been recognised as a valid basis on which to find that a

binding agreement has been formed. As the authors of *Law of Contract in New Zealand*, referred to earlier, put it at paragraph 3.3.1:

> *Whether there has been an acceptance by one party of an offer made by the other may be collected from the words or documents that have passed between them or may be inferred from the totality of their conduct.*

[69] In summary, the conduct of the parties relevant to this issue was as follows. Mrs Olsen received the offer on 10 November 2005. The following day, she was asked by Mr van der Voort to prepare an action list for work to be done after 18 November 2005, that being the date recorded in the letter of 10 November 2005 as the day on which employment by DMS 2005 was to begin. That action list included work to be done by her. The preparation of the list by Mrs Olsen was consistent with her accepting the offer. This must have been known to Mr van der Voort as the list was provided to him.

[70] On 18 November 2005, Mrs Olsen told Mr Peddie that she would be at work on 21 November 2005. That could only have been understood by Mr Peddie as meaning that Mrs Olsen would be working from that day on for DMS 2005 and he said nothing to her to suggest otherwise. We find that, in this conversation, Mrs Olsen effectively accepted the offer of employment made by DMS 2005 and that this acceptance was communicated to Mr Peddie.

[71] Although Mr Peddie was engaged by DMS, we find that he was not acting at arm's length from DMS 2005. Far from it, he and Mr van der Voort were in close communication about the affairs of both DMS and DMS 2005. The evidence shows that they each acted as agent for both companies at various times.

[72] Mrs Olsen's acceptance of the offer was confirmed to both Mr Peddie and Mr van der Voort on 21 November 2005 when she began work. The letter of 10 November 2005 had made it clear that the business formally carried on by DMS would be taken over by DMS 2005 with effect from 5pm on 18 November 2005. Nothing had been said to Mrs Olsen to change that impression. The only inference to be drawn from Mrs Olsen's presence in the office on 21 November 2005, therefore, was that she accepted employment by DMS 2005. By their actions, Mr Peddie and Mr van der Voort endorsed that conclusion. That morning, they both met

with her to discuss her pay but said nothing about her continuing employment. By the time anything was said to Mrs Olsen inconsistent with the offer of employment made in the letter of 10 November 2005, she had been working for half of the day. She did so with the knowledge and permission of both Mr Peddie and Mr van der Voort.

[73] Looking at the totality of the conduct of the parties, we find there is a clear inference that Mrs Olsen accepted the offer of employment made to her by DMS 2005 in the letter of 10 November 2005. We conclude that, from 5.00pm on 18 November 2005, Mrs Olsen was an employee of DMS 2005.

2. Was Mrs Olsen dismissed?

[74] At their meeting early in the afternoon of 21 November 2005, Mr van der Voort told Mrs Olsen that she would not be transferring to DMS 2005. That undoubtedly constituted a repudiation of the employment agreement which we have found then existed between the parties. That was a dismissal. The subsequent offer of fixed term employment followed that dismissal.

3. Was DMS 2005 justified in dismissing Mrs Olsen?

[75] The principal argument for the defendant was that Mrs Olsen had not been employed in the first place. It was not argued on behalf of the defendant that the actions of DMS 2005 in dismissing her were justified procedurally. We find there was no proper procedure adopted for the termination of her employment for the following reasons:

- Although Mr van der Voort and Mr Peddie knew from at least 11 November 2005 that Mrs Olsen was not to be employed by DMS 2005 and there being ample opportunity to inform her of this, she was not told until the afternoon of 21 November 2005.
- Mrs Olsen was given work to do which affirmed her ongoing employment.

- On 21 November 2005, Mrs Olsen was permitted to start work and carry on working for half a day on the understanding that she was working for DMS 2005.
- There was no consultation with Mrs Olsen about alternatives to dismissal prior to her being told on 21 November 2005 that DMS 2005 would not be employing her in the future. While there was evidence that Mr Peddie and Mr van der Voort had made some enquiries about alternative employment, those were never discussed with Mrs Olsen. More importantly, she was never involved in the process of finding and considering alternatives to dismissal. This failure meant that she was deprived of an opportunity to suggest ways in which her ongoing employment could be secured.

