**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2012] NZEmpC 86**
**ARC 31/12**

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| IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| BETWEEN | LEND LEASE INFRASTRUCTURE SERVICES (NZ) LIMITED<br>Plaintiff |
| AND | RECREATIONAL SERVICES LIMITED<br>Defendant |

Hearing: 23 May 2012
(Heard at Auckland)

Counsel: Anthony Drake and Rosemary Childs, counsel for plaintiff
Gary Pollak, counsel for defendant
Phillipa Muir and Katherine Burson, counsel for Auckland Council as first intervener
Helen White, counsel for the Northern Amalgamated Workers Union of New Zealand Inc as second intervener

Judgment: 1 June 2012

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] This proceeding was removed to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act) by way of determination dated 9 May 2012.[1] The dispute between the parties relates to whether potentially affected employees of Lend Lease Limited have a right to transfer to Recreational Services Limited under Part 6A of the Act.

[2] The question posed for determination (as clarified by counsel at the hearing) is whether five categories of potentially affected employees are providing cleaning

[1] [2012] NZERA Auckland 158.

services in the local government sector or in relation to any other place of work within the meaning of the Health and Safety in Employment Act 1992. The parties seek a declaration from the Court in respect of this question.[2]

[3] The Auckland Council and the Northern Amalgamated Workers Union of New Zealand Inc (the Union) sought, and were granted, leave to be represented and be heard by way of submissions in this matter.

[4] The proceeding was heard on an urgent basis. It proceeded on the basis of affidavits filed by each of the parties, although two deponents were cross examined.

**Facts**

[5] The plaintiff provides various services under contract to the Auckland Council involving the maintenance of public parks on the North Shore. The contract comes to an end on 30 June 2012. The defendant will commence a contract with Auckland Council on 1 July 2012. The plaintiff contends that a number of its employees are providing cleaning services under the current contract, and have a right to transfer to the new contractor. Eleven employees have indicated that they wish to transfer. The defendant denies that any of the potentially affected employees are entitled to transfer. It says that they are not providing cleaning services as required by Schedule 1A of the Act.

[6] The contract between the Auckland Council and the plaintiff company is directed at providing quality parks for North Shore residents. Under the contract, the plaintiff is required to ensure compliance with a number of specifications, as well as meeting maintenance frequencies set out by the Council.

[7] The Community Parks/Contract Specifications documentation is expressed to represent a "best practice management approach based on proven horticultural and related maintenance techniques and procedures." A significant number of specifications are itemised, not all of which were before the Court, together with

[2] The full Court in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] ERNZ 405 held that the Employment Court may make declarations to resolve an employment dispute.

associated performance measures. In amongst the raft of specifications are activities such as graffiti removal; cleaning sumps and cess pits; loose litter collection; waterblasting to remove moss and dirt; barbeque cleaning; and sweeping paths. "Cleaning" is specified under the sub-heading "Playgrounds", and involves cleaning of loose fill (by raking, sweeping, litter removal); cleaning of equipment; waterblasting; and cleaning skateboard ramps and bowls and (in relation to Parks Furniture) includes loose litter collection; waterblasting; removal of soil buildup on furniture pads; cleaning and servicing of barbeques; and sweeping paths. Under the heading "cleaning", "structures" there is a requirement to collect and remove litter and debris and to waterblast structures as necessary.

[8] The Specifications also require loose litter collection for track maintenance, including the removal of tree branches, vegetation and tipped rubbish. Employees undertaking mowing duties are required to pick up all loose litter and debris, bricks and tree branches before commencing mowing.

[9] There are numerous other tasks set out in the Specifications, directed at the overarching contractual purpose of ensuring quality public parks on the North Shore, including a variety of tasks associated with the physical maintenance of fixtures, such as painting and repairs, and detailing the way in which annual and perennial beds are to be laid out, planted, fertilised, irrigated, and controlled for weeds and pests.

[10] The frequency with which the specified activities are to be undertaken is also provided for under the contract. Weed and pest control, managing irrigation systems, dead-heading, litter collection, and pruning are required on an ongoing basis during the year. Barbeque cleaning and servicing is predominantly required in the summer months. Waterblasting is to be carried out infrequently.

[11] There is no dispute that the 11 potentially affected employees fall into five groups:

1. labourer - gardener
2. labourer - mower

3. labourer - edger
4. labourer - maintenance fixtures
5. horticultural labourer.

[12] The position description for the role of gardener sets out the purpose of the position as:

> To develop and manage assigned staff and resources required to successfully achieve the agreed outcomes of departmental contracts...

