

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN NZ Amalgamated Engineering Printing & Manufacturing Union Inc
(Applicant)

AND Air New Zealand Limited (Respondent)

REPRESENTATIVES Kathryn Beck, Counsel for Applicant
Rachel Larmer, Counsel for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 17 March 2006

DATE OF DETERMINATION 21 March 2006

DETERMINATION OF THE AUTHORITY

Application for removal of matter to Employment Court

[1] Before the Authority is an application to remove an employment relationship problem to the Court, for the matter to be heard and determined there without an investigation by the Authority.

[2] The removal application is made on behalf of the NZ Amalgamated Engineering Printing and Manufacturing Union Inc. (EPMU). It is opposed by the respondent employer Air New Zealand Limited (Air NZ).

[3] The employment relationship problem (which has been the subject of extensive mediation) is described in the substantive application lodged in the Authority by EPMU as being a problem concerned with the following;

- (a) *An apparent (but undisclosed) strategy by the Respondent to contract out “non-core” or “peripheral” areas of business (“the strategy”);*
- (b) *The strategy’s practical affect on the Respondent’s proposal dated 28 September 2005 to contract out cleaning services and thus the work of 106 employees (“the employees”) employed by the respondent.*

[4] EPMU’s case is that in August 2005, Air NZ invited approaches from persons or firms interested in contracting with the company to carry out the work involved in cleaning aircraft. That work was then and is now being carried out by employee cleaners of Air NZ, whose employment is covered by the Ground Staff Collective Agreement which EPMU, their union, is also party to.

[5] The case for the union is also that in furthering its interest towards contracting out the aircraft

cleaning work, Air NZ invoked provisions of the Collective Agreement which require a particular process to be followed in achieving that change. Amongst other things, the process prescribes that before any final decision is made about any contracting out proposals the airline must supply all relevant information to union representatives and must provide opportunities for consultation to take place between the parties.

[6] The particular matters EPMU has identified for resolution in this case are;

- a failure by Air NZ to correctly understand its obligations under the Collective Agreement provisions relevant to contracting out the airline's work,
- a failure to comply with those obligations,
- an anticipated failure to comply with the process further downstream,
- the existence of a "business strategy" devised by Air NZ and intended by it to be implemented in a blanket or wholesale fashion so as to achieve the contracting out of other work and services as well as that of aircraft cleaning.

[7] To resolve the employment relationship problem EPMU seeks declarations that in several particularised respects Air NZ has acted in breach of good faith requirements under the Employment Relations Act 2000. The union also seeks declarations that in several respects Air NZ has failed to comply with its obligations under the Collective Agreement.

[8] To remedy the breaches EPMU seeks orders on specific terms requiring Air NZ to comply with its obligations under the Act and the Collective Agreement. Those obligations include the supply of all information relevant to the contracting out proposal and the performance of a commitment to prefer the employment of its own employees in work covered by the Collective Agreement. Also sought is an order preventing Air NZ from contracting out the aircraft cleaning work. This remedy is contingent upon the union being able to help make material improvements to the quality and profitability of the cleaning services performed by the airline.

Grounds on which removal sought

[9] Removal is sought on either of the particular grounds under s.178(2) of the Act that;

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court;

and,

(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[10] It is submitted by EPMU that as well as directly affecting the 106 workers to which the statement of problem refers, the outcome of this case will potentially affect a significant number of other Air NZ workers who are covered by the Collective Agreement. It is submitted in this regard that about 40 aircraft cleaners who are currently employed by Air NZ on a casual basis will potentially be affected because of rights or expectations they have been given by the airline to remain employees and to become employed on a permanent basis.

[11] As well as aircraft cleaners, up to about 1100 other workers employed under the Collective

Agreement may have their jobs placed in jeopardy by any expansion of the airline's contracting out proposals, particularly if the strategy perceived by EPMU is intended to be used widely across the business operations of Air NZ. For this reason it is submitted a determination of the Court as to the parties' rights and obligations under the applicable provisions of the Collective Agreement is a matter of high importance in this case. It is submitted that the number of workers directly affected and also potentially affected - about 1200 - is great enough to justify removal.

[12] A further reason given in support of removal is that because of the nature of the case the Authority's determination will inevitably be challenged by one party or the other and that therefore removal will prevent the loss of time and the depletion of resources that will be caused if an investigation by the Authority takes place.

[13] In opposing removal Air NZ has submitted that the Authority should preserve for the employer the right to appeal by way of de novo challenge and that there can be no certainty of a challenge being brought. It is submitted that much about the removal application is speculative, hypothetical and anticipatory, and is not therefore a sure enough basis for removal. EPMU's case is built to a large extent upon an alleged "strategy" on the part of Air NZ which if it does not exist makes any prediction about the wider consequences of this case purely speculative.

[14] It is implicit in s.178(2)(b) of the Act that if a matter is removed "immediately" the Court will be in a position to receive and dispose of it with an appropriate degree of urgency. The Authority is able to investigate this matter by mid-April and a determination could reasonably be expected by the parties within a fortnight after that. Enquiries of the Court by counsel as to when a hearing could take place there have yielded different advice and I am therefore uncertain about this factor, which may generally go to the residual discretion not to remove.

Determination

[15] I consider that there is much force in the submissions made by EPMU about the particular nature of this case and its urgency, but I am not persuaded that the matters referred to are enough to draw the interest of the public in having this case removed immediately. The matters relied on by EPMU do however readily lead me to the view that in all the circumstances the Court should determine this case.

[16] In particular I note the presence, although not invoked, of another ground for removal under s.178, namely that an important question of law is likely to arise in this matter other than incidentally; s.178(2)(a). There is no dispute between the parties that an issue of interpretation of the Collective Agreement arises directly in this case and that the issue will be of importance in resolving the case. This issue is largely a question of law and one which although not the sole issue is reasonably central to the resolution of the case. If not the ground itself, there are elements of s.178(2)(a) present to such a degree that when considered with the nature of the case and its relative urgency they leave me with the opinion that the Court should determine the matter.

[17] For the reasons given above, the Authority orders the removal of this matter in its entirety to the Court.

Non-publication order

[18] I confirm the orders made orally by the Authority on the application of Air NZ, that publication is prohibited of;

- paragraphs 1.13, 2.2 – 2.7, 2.12, 2.14, 2.16, 2.18 – 2.23, 2.25, 2.32, 2.34, 2.36 and 2.37 of Air

NZ's statement in reply dated 3 March 2006, and

- documents numbered 1, 3, 4, 5, 9, 11, 12, 13, 14, 19, 20, 21, 24, 25 and 26 of Air NZ's list of documents as attached to the statement in reply.

[19] The application for the non-publication orders was unopposed by EPMU and I am satisfied that given the commercially sensitive and confidential nature of the above specified information in the statement in reply and accompanying documents, it is in the interests of justice for the orders to be made. The non-publication orders are to remain in force until varied or discharged by order of the Authority or Court.

Costs

[20] Costs are reserved. If there is any question of costs which either an agreement of the parties or a decision of the Court does not resolve, application may be made in writing in the usual way.

A Dumbleton
Member of Employment Relations Authority