

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 143/08
5120850

BETWEEN NEW ZEALAND AIRLINE
 PILOTS ASSOCIATION INC
 Applicant

AND AIR NELSON LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Richard McCabe for Applicant
 Kevin Thompson for Respondent

Submissions received: 16 April 2008 from Respondent, 17 April 2008 from
 Applicant

Determination: 17 April 2008

**DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR
REMOVAL**

Employment Relationship Problem

[1] On 9 April the applicant union (ALPA) lodged an application for a declaration as to the lawfulness and effect of a notice of intention to strike it had issued on 3 April 2008. Urgency was sought and granted and a timetable agreed for the Authority's investigation. Yesterday, however the respondent (Air Nelson) applied to have the matter removed to the Employment Court pursuant to section 178 of the Act on the grounds that:

- i. an important question of law is likely to arise in the matter other than incidentally and,
- ii. in all the circumstances the Court should determine the matter.

[2] The subject matter of this determination is limited to the application for removal. The applicant, ALPA, does not oppose removal. However the consent of both parties is not by itself sufficient grounds for the Authority to order removal. At least one of the grounds set out in s.178 (2) must be made out. The issues for determination are therefore whether either or both of the grounds relied on by the respondent are made out in this case.

Is an important question of law likely to arise other than incidentally?

[3] The relevant parts of the notice in question read as follows:

“(A) NATURE OF THE PROPOSED STRIKE:

A total unavailability of the pilots for all flying duties, which action shall be continuous for the period specified in paragraph (C) hereunder at the conclusion of which period each of the pilots not rostered for leave, a day off, or a recreation period at that time shall be available to recommence his or her duties, and shall present himself or herself as available for duty at the place at which he or she commenced the proposed strike...

(C) THE DATE AND DURATION OF THE PROPOSED STRIKE SHALL BE:

Commencing on FRIDAY the 18th day of APRIL 2008 at 00.01 hours (00.01 a.m.) and continuing until 23.59 hours (11.59 p.m.) on FRIDAY the 18th APRIL 2008...”

[4] On 7 April 2008 ALPA was advised by Air Nelson that it had notified or intended to notify ALPA pilot members, without the union’s consent, that:

“...if you do participate in strike action on 18 April, it will be your responsibility to ensure that you are available for your next rostered duty at the rostered location following the end of the strike. This may mean that you will need to make your own transport arrangements so as to be able to commence that duty. Failure to present at the next rostered point of departure could result in your being absent without leave or party to an unlawful strike.”

[5] The applicant sought from the Authority a declaration that the notice of intended strike was lawful, that not being “*in position*” was a natural and logical consequence of the lawful strike, and that no pilot who was “*out of position*” on 19 April 2008 at the end of the intended strike would be absent without leave or a party to an unlawful strike as a result.

[6] The respondent’s position as set out in the Statement in Reply was that the intended strike action was unlawful, in part because pilots would be out of position at the conclusion of the strike period specified in the notice. As set out in the respondent’s particulars, work for pilots is allocated in accordance with a roster published in advance which requires pilots to present for duty at specific airport locations across Air Nelson’s network of operations. Pilots who were “out of position” at the conclusion of the strike would not be available to perform normal flying duties on 19 April.

[7] The respondent further asserts that the action of pilots in advising that they will present for duty at a location other than the one they are rostered to work from is a strike within the meaning of section 81(1.) Such action will not, it says, be lawful because it has not been the subject of a notice of intention to strike.

[8] The respondent also says that in stating that the pilots “*intend to strike after the expiry of fourteen (14) days and before the expiry of twenty eight (28) days of the date of receipt of this notice by the employer*” the union has failed to comply with the section 90(3) which requires that the notice “*must specify the period of notice.*”

[9] The respondent put ALPA on notice of its intention to recover any losses it might suffer as a result of strike action found to be unlawful.

[10] In support of the application for removal the respondent says that two important questions of law arise in the substantive matter, namely:

- i. Whether the notice of intention to strike meets the notice requirements of s.90 (3), and
- ii. Whether a failure by pilots to be “*in position*” at the conclusion of the specified period amounts to strike action.

[11] The respondent notes that these issues have previously been considered in the context of an application for interim injunction (*Air New Zealand Limited v FARSA [2002] 2 ERNZ 770.*) but notes that since the matter in question did not proceed to a substantive hearing, not all the relevant issues have been settled.

[12] I accept these arguments. I am satisfied that the questions raised are important questions of law. The application for removal succeeds on that ground.

The circumstances of the case

[13] The respondent argues that the Court should determine the matter because:

- i. The issues raised here are recurring issues and it is anticipated that further similar strike notices will be issued;
- ii. The matter is of importance to the parties and to all the affected pilots as individuals;
- iii. The matters raised are of wider significance to employees, employers, and unions generally;
- iv. Although both parties seek to rely on the decision in *Air New Zealand v FARSA* the matter should be addressed on a substantive basis;
- v. Whatever the outcome in the Authority, the matter is likely to be subject to a challenge to the Court;
- vi. Removal will expedite the final determination of the issues.

[14] I am satisfied that given these circumstances the Court should determine the matter.

[15] **Both grounds for removal have been made out. The matter is removed to the Employment Court.**

Yvonne Oldfield

Member of the Employment Relations Authority