[13] The accountabilities for the position include gardening tasks, weed control, the removal of litter and debris from gardens, hedges and specimen trees, reporting dumped rubbish, monitoring pest and disease levels, reporting damage, vandalism, trees requiring attention, and drainage issues, and the maintenance of all Plant and work vehicles (to ensure that moving parts are greased as necessary, oil levels are maintained, checklists are completed and that the vehicle is kept to a reasonable standard, by being cleaned regularly and kept free of litter).

[14] The position description for the role of mower sets out 13 summary (non exhaustive) tasks that are to be performed, including the mowing of identified areas to a schedule and to a stated height, the spreading of mulch, sweeping or blowing clippings from hard surfaces after mowing, and picking up all loose litter and debris prior to mowing. Mowers are also required to keep their vehicles maintained, including by cleaning them and keeping them free of litter.

[15] The position description for edgers also contains a summary of tasks, including moving obstructions to ensure that edging can take place and ensuring that all loose litter or debris is picked up prior to mowing/edging.

[16] The stated purpose of the maintenance role is:

> The maintenance of Community Parks Fixtures, Furniture and Structures. Servicing and Maintenance of playground equipment, BBQs, footpaths and other structures

[17] The position includes undertaking maintenance work on playground equipment, furniture and structures (including by carrying out minor repairs and the

removal of dangerous components); the removal of graffiti and litter from designated areas; the removal of animal or bird droppings and spider webs from structures, including by wiping down surfaces and waterblasting; the control of weeds; reporting damage; cleaning and servicing barbeques and their surrounding structure, checking their working order and reporting any defects; sweeping paths; wiping down seats as required; and minimising noise pollution.

[18] The position description for horticultural labourer describes the primary purpose of the role as being to:

> ... maintain or construct gardens. Undertake weed control, prepare and plant re-vegetation sites, help and provide support for the Community Parks planting's, and as required carry out miscellaneous works associated with horticultural or similar works to contract specifications.

[19] Horticultural labourers are required to maintain shrub beds, apply mulch, prune, dead head, remove litter from beds, set out and plant beds, fertilise, control pests and weeds, carry out miscellaneous grounds work, report damage, and maintain all Plant and vehicles to a reasonable level.

[20] Affidavits were filed from a number of employees who are currently employed in the above roles.[3] Some, but not all, are potentially affected employees.

[21] Mr Hopkins is employed as a gardener. He says that he spends approximately a day and a half per week doing what he describes as "cleaning duties". The duties he describes in this way relate to picking up rubbish and keeping pathways and gardens clear and tidy.

[22] Mr Shore is a horticultural labourer. His evidence was that he spends approximately two hours per week doing "cleaning duties", which he describes as picking up litter (such as lolly wrappers, dead fish, dirty nappies, and cigarette butts). He says that audits are randomly carried out and disciplinary action may be taken if, for example, litter is not removed. Mr Philips is also a horticultural labourer. The "cleaning duties" he says he is required to do involve picking up rubbish. Mr Philips is not a potentially affected employee.

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[3] There was no affidavit evidence from a labourer-edger.

[23] Mr Walker is a labourer, maintenance fixtures and has held that position for over 20 years. He says that he picks up litter as part of his role, including in parks and at the beach, and responds to requests to pick up bags of rubbish that have been dumped in reserves. Mr Walker is also involved in graffiti removal and waterblasting. He estimates that he spends approximately six hours per week on these tasks. Mr Harley also works as a labourer, maintenance fixtures. He says that the "cleaning duties" he carries out are picking up litter, removing graffiti, removing litter from playgrounds, waterblasting any graffiti, wiping down playground equipment, cleaning barbeques and waterblasting concrete surfaces. He says that this range of tasks consumes approximately one and a half days per week. Mr Harley is not one of the potentially affected employees.

[24] Ms Allsopp is employed as a mower. She spends approximately three hours a day picking up rubbish over eight reserves, which she says she needs to do before she mows the grass. She also picks up fallen over fencing, lumps of wood and pieces of steel on the ground and keeps her mowing machinery and truck clean.

[25] Mr Sutherland is employed as a leading hand, and is not one of the potentially affected employees. He says that he picks up litter as part of his role, which he estimates consumes approximately one hour a day.

[26] Mr Russell, a business unit manager at Lend Lease Limited, says that it is essential for mowers and edgers to collect litter before they initiate mowing or edging, and that maintenance employees are required to clean fixtures such as playgrounds and play amenities (such as skate bowls) at least once a week, and clean barbeques daily in summer. His evidence was that one (unidentified) gardener spends up to five hours a day picking up rubbish.

[27] It is clear that picking up litter is a component of the work carried out by employees within each of the five identified groups. This is reflected in the affidavit evidence, and the schedule of tasks set out within the Community Parks Specifications Contract between the plaintiff and Auckland Council.

[28] It is also clear that under the position descriptions horticultural labourers are expected to keep their vehicles clean; gardeners are to keep their vehicles clean and pathways clear; mowers must sweep and blow paths and keep their vehicles clean; edgers must keep their vehicles clean; and maintenance labourers remove graffiti, wipe down surfaces, waterblast, clean barbeques during summer, and sweep paths.

[29] Audits are carried out by the Auckland Council from time to time to assess the extent to which the plaintiff is meeting the standards set out in the Specifications. Ms Mackie, human resources manager at Lend Lease Limited, accepted that these audits are undertaken by Auckland Council's Park Management Unit, rather than its Cleaning Unit.

[30] Employees are liable to disciplinary action, and the plaintiff may suffer adverse contractual consequences, if the Specifications are not met.

## Statutory scheme

[31] Part 6A of the Act provides a framework of employment protection for employees where their employer proposes to restructure its business and the same or similar work is undertaken by a new employer. The provisions of Part 6A divide employees into two categories: specified employees as listed in Schedule 1A (whose rights are set out in subpart 1) and all other employees (who are covered by subpart 3, Part 6A).

[32] The object of subpart 1 is set out in s 69A. It provides that:

> **69A Object of this subpart**
> The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—
> (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and
> (b) the employees who have transferred a right,—
> (i) subject to their employment agreements, to bargain for redundancy entitlements…; and
> (ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

[33] Section 69F(1) is a gateway provision to subpart 1 of Part 6A. It provides that:

> **69F Application of this subpart**
> (1) This subpart applies to an employee if—
> (a) Schedule 1A applies to the employee; and
> (b) as a result of a proposed restructuring,—
> (i) the employee will no longer be required by his or her employer to perform the work performed by the employee; and
> (ii) the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person.

[34] It follows that before subpart 1 of Part 6A can apply, employees must establish three things, namely that they fall within Schedule 1A and that both limbs of s 69F(1)(b) are satisfied. It is the first of these three hurdles that is at issue in these proceedings.

[35] Schedule 1A provides that:

> **Employees to whom subpart 1 of Part 6A applies**
>
> Employees who provide the following services in the specified sectors, facilities, or places of work:
>
> (a) cleaning services, food catering services, caretaking, or laundry services for the education sector ...
>
> (b) cleaning services, food catering services, orderly services, or laundry services for the health sector...
>
> (c) cleaning services, food catering services, orderly services, or laundry services in the age-related residential care sector;
>
> (d) cleaning services or food catering services in the public service (as defined in Schedule 1 of the State Sector Act 1988) or local government sector;
>
> (e) cleaning services or food catering services in relation to any airport facility or for the aviation sector;
>
> (f) cleaning services or food catering services in relation to any other place of work (within the meaning of the Health and Safety in Employment Act 1992).

[36] The plaintiff argues that each of the five categories of potentially affected employees provide cleaning services either in the local government or in any other place of work within the meaning of the Health and Safety in Employment Act

(Schedule 1A(d) or (f)). It is submitted that that is because the potentially affected employees perform cleaning tasks as part of their overall role. Mr Drake submitted that it was not necessary that cleaning be the main focus of the role, or that it arise other than incidentally. He submitted that activities such as litter collection, graffiti removal, path sweeping and leaf blowing, barbeque cleaning, and waterblasting were cleaning services for the purposes of Schedule 1A.

[37] Ms White, for the union intervener, largely agreed with the submissions advanced on behalf of the plaintiff. She submitted that the potentially affected employees were vulnerable and the very sort of worker that Part 6A was designed to protect. This was because they undertake "blended work" (work that covers a range of activities, including cleaning activities), as a result of Auckland Council contracting out its cleaning services to the plaintiff company and the company then employing people to undertake that work along with other functions. She conceded that if cleaning was being undertaken as an incidental activity to a main task then it would fall outside the scope of Schedule 1A, but that if an employee was regularly engaged in cleaning as part of their daily or weekly activities then they would fall within the scope of Schedule 1A.

[38] Ms White submitted that it was clear from the evidence that the cleaning tasks undertaken by the employees in the present case were not incidental, rather they were an important part of their work. She submitted that this was reflected in the fact that employees could be disciplined if they did not pick up litter. She also advanced a submission that the Council itself regarded litter collection as cleaning, having inserted a heading of this description in the Specifications. She said that the way in which the activity was described in the Specifications was unsurprising as picking up litter was ordinarily considered to be cleaning.

[39] Mr Pollak, for the defendant, contended that potentially affected employees were not undertaking cleaning services, despite describing a number of their tasks in this way in their affidavits. He accepted that they were required to spend time picking up litter, and removing debris and detritus, but submitted that this did not amount to cleaning in any generally understood sense. He pointed out that none of the employees were described as cleaners, and submitted that it was relevant that the

work relied on by the plaintiff as amounting to cleaning was simply incidental to their main role, which was parks maintenance.

[40] Ms Muir, for the Auckland Council, submitted that the purpose of Part 6A and Schedule 1A was to protect certain categories of vulnerable workers only, and that maintenance/horticultural workers, who carry out incidental litter collection and other miscellaneous "cleaning" activities as part of their role, do not fall within the limited scope of these protective provisions. Counsel submitted that determining the issue of whether an employee was providing cleaning services involved an assessment of whether such services comprised a substantial component of their work. Ms Muir made the point that if a broad definition had been intended, there would have been no need to specifically provide for other categories of worker, such as caretakers (who are generally required to sweep paths and pick up litter as a necessary incident of their role). She conceded that cleaning a barbeque could come within the ordinary meaning of cleaning, but that picking up litter did not, and that employees carrying out sporadic cleaning tasks as part of their overarching role were not intended to be covered by Schedule 1A.

[41] While a number of submissions were advanced about the possible motivations of the parties in these proceedings, that is irrelevant to a determination of whether the threshold test in s 69F(1)(a) has been satisfied.

**Discussion**

[42] The term "cleaning services" is not defined in the Act. Nor has it been considered by the Court in the context of Schedule 1A.

[43] Counsel for the defendant made the point that none of the potentially affected employees were described as cleaners. While a label may be a useful indicator, I accept Mr Drake's submission that the title attached to a particular role is not determinative. It is the nature of the services actually provided by an employee that is relevant for the purposes of Schedule 1A. This requires a factual assessment.

[44] Each of the employees described their work as involving cleaning. Again, the label attached to a particular activity is not decisive. Whether or not the description the employees adopted is apt requires analysis. It is apparent from the evidence that the thrust of the potentially affected employees' daily activities was directly related to maintenance and gardening (including mowing and edging). This is also reflected in the position descriptions, which are couched in terms of maintenance (rather than cleaning).

[45] Section 5 of the Interpretation Act 1999 requires the Court, in interpreting legislation, to have regard to text and purpose. As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*,[4] even if the meaning of the text may appear plain in isolation of the purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5.

[46] The *Shorter Oxford English Dictionary*[5] defines "clean" as including to "make clean (of dirt etc.)" and "cleaner" as "a person who cleans, esp. rooms or clothes."[6] "Service" is defined to include:[7]

> (i) "Performance of the duties of a servant; work undertaken according to the instructions of an individual or organisation..."
>
> (ii) "An act or instance of serving; a duty undertaken for a superior."
>
> (iii) "The action of serving, helping or benefiting another..."

[47] I accept counsel for the Auckland Council's submission that cleaning ordinarily conjures up the following sort of characteristics – primarily an indoors activity; the cleaning of man-made surfaces; activities that are familiar to most people from domestic experience. Such characteristics are non-determinative, but are useful indicia.

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[4] [2007] NZSC 36, [2007] 3 NZLR 767at [22].
[5] (6th ed, Oxford University Press, Oxford, 2007).
[6] At 426.
[7] At 2700.

[48] Mr Drake submitted that leaf blowing is comparable to vacuuming. While leaf blowing involves the removal of unwanted material from a surface, I do not accept that it would ordinarily be described as providing a cleaning service. Activities involving vacuuming carpet, cleaning toilets, wiping out cupboards, and mopping floors would. Nor do I consider that activities such as picking up litter or waterblasting outdoor equipment or paving would generally be described as providing cleaning services. While picking up litter could conceivably (though not in my view usually) be described (as the plaintiff's witnesses did) as integral to ensuring a "clean" park, the act itself could hardly be termed cleaning in the ordinary sense of the word. Activities such as waterblasting a path or play equipment, and removing graffiti, would ordinarily be described as outdoor maintenance (to keep in good condition). Unsurprisingly, this is the way in which such activities are described in the relevant position descriptions.

[49] Both counsel for the plaintiff and Ms White emphasised that an employee could be disciplined or performance managed for failure to adequately perform what counsel described as their cleaning duties (including the picking up of rubbish). It was submitted that this indicated that such duties were important enough to the employer and Auckland Council to require monitoring of their attainment and, more generally, indicated that cleaning was integral to the employees' roles. However, the fact that employees (and the employer) were monitored to ensure that rubbish was being picked up, alongside many other performance criteria, does not change the nature of the work being performed. Nor does it render performance of one task, among many, pivotal to the role.

[50] Section 69A provides that the object of subpart 1, Part 6A is to "provide protection to *specified categories* of employees", whose "work" is to be performed for a new employer.[8] The specified categories of employees are referred to in Schedule 1A, which relevantly refers to a number of occupational groupings – those providing orderly, caretaking, laundry, food catering and cleaning services. Schedule 1A is focussed on the nature or type of service provided by the potentially affected employee. This suggests a need to consider the overall nature of the employee's role in the context of the total work activity, rather than engaging in a

[8] Emphasis added.

minute dissection of individual components of the employee's work and whether they might be independently described as "cleaning", "food catering", "orderly", "caretaking" or "laundry" functions.

[51] The point is reinforced by s 237A, which sets out the criteria that the Minister is to apply in recommending to the Governor-General that an amendment be made to Schedule 1A to "add to, omit from, or vary the categories of employees." The criteria are (as set out in ss (4)):

> (a) whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently:
> (b) whether the restructuring of employers' businesses in the sector concerned has tended to undermine the employees' terms and conditions of employment:
> (c) whether the employees concerned have little bargaining power.

Again, the focus is on the nature of the work as a whole.

[52] Counsel for the plaintiff drew attention to the fact that there is no reference to "cleaners" in Schedule 1A, rather the Act refers to employees providing "cleaning services". This, he submitted, reflected an intention that any employee undertaking cleaning tasks as part of their role (whatever it might be), would be covered by the protections conferred by Part 6A. I do not accept that submission. The reference to the service being provided reflects a legislative focus on the actual nature of the work, rather than the label accorded to an employee's role. If it were otherwise the protections afforded by Part 6A (and their associated costs) could readily be avoided. The focus on the nature of the service is also reinforced by s 69A, which refers to an employee's "work" being transferred.

[53] Adopting the wide interpretation advanced on behalf of the plaintiff would broaden the specified categories to a point where their legislative specification was rendered wholly redundant – employees providing food catering services would be covered under the cleaning services category` because part of their role involves cleaning up during food preparation, and persons providing laundry services would be covered because their role involves cleaning dirt off clothes.

[54] On the plaintiff's analysis dental hygienists, who clean teeth and dental equipment, would be providing "cleaning services", as would airline stewards who collect cast-off coffee cups and lolly wrappers during flights. The proposition only needs to be stated to be dismissed as absurd. Counsel for the union submitted that the result would be far from absurd, however, and that dental hygienists were precisely the sort of workers intended to be covered by Part 6A. I cannot accept that submission. There is nothing to suggest that Parliament intended that any employee who carries out cleaning duties as part of his or her role, however minor and however incidental and whatever the overarching nature of the position, would fall within the protective ambit of Part 6A.

[55] In *Matsuoka v LSG Sky Chefs New Zealand Ltd*,[9] Judge Travis held that an employee (Mr Matsuoka) who was involved in the organisation and delivery of food (for part of his work day) to aircraft, but not its actual production, was undertaking an activity that fell within the definition of food catering services for the purposes of Schedule 1A.[10] It is apparent that the Court had regard to the nature and extent of the duties undertaken by the employee in reaching this conclusion. Mr Matsuoka was found to be providing a wide range of duties in relation to food catering services for a number of different airlines, which fluctuated in terms of the time involved,[11] but which appears to have been several hours a day.[12]

[56] Counsel for the plaintiff submitted that Mr Matsuoka was, for the purposes of s 69F, only providing food catering services to Singapore Airlines (the relevant contracting party) and that it was this component of his work that was relevant because it was this work which was contracted out. This contention supported counsel's claim that *Matsuoka* stood for the proposition that minimal work of the sort specified in Schedule 1A was all that was required. However, the focus of Schedule 1A is on the nature of the services being provided, not on the identity of the party they are being provided to. It is tolerably clear that the bulk of Mr Matsuoka's average day was consumed with the provision of food catering services

[9] [2011] NZEmpC 44.
[10] At [65].
[11] At [89].
[12] At [83].

to a range of airlines. Although not expressly stated, it appears to be this factual finding that underpinned the Judge's conclusion that Schedule 1A applied.

[57] Ms Muir submitted that assistance could be derived from the approach adopted in cases involving demarcation disputes. She referred to *Northern Pulp Ltd v NZ Engine Drivers etc IUOW and NZ Timber Industry Employees IUOW*,[13] to support the application of a substantial component test in assessing whether a category of employee is providing cleaning services for the purposes of Schedule 1A. However, the substantial component test adopted by the Labour Court in *Northern Pulp Ltd* was drawn from s 108(3) of the Labour Relations Act 1987, which expressly required the Court to have regard to the "substantial nature of the occupation of those workers", among other things.

[58] Reference was also made to the approach adopted in *Wilkins and Davies Construction Co Ltd v New Zealand Labourers, General Workers and Related Trades IUOW Northern Branch.*[14] This case concerned the loading of barges with concrete pipes which were then moved to the construction site elsewhere within Whangarei harbour, and whether this constituted "waterside work" under the Waterfront Industry Act 1976. Justice Richardson observed that:[15]

> But then it was said by Mr Adams-Smith for the appellant that the Act is concerned with loading and discharging of vessels used in the commerce of water transport and that, in deciding whether a particular activity is waterside work, it is necessary to analyse the purpose for which the goods were being handled. In particular, it was said it was necessary to consider whether the activity was in the nature of general cargo handling or whether it was an activity incidental to some main purpose, the suggestion in this case being that it was an activity involved under a construction contract.
>
> In my view the suggested limitations read more into the Act than appears on an ordinary reading of the definition of waterside work in its context and would involve drawing elusive distinctions. *In my opinion it is the nature of the activity in question viewed in the context of the total work activity being undertaken at that time and its relationship to activities falling within the definition of waterside work that are crucial.* In this case the work involved is not preliminary to loading. It is not the moving of goods which have already been unloaded. Nor is it part of a wider activity on or about the vessel. It is an act of loading involving the movement of goods from shore to ship.

[13] [1989] 1 NZILR 680.
[14] [1979] ACJ 365 (CA).
[15] At 365, emphasis added.

[59] While *Wilkins and Davies* related to the definition of waterside work, the approach is instructive, focussing as it does on the nature of the activity in question as against the overall, or total, work activity being undertaken by the worker.[16]

[60] In *Wilkins and Davies* Richardson J cautioned against drawing "elusive distinctions" in terms of the test to be applied to determining whether the activity at issue fell within the category of waterside work. This point is of equal application in the context of the present case. As Chief Judge Goddard emphasised in *New Zealand Rail Ltd v National Union of Railway Workers of New Zealand Inc (No 1),*[17] in the context of the interpretation to be given to a category of essential service specified in what is now Schedule 1 of the Act:[18]

> … the schedule was written so as to be understood by practical people engaged in the practical conduct of industry – personnel managers and union officials principally. They are busy people who need to know where they stand, and do not expect in so fundamental a matter as whether a service is or is not essential to have to search for hidden meanings in the legislation, or have to take the advice of counsel before acting ...

[61] Relevantly, Schedule 1A refers to cleaning services, not "cleaning". This suggests that it is the provision of this type of service, rather than an aspect of the role that requires cleaning to be undertaken, that is required to be performed. This requires assessment of the real nature of the role, which will include consideration of its focus and purpose. The frequency and importance of cleaning within the role will assist in determining if a cleaning service is being provided.

[62] Whether a category of employee can be said to be providing a cleaning service for the purposes of Schedule 1A will readily be answered where, for example, employees are employed as cleaners undertaking traditional office cleaning work. Issues may arise in relation to "blended" roles. Such a case will require a factual assessment of the real nature of the role undertaken by the employee under their employment agreement and the relationship of the tasks in question to that role.

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[16] See also *Cunningham Construction (1987) Ltd v NZ Labourers Union & Ors* [1990] 3 NZILR 868 (CA) at 870, which emphasises that whether an employee's work falls into the category of performing an essential service is necessarily a question of fact.
[17] [1992] 3 ERNZ 966.
[18] At 973.

[63] The plaintiff sought to rely on the evidence of Mr McDonald, senior human resources advisor at Massey University. Mr McDonald described himself as an expert, and expressed a number of views in his affidavit about whether he considered the potentially affected employees were providing cleaning services. I did not find his evidence helpful. Whether or not cleaning services are being provided for the purposes of Schedule 1A involves an exercise of interpretation and factual assessment by the Court.

[64] In the present case, the real nature of the roles performed by each of the five categories of potentially affected employee emerges from the evidence – the roles are horticultural and squarely relate to parks maintenance, with a focus on lawn mowing, maintenance of flower and other beds, and the maintenance of park structures and amenities. That is what the potentially affected employees are employed for (as reflected in the relevant job descriptions), and that is what their daily work is directed at.

[65] Picking up litter is a component of the work carried out by employees within each of the five identified groups. Such an activity is not cleaning within an ordinarily accepted meaning of the word. While there is some reference to "cleaning" in the Specifications as including loose litter collection and other activities such as waterblasting, this is not the way in which these activities are otherwise described and nor is it the way in which the position descriptions refer to the roles in question.

[66] The residual activities of the potentially affected employees reduce to the following. It appears that horticultural labourers may be required to keep their vehicles clean; gardeners to keep their vehicles clean and pathways clear; mowers to sweep and blow paths and keep their vehicles clean; and maintenance labourers to remove graffiti, wipe down surfaces, waterblast, clean barbeques during certain times of the year, and sweep paths. I do not consider that tasks of this sort (which are incidental, preliminary or merely preparatory) engage Schedule 1A, and bring an employee within the categories of protected employees. Viewed in the context of the total work activity, the cleaning tasks component of the positions is such that it is clear that the real nature of the positions is not the provision of cleaning services.

**Legislative history cross-check**

[67] The legislative history provides a useful cross-check. It does not support the broad interpretation of Schedule 1A advanced on behalf of the plaintiff.

[68] Council for the Auckland Council referred to the 2001 *Report of the Advisory Group on Contracting Out and Sale and Transfers of Business to the Minister of Labour*,[19] which preceded the introduction of the original Part 6A via the Employment Relations Law Reform Bill.[20] The Advisory Group concluded that there was a need to provide further protection to employees, particularly vulnerable members in the workforce. It observed that:[21]

> … contracting out is particularly common in some sectors – cleaning, catering, and security services, IT, forestry, construction and so on. In many cases these arrangements work to the satisfaction of both parties. In many others, serious concerns about the impact of contracting out are raised. These concerns frequently relate to 'vulnerable' members of the labour market, for example, Pacific women cleaners.

[69] The Advisory Group also noted that there is a possibility of targeting intervention at certain groups where there was an identified need (essentially because of vulnerability).[22]

[70] As is apparent, some of the sectors identified by the Advisory Group in which contracting out was identified as commonly occurring (namely security services, information technology, forestry and construction) did not find their way into Schedule 1A. In its report, the Advisory Group referred to a discussion paper prepared by the Council of Trade Unions (CTU) which had specifically identified for possible inclusion the following contract workers:[23]

1. Railway workers;

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[19] *Report of the Advisory Group on Contracting Out and Sale and Transfers of Business to the Minister of Labour* (Ministry of Labour, April 2001).
[20] The original Part 6A was repealed and replaced by the Employment Relations Amendment Act 2006 which instituted the current provisions. The *Explanatory Note* to that Act explains (at 2) that the Act was intended to "ensure that the Government's original policy intent" with respect to transfer of undertakings, as embodied in the Employment Relations Law Reform Bill, was carried out. In any case, the 2006 amendments did not alter the wording of sch 1A.
[21] *Report of the Advisory Group* at 22.
[22] At 45.
[23] Council of Trade Unions *Protection of Employees in the Case of Sale, Transfer or Contracting Out* as cited in *Report of the Advisory Group* at 57-58.

2. Cleaners in commercial buildings, including airports, business premises;
3. Bank workers;
4. Cleaners in educational institutes;
5. Cleaners in hospitals and rest homes;
6. Catering workers employed in commercial cafeterias, education cafeterias, etc;
7. Orderlies employed in hospitals;
8. Laundry workers in hospitals and rest homes;
9. Security guards in commercial premises, education institutes and hospitals;
10. Ground maintenance workers in education institutes.

[71] The CTU observed that:[24]

> In all of [the above] situations, the employer of the workers ... has made a decision to no longer provide the service and employ the workers itself, but to enter into a service contract with a contract company to provide the service. In other words, the worker's job is still to be performed, but by an employee of the contract company, not the employee of the user enterprise.

[72] It is notable that while grounds maintenance workers (in the education sector) were identified by the CTU as contract workers who were vulnerable, they were also identified by the CTU as a distinct and separate group from cleaners. It is also notable, as Ms Muir pointed out, that grounds maintenance workers were not included in Schedule 1A.

[73] In *Gibbs v Crest Commercial Cleaning Ltd*[25] the Employment Court adopted a relatively broad approach to legislative materials, holding that the Court may, in considering ambiguous or deficient legislation, have regard to:[26] "the background material relied on by the proponents of the legislation and by Parliament to attempt

[24] At 58.
[25] [2005] ERNZ 399.
[26] At [72].

to discern what may have been its intention." The Advisory Group's report was prepared for the Minister.[27]

[74] In *Marlborough District Council v Altimarloch Joint Venture Limited*[28] the Supreme Court declined leave to extend the grounds of appeal based on a departmental report that the appellant wished to rely on. The Court observed that:[29]

> The departmental report upon which the appellant now wishes to rely to support its statutory interpretation argument does not come within the scope of legislative material conventionally regarded as available for that purpose. The report was not referred to by the Select Committee nor was it mentioned in Parliamentary debate.