[76] All of these are fundamental breaches of the procedure which is to be expected of a fair and reasonable employer in the circumstances.

[77] We conclude that in all circumstances Mrs Olsen was unjustifiably dismissed by DMS 2005.

Defendant's obligations under section 69O

[78] The issues under this cause of action are:

- What obligations were imposed by section 69O on DMS 2005 in terms of its relationship with Mrs Olsen?
- What is the effect of any arrangement entered into pursuant to section 69O?
- Was there compliance with the arrangement?
- What rights of enforcement does an employee have in respect of such an arrangement?

1. Purpose of s69O

[79] Part 6A of the ER Act 2000 was enacted in 2004. It legislated for the protection of employees in situations where an employer proposes to restructure its business so that employees' work is to be performed for a new employer. Part 6A

was divided into two parts. Subpart 1 covered specified categories of employees who were categorised as "vulnerable employees". Subpart 2 concerned all other employees. As the full Court in *Gibbs v Crest Commercial Cleaning Limited* [2005] ERNZ 399 stated at paragraph [19]:

> *The principal difference between employees covered by subparts 1 and 2 is that those designated "vulnerable" under subpart 1 are intended to have explicit statutory protections irrespective of the terms and conditions of their employment or other arrangements made by persons affecting that employment. Other employees under subpart 2 must have relevant provisions in their employment agreements but the content of those provisions is largely to be determined by the parties to the agreements rather than the Act.*

[80] As Mrs Olsen was not a vulnerable employee, her situation was governed by subpart 2 and, in particular, s69O which read:

> ***69O Affected employee may choose whether to transfer to new employer***
>
> *If an employer, in relation to the restructuring of the employer's business, arranges for an affected employee to transfer to the new employer, the affected employee may –*
>
> *(a) choose to transfer to the new employer; or*
>
> *(b) choose not to transfer to the new employer.*

[81] The parties agree that s69O applies in this case. There was a sale of the business of DMS to DMS 2005. That sale was a "restructuring" as defined in s69L(1). Mrs Olsen was an "affected employee" as defined in s69L(2). What is in issue is the purpose and effect of section 69O.

[82] Mr Kiely submitted that, where an employer arranges for affected employees to transfer to the new employer, the purpose of s69O was only to make it clear that an employee had the right to elect to transfer or not to transfer. Beyond that, Mr Kiely submitted that the section imposed no other obligations that are enforceable by an affected employee against a new employer.

[83] In support of this proposition, Mr Kiely invited us to compare the provisions of subpart 1 with those in subpart 2. He noted that subpart 1 contained express provisions dealing with the consequences of an employee's election to transfer to a new employer whereas subpart 2 did not. He submitted that it can be inferred from

the absence of such provisions in subpart 2 that Parliament did not intend the existence of an election to transfer to create an employment relationship or to impose ongoing obligations on the new employer. In his submission, this was consistent with the overall intent and scheme of Part 6A to provide a higher level of protection for vulnerable employees than for other employees such as Mrs Olsen.

[84] We do not accept this analysis. Like subpart 1, the primary object of subpart 2 of Part 6A was to provide protection to employees affected by restructuring. This was expressly stated in s69K. While Mr Kiely is correct that the overall scheme of Part 6A was to provide greater protection to vulnerable employees covered by subpart 1, we do not accept that employees covered by subpart 2 were intended to have no protection.

[85] The scheme of subpart 2 was that employment agreements were required to contain employment protection provisions. As defined in s69L, those provisions were to provide protection for the employment of affected employees if their employer's business was restructured. An aspect of the mechanism by which protection was to be provided was the agreement of a process that the employer must follow in negotiating with a new employer about restructuring, including the negotiation of provisions for transfer of affected employees. This machinery was clearly aimed at encouraging, without necessarily obliging, employers to negotiate arrangements with new employers for the transfer of affected employees. Where that aim was achieved in the form of such an agreement with the new employer, it would be entirely inconsistent with the object of this part of the ER Act to conclude that the statute imposed no obligations on that new employer and conferred no rights on the affected employees. The nature and extent of those rights and obligations in any particular case, however, will depend on the terms of the arrangement with the new employer.

2. Was there an arrangement in this case?

[86] Section 69O was phrased in terms of an employer who *"arranges"* for the transfer of affected employees to the new employer. The necessary implication of this wording is that the employer must "arrange" that transfer with the new

employer. Put another way, the employer and the new employer must be parties to an arrangement for the transfer. What is required to constitute such an arrangement is not defined in the ER Act. Having regard to the ordinary meaning of the word *"arranges"* and to the protective purpose of this part of the ER Act, however, it must be construed relatively widely.

[87] In *Giltrap City Limited v The Commerce Commission* [2004] 1 NZLR 608, the Court of Appeal considered the meaning of the term "arrangement" in s27 of the Commerce Act 1986. It concluded that, to establish an arrangement, it was not necessary to rely on concepts of mutuality, obligation or duty and that the ultimate inquiry had to focus on the concepts of consensus and expectation. Although cautious about importing the meaning of a term used in one statute into the context of another, we adopt a broadly similar approach to the construction of s69O of the ER Act. Where an employer whose business is to be restructured reaches a consensus with the new employer which gives rise to an expectation that affected employees will transfer to the new employer, that is likely to be an arrangement for the purposes of s69O. Provided it arises out of a clear consensus, the arrangement need not be recorded in a legally binding agreement.

[88] We have no hesitation in finding that there was an arrangement for the purposes of s69O in this case. It was evidenced by clauses 8.1 and 8.2 of the sale and purchase agreement which explicitly provided for the transfer of affected employees to DMS 2005.

3. The nature and effect of the arrangement

[89] Clauses 8.1 and 8.2 of the sale and purchase agreement reflected a consensus between the joint venture parties and DMS 2005 on the following matters:

- DMS would consult with its employees before giving notice of termination.
- Once the joint venture was notified of that consultation DMS 2005 had to make offers to employees on terms no less favourable than their current terms.
- The offer had to be kept open until 5 days before the completion date.

- The offer must be to commence employment with the new employer, DMS 2005, with effect from close of business on the completion date.
- Employees' service was to be treated as continuous.
- The joint venture parties and DMS 2005 were to use reasonable endeavours to persuade all of the employees to whom an offer was made to accept employment with DMS 2005.
- DMS 2005 was to give notice to DMS of all employees who had accepted its offer of employment 5 days before completion.

[90] The parties to the sale and purchase agreement varied some aspects of this arrangement. The completion date was finally agreed to be 18 November 2005 and other time periods in the arrangement were compressed but these changes did not alter the substantive components of the arrangement. As noted in our discussion of the evidence, we reject the proposition that clause 8 of the sale and purchase agreement was varied to exclude Mrs Olsen from its effect.

4. To what extent did DMS 2005 comply with the arrangement?

[91] There is evidence that Mr Peddie consulted with staff about the likely sale of the business of DMS and its effect on employees in December 2004. There is no evidence, however, that Mr Peddie did so again after the sale and purchase agreement had been concluded.

[92] On 10 November 2005, DMS 2005 made offers of employment to the employees of DMS on their existing terms and conditions. Such an offer was made to Mrs Olsen. The offers requested a response two days prior to the completion date but were not closed or withdrawn at that point. The offer to Mrs Olsen remained open until the afternoon of 21 November 2005.

[93] DMS 2005 failed to provide Mrs Olsen with a copy of the proposed employment agreement and, on 21 November 2005, purported to withdraw the offer.

[94] The subsequent offer of fixed term employment made to Mrs Olsen did not comply with the arrangement as it was not on the same terms and conditions of employment she had with DMS.

[95] There was no evidence about whether DMS 2005 gave notice to DMS about the acceptance of its offers.

[96] From these findings of fact we conclude that DMS 2005 did not use reasonable endeavours to persuade Mrs Olsen to accept its offer of employment. DMS 2005 also failed to comply with the most important aspect of the arrangement which was to ensure that DMS employees had a real choice to transfer to the employment of DMS 2005 on the same terms and conditions and with continuity of employment. By its actions it denied Mrs Olsen that choice.

5. Enforcement of the arrangement

[97] For the defendant, Mr Kiely relied on clause 8.5 of the sale and purchase agreement which declared that nothing in clause 8 created any third party beneficiary rights in any employee for the purposes of the Contracts (Privity) Act 1982. He submitted that this statute provided the only means by which the terms of the sale and purchase agreement could be enforced by Mrs Olsen as she was not a party to it. The operative provision of the Act is s4 which provides:

> ***4 Deeds or contracts for the benefit of third parties***
>
> *Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:*
>
> *Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.*

[98] Mr Kiely submitted that the effect of clause 8.5 of the sale and purchase agreement was to invoke the proviso which concludes the section and that Mrs Olsen therefore had no enforceable rights under the agreement.

[99] In response, Mr Roberts made it clear that Mrs Olsen does not rely on the Contracts (Privity) Act. Rather, her case is that s69O of the ER Act gave the arrangement statutory recognition and effect. As such, the arrangement was enforceable independent of the sale and purchase agreement. Mr Roberts then referred to s238 of the ER Act which provides that the provisions of the Act have effect despite any provision to the contrary in any contract or agreement and submitted that this precluded DMS 2005 contracting out of the obligations imposed on it by s69O.

[100] Largely for the reasons advanced by Mr Roberts, we conclude that s69O conferred rights on Mrs Olsen consistent with the arrangement evidenced in the sale and purchase agreement. Those rights arise not from the agreement itself but from the statute. The right to choose conferred by s69O is a right to choose in accordance with the arrangement. To the extent that DMS 2005 failed to act in accordance with the arrangement, therefore, it denied Mrs Olsen her statutory right.

[101] It follows that we do not accept key aspects of Mr Kiely's submissions. While his analysis of the Contracts (Privity) Act was correct, it is clear that Mrs Olsen does not rely on that Act for her claims and we find that she has no need to. Rather, she is entitled to rely on the infringement of the statutory right conferred on her by s69O of the ER Act to choose to transfer in accordance with the arrangement. It is not possible to contract out of the provisions of the ER Act – see s238.

[102] That raises the question whether Mrs Olsen did attempt to exercise that right to transfer. We find that she did when she effectively accepted the offer of employment made by DMS 2005 in its letter of 10 November 2005. That triggered her right to transfer in accordance with the arrangement. By failing to effectively implement the arrangement with respect to Mrs Olsen, DMS 2005 compromised her right to choose under s69O and was in breach of the statute.

Misleading and deceptive conduct – Fair Trading Act 1986

[103] Mrs Olsen's third cause of action was that the defendant made representations that she would not be made redundant and that her employment

would be transferred to DMS 2005. She alleges that these statements were false and misleading, contrary to section 12 of the Fair Trading Act 1986.

[104] Mr Roberts listed over twenty examples of conduct which he submitted were misleading and deceptive. These ranged from Mr Peddie's announcement on 1 December 2004 that there would be no redundancies and Mr Trumper's statement to like effect at a DMS board meeting in early 2005, to the preparation and issuing of the job offers in November 2005 and the failure to tell Mrs Olsen of the decision by CHH Forests to provide services to DMS 2005 until 21 November 2005.

[105] Mr Roberts referred us to a three-part test formulated by the Court of Appeal in *AMP Finance Ltd v Heaven* (1997) 8 TCLR 144. He invited us to conclude that the conduct he had detailed was capable of being misleading, did in fact mislead Mrs Olsen, and that it was reasonable for her to be misled.

