

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 222/08  
5124937

BETWEEN                      NEW ZEALAND AIR LINE  
                                         PILOTS' ASSOCIATION  
                                         INCORPORATED  
                                         Applicant

AND                              AIR NELSON LIMITED  
                                         Respondent

Member of Authority:      Dzintra King

Representatives:            Richard McCabe, Counsel for Applicant  
                                         Kevin Thompson, Counsel for Respondent

Investigation Meeting:     27 June 2008

Determination:              30 June 2008

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**DETERMINATION OF THE AUTHORITY**

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[1]     The applicant union, the New Zealand Air Line Pilots' Association ("NZAPLA") asks that the Authority provide facilitation to help the parties resolve serious difficulties in concluding a collective agreement.

[2]     The respondent, Air Nelson Ltd, neither supports nor opposes the application but says that it does not believe that the thresholds under the Employment Relations Act 2000 have been met.

**Discretion**

[3]     Air Nelson's position is that even if the mandatory grounds have been met the Authority should not exercise its discretion to direct the parties to facilitation. Air Nelson says that s 50A clearly provides that as a prerequisite the parties must have not only difficulties but serious difficulties. Section 50B sets out the power to refer to

facilitation which Air Nelson says is a discretionary power exercisable only in the event that one or more of the grounds set out in 50C are established.

[4] NZALPA says that the wording of s 50C (1) means that the Authority must accept a reference to facilitation if one or more of the grounds set out in s 50C exist.

[5] In *New Zealand Meat Workers and related Trades Union v Crusader Meats NZ Ltd*, 24/5/07, L Robinson (Member), AA 157/07 the Authority held that s 50C was “framed in terms of a presumption against facilitation unless prescribed circumstances are present”.

[6] I do not think there is a discretion to refuse facilitation if the parties are having serious difficulties concluding a collective agreement and one of the criteria in s 50C is satisfied. The criteria listed are those that are indicative of there being serious difficulties. They contain, for instance, a recognition that negotiations can be lengthy and can entail industrial action by either party but that those elements in themselves are to be seen as normal incidents of negotiation. The qualifications on those criteria – that negotiations be “unduly” protracted and that strikes or lockouts must also be protracted – indicate that in those circumstances the parties are experiencing not only difficulties but serious difficulties.

### **Grounds for the Application**

[7] The grounds upon which the applicant seeks facilitation are:

- Pursuant to s 50C (1) (b) Employment Relations Act 2000 the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a replacement collective agreement;
- Pursuant to s 50C (1) (c) Employment Relations Act 2000 there have been a number of strikes and further strikes are proposed. The strikes have been protracted;
- Pursuant to s 50C (1) (d) in the course of bargaining the applicant has proposed strikes and the strikes will affect the public interest adversely.

[8] The respondent says that:

- Bargaining has not been unduly protracted and that there have not been extensive efforts to settle a CEA;
- While there have been strikes they have not been protracted or acrimonious;
- Strike action which has occurred has not substantially affected the public interest.

**Has the bargaining been unduly protracted?**

[9] NZALPA and Air Nelson Ltd are parties to the Air Nelson Limited NZALPA Air Nelson Pilots' Collective Agreement 2004 – 2007 ("the CEA"). The CEA came into force on 17 August 2004 and expired on 16 August 2007. It continues in force as a CEA until 17 August 2008 pursuant to s 53 (3) Employment Relations Act 2000.

[10] The applicant initiated bargaining for a new CEA on 3 July 2007. The parties met on 16 and 17 July 2007 and discussed a bargaining process agreement but did not reach agreement.

[11] The parties have had negotiations or meetings related to negotiations for about 20 days between July 2007 and February 2008. There have also been two mediations, one in March 2008 and one in May 2008.

[12] Since then there have been no further meetings.

[13] However, negotiations in the industry have tended to be prolonged negotiations.

[14] The parties differ as to whether or not NZALPA indicated a willingness to return to return to mediation following the May 2008 mediation.

[15] NZAPLA advises that it has recently held a series of meetings with its members and has no mandate to alter the claims as they currently stand. Judging by the evidence given at the hearing Air Nelson is unlikely to move on a substantial

number of issues. I think it can be said that the negotiations are at a virtual stalemate. The issues being negotiated are complex and interrelated.

[16] Because of the nature of the industry there have been problems ensuring that all the negotiators are available on days set aside for negotiations.

[17] I am not convinced that the bargaining has been unduly protracted. There has been very limited bargaining in the last six months and limited use of mediation.

### **Strikes s 50C (1) (c)**

[18] There have been a number of strikes and further strikes are proposed. There have been over 100 days of strike action since March 2008. Notice of intention to strike during the school holidays has been given to Air Nelson. These notices include:

- A refusal to work on days off or return to work while on annual leave;
- A refusal to perform visual approaches and departures;
- Withdrawal of labour on each day until 9.15am.

[19] The nature of the past strike action has been largely of a more limited nature. However, these have taken place over a prolonged period.

[20] The respondent says this does not constitute protracted strike action. It says that protracted strike action means that there must be “continuous strike action of an impacting nature”. “Protracted” means “prolonged’ or “lengthy”. The fact that a large number of separate strike notices have been issued and acted upon does not mean that the strike action has not been prolonged or lengthy.

[21] This ground for referral to facilitation has been met.

### **Affect on Public Interest**

[22] NZALPA says that the strikes proposed are likely to substantially affect the public interest. Section 50C (2) (b) provides that a substantial effect on the public interest will occur if the strike or lockout is likely to disrupt social, environmental, or

economic interests and the effects of the disruption are likely to be widespread, long-term or irreversible.

[23] Having heard from Air Nelson I am doubtful that the effects of the proposed strikes are likely to fall within the statutory criteria. That is not to say that more widespread action, for example lengthier withdrawals of labour, would fail to meet the criteria. What is proposed will cause inconvenience and disruption but there is not, at this stage, a real and substantial risk that the consequences will be widespread, irreversible or long term.

### **Referral to Facilitation**

[24] The application meets the criterion set out in s 50C (1) (c). I therefore make an order that the matter be referred to the Authority for facilitation.

### **Costs**

[25] Costs were reserved. If the parties are unable to resolve this issue the applicant is to file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority