

Cleaning and catering staff

Cleaners and caterers have special rights under the Employment Relations Act to transfer their employment to a new employer, when a business is sold for example, and also when there is a change of contractor. These rights are shared by just a few other groups of workers in specified industries.

One company, Crest Commercial Cleaning, has challenged these legal provisions with mixed results. In 2005 it successfully argued that the first attempt in legislation failed to achieve the transfer of employees in the event of a change of contractor. The relevant parts of the legislation were rewritten as a result.

In June 2012 the Employment Court decided that Mr Doran had become an employee of Crest in 2009 by operation of the Act. Mr Doran's previous employer, the company Crest had been cleaning for, and Mr Doran himself had all told Crest that he elected to transfer his employment to Crest. Crest unjustifiably dismissed Mr Doran by refusing to recognise him as an employee.

The same happened when Crest refused to recognise Mr and Mrs Fotu as employees earlier this year in similar circumstances. In this Employment Relations Authority case Crest also tried to argue that it needed documentation from the Fotus' previous employer in order to meet other legal requirements. However Crest could have obtained the information it was seeking directly from the Fotus by meeting with them as had been offered.

These recent decisions confirm that:

- An employee must be given a reasonable time to decide whether to elect to transfer, as well as being given the information specified in the Act.
- No particular form of written words is required by the Act. The outgoing employer may accept an employee's election to transfer verbally or in writing. If it is in writing it does not have to be signed.
- The Act provides the new employer with the right to request certain information about the employees who are entitled to transfer, but only before agreement is reached for the new employer to provide the services.
- The transfer of an employee is not conditional upon the provision of that information or any other information which the new employer may want (e.g. copies of employment agreements).
- The outgoing employer has no obligation to provide any undertaking to the new employer that it has complied with its obligations under the Act.

Crest's lobbying has been more successful. This week the Government has announced that it intends to change the law to exempt businesses with fewer than 20 employees from the requirement to accept transferring employees. If each of Crest's franchisees employs fewer than 20 staff they would be exempt. Another proposed change is a requirement for the outgoing employer to forward relevant information about employees to the new employer.

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