[106] *AMP Finance* concerned allegations of deceptive and misleading conduct in a commercial transaction over loans advanced for the development of property. However, in *Sinclair v Webb and McCormick Ltd* (1990) 3 NZELC 97,405, Barker J dealt specifically with s12 in the context of an employment dispute. In that case, the plaintiff alleged that, by failing to comply with express terms in an employment contract, the defendant misled him. Barker J drew a distinction between breach of contract and the sort of false and misleading conduct contemplated by s12. He said:

> *If this were "misleading or deceptive" conduct then every breach of an employment contract would be a contravention of s12 of the Act. It would be surprising if s12 were intended to cover every breach of an employment contract. It is more likely that the section is designed to cover cases where an employee is told that a term means something it does not, or is misled as to the nature of his or her duties.*

[107] We agree with this analysis. In this case, while we find that DMS 2005 did not comply with the terms of the arrangement in several respects, this ought not to be regarded as deceptive or misleading conduct for the purposes of s12. We also accept Mr Kiely's submission that much of the conduct relied on by Mr Roberts in his submissions was on behalf of DMS and cannot be attributed to the defendant. This cause of action fails.

Unfair bargaining

[108] The second cause of action is that DMS 2005 breached section 63A(2) of the ER Act in relation to the offer of employment made on 10 November 2005. The fifth cause of action comprises a similar allegation in relation to the offer of fixed term employment made to Mrs Olsen in December 2005. With respect to that agreement, she also claims that it failed to comply with the requirements of s66 of the ER Act. Again these issues are largely factual.

November agreement

[109] The evidence established that no written employment agreement was ever provided to Mrs Olsen in relation to the offer made in the letter of 10 November 2005. This was a breach of s63A(2).

[110] Further, although the letter of offer did say she was entitled to seek independent advice about the agreement, that was of no effect because the proposed agreement itself was never provided.

[111] On the other hand, we find that these breaches were of little or no practical significance because the offer made to Mrs Olsen was described in the letter of 10 November 2005 as being *"under the same Terms and Conditions"*. We have already found that this could only refer to the terms of employment between Mrs Olsen and DMS and it is clear from the evidence that she was well aware of what those terms were.

December agreement

[112] We find that DMS 2005 also failed to comply with s63A in relation to the offer of fixed term employment made in December 2005 and that these were of greater significance. DMS 2005 made a written offer of fixed term employment on 22 November 2005 but, in spite of Mrs Olsen's request for a copy of the proposed agreement, Mr van der Voort refused to give her one. It took the intervention of Mrs Olsen's lawyer to get a copy of the agreement three weeks later. It was sent after

normal office hours on a Friday with a deadline for acceptance 5 days later. The offer was then withdrawn before Mrs Olsen had a reasonable opportunity to consider it and to get advice about it. We note also that this proposed agreement was not accompanied by any advice about obtaining independent legal advice although, as it was sent through Mrs Olsen's lawyer, that is probably of little moment.

[113] The failure to provide a copy of the employment agreement was in breach of s63A(2) and, we find, a material factor in the breakdown of negotiations for the new agreement being offered.

Summary of findings

1. We find that Mrs Olsen was unjustifiably dismissed by the defendant.

2. The defendant was in breach of its obligations under s69O of the ER Act in that it failed to give effect to the arrangement for transfer of Mrs Olsen to it.

3. The defendant did not breach the Fair Trading Act 1986.

4. The defendant breached its obligations under s63A(2) of the ER Act by failing to provide a copy of the proposed employment agreement in November 2005 and by failing to give Mrs Olsen a reasonable opportunity to seek advice about the proposed employment agreement provided to her in December 2005.

Remedies

[114] The question of remedies arising from the causes of action other than the Fair Trading Act are to be dealt with in a further hearing before a single judge unless the parties are able to settle them by agreement. Counsel are to advise the Registrar if a further hearing is required. In that event, Mr Roberts should file a memorandum updating the remedies sought and, in the case of monetary remedies, details of how they have been calculated.

Costs

[115] Costs in relation to the matter to date are reserved. The parties are encouraged to agree costs if possible. If costs need to be fixed, it will be sensible to leave that until it is known whether a hearing on remedies is required and, if so, until after final judgment has been given. If the parties are able to agree on remedies but not on costs, Mr Roberts should file and serve a memorandum. Mr Kiely will then have 28 days within which to file a memorandum in response.

Judge C M Shaw
for the full Court

Judgment signed at 3.00pm on 24 November 2008