[75] In the present case it is apparent that the Advisory Group's work was referred to at the first reading of the Employment Relations Law Reform Bill.[30] No issue was taken by counsel for the plaintiff in relation to any reference to the Advisory Group's report. Even if the Advisory Group report is put to one side, the parliamentary material supports the position being advanced on behalf of the defendant.

[76] The Employment Relations Law Reform Bill was introduced into Parliament in 2003 and contained the original Part 6A. The *Explanatory Note* to the Bill states the intention was:[31]

> … the protection of employees in restructuring situations, so that terms and conditions are not undermined and the new employer is encouraged to make the best use of existing talent … *The Bill also identifies specific groups of employees who require special protection in restructuring situations*, due to their particular vulnerability and lack of bargaining power.

[77] The explanatory note went on to describe the "statutory protection for specified categories of employee" as follows:[32]

> The Bill also contains provisions designed to provide a higher level of statutory protection to groups of employees that are considered particularly vulnerable to and disadvantaged by change of employer situations. … These

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[27] See also *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 where the Court of Appeal relied on a departmental report as part of the legislative history although noting that such reports should be treated with caution (at [26]).
[28] [2010] NZSC 126.
[29] At [1].
[30] (11 December 2003) 614 NZPD 10672.
[31] At 2. Emphasis added.
[32] At 10. Emphasis added.

> protections will apply to groups of employees described in a schedule to the legislation. … *Elements of the service sector (cleaning, food, and laundry services) are prime examples of particularly vulnerable employees* … and have therefore been included in a schedule of the Bill.

[78] The Employment Relations Law Reform Bill became the Employment Relations Amendment Bill (No 2) and, at its third reading, the then Minister of Labour stated, in relation to the new Part 6A that:[33]

> … I would like to comment on the introduction of protections for the most at-risk employees. In sale, transfer, or contracting out, *a higher level of protection has been given to those employees who have been most vulnerable to restructuring situations in the past*. Those employees will have the right to transfer to the new employer on the existing terms and conditions of employment, and are *those in the cleaning and food catering industries.* To accommodate future change in the labour market and in employment practices, we have built in a clear process for amending the groups of employees who will have a statutory right to transfer and restructuring situations.

[79] The built in process for amending the groups of employees referred to by the Minister of Labour during the third reading of the Bill, is reflected in the criteria specified in s 237A. They include, as noted above at [51], whether the employees are employed in a sector in which the restructuring is common; whether the restructuring in the sector concerned has tended to undermine the employee's terms and conditions of employment; and whether the employees concerned have little bargaining power.

[80] It is evident from the foregoing that Parliament's purpose was to protect limited categories of employees in sectors subject to frequent restructurings, who are generally unskilled, and who lack bargaining power. Counsel for the union submitted that the potentially affected employees required protection because they held a number of similar characteristics to the protected categories of employee in Schedule 1A. Even if that is so, these are criteria that the Minister is obliged to apply in determining whether to provide statutory coverage to a new group of employees. As the legislative history makes clear, there were other categories of "vulnerable" employees which Parliament chose not to protect. There is no suggestion that can be drawn from the legislative material that components of an employee's work, rather than the overall nature of the service being provided, was to

[33] (19 October 2004) 621 NZPD 16271. Emphasis added.

be the cornerstone inquiry for entry through the Schedule 1A gateway. Any decision to expand the categories identified in Schedule 1A is for the Minister, not the Court.

[81] The effect of Part 6A is to require an employer to engage employees, over which the new employer has no control or choice – effectively strangers. It is, in this sense, an exception to the usual principles regarding the freedom to contract in employment. The position adopted in New Zealand can be contrasted to the legislative framework in the United Kingdom, where all employees – rather than discrete categories of employees – are eligible to transfer.[34] It is clear that Part 6A was intended to provide protection for limited categories of employees providing a particular type of service.

**Result**

[82] I conclude that none of the categories of employee identified as being potentially affected are providing cleaning services within the meaning of Schedule 1A of the Act. I accordingly answer the question posed by the parties at [2] above: "No".

[83] As neither party sought costs, no such order is made.

Christina Inglis
Judge

Judgment signed at 12.30pm on 1 June 2012

[34] Transfer of Undertakings (Protection of Employment) Regulations 2006 (UK).