**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

CA 74/09
5159924

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| | BETWEEN | NEW ZEALAND MERCHANT SERVICE GUILD<br>First Applicant |
| | | DAVID BOURNE, JOHN CONRAD and JAMES KING-TURNER<br>Second Applicants |
| | AND | REAL JOURNEYS LIMITED<br>Respondent |

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| Member of Authority: | Paul Montgomery |
| Representatives: | Paul McBride, Counsel for Applicants<br>Janet Copeland, Counsel for Respondent |
| Investigation Meeting: | 28 May 2009 at Queenstown |
| Determination: | 5 June 2009 |

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**INTERIM DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] There are two primary strands to this application. The first is the seeking of an interim injunction restraining the respondent from continuing its restructuring process pending the Authority's resolution of the dispute as to the application and operation of the collective employment agreement (CEA) in the restructuring setting.

[2] The second strand relates to an allegation of discrimination against the second applicants on the ground of union membership. This is said to arise due to the three permanent Launch Master positions based in Milford Sound being the positions affected by the restructuring process. The present incumbents are members of the first applicant.

[3] On behalf of the applicants, Mr McBride contends there is an arguable case on three grounds. He submits the selection pool is wrong as the scope of the contractual duties carried out by the three second applicants is the same as the three launch masters who also captain vessels in Milford Sound during the summer season and are deployed on other tasks during the winter season when the respondent's requirement for cruises is reduced. All six men are permanent employees.

[4] The second ground cited is the alleged discrimination on the ground of union membership and the third relates to a dispute regarding the process being applied which, it is alleged, is in breach of s.15(2) of the CEA.

[5] The respondent opposes the application. While contending the issue of the constitution of the *selection pool* has become *largely irrelevant* in the light of the respondent's undertaking to include all six launch masters in the selection, Ms Copeland submits the raising of the dispute is *an abuse of process* and is designed to derail the restructuring process in the face of a serious projected decline in tourist numbers in the coming summer season.

[6] Counsel submits there is a relevant difference in the role undertaken by the second applicants and that performed by the three *variable permanent launch masters.* In support of this contention, Ms Copeland advances a range of factually-based differences which need not be detailed here but which, counsel submits, identify the nature of the second applicants' employment as being substantially different from that of the *variable permanent launch masters*.

[7] Further, counsel submits that in good faith it widened the initial selection pool to include the *variable permanent launch masters* and has, at the time of the interim investigation meeting, begun a selection process involving all six masters, on the basis that the selection process is on a without prejudice basis, pending hearing of the substantive issues.

[8] In counsel's contention that is a fair response to the applicants' concern and, on that basis, the applicants' arguable case fails.

**The law to be applied**

[9] In an application for interim relief, the Employment Court in *X and Y Ltd v. NZ Stock Exchange* [1992] 1 ERNZ 863 set out the principles in relation to the

threshold of an arguable case defining this as *a case with some serious or arguable, but not necessarily certain, prospects of success. The Court looks to see whether the facts which may be established subsequently might be sufficient to entitle the plaintiff ultimately to succeed*.

[10] Where, as in this case, the application for interim relief rests on an alleged dispute between the parties, the dispute itself cannot be resolved at the interim stage, *but may itself be an element tending to show the existence of an arguable case,* (*Laker v. Armourguard Security Ltd* [1998] 1 ERNZ 424).

**Arguable case**

(i) ***The selection pool***

[11] The undertaking given by the respondent to include all six launch masters in the selection pool has addressed this element of the applicants' claim adequately. In spite of this, a substantive issue remains to be argued as to whether the nature of the positions held by all six are the same or substantially the same.

(ii) ***Discrimination***

[12] The applicants contend the three permanent Milford Sound masters are being targeted for possible redundancy because all three are Guild members while the other three launch masters are not. Counsel for the applicants submits, in the light of ss.104 and 119 of the Act, that all three second applicants are involved in the activities of the Guild, a duly registered union under the Act.

[13] The affidavit of Mr Conrad makes it clear he has acted as a bargaining agent for the Guild membership and for individual members in dispute with the respondent. In that affidavit, he refers to Mr Bourne and Mr King-Turner as *active and vocal Guild members*. Mr King-Turner provided an affidavit in reply. However, he makes no reference to the extent of his involvement in Guild affairs. Mr Bourne did not submit an affidavit so the Authority has no details on the extent of his involvement at this point.

[14] On the face of the untested evidence, it appears the rebuttable presumption set out in s.119 may have application in Mr Conrad's case and may also apply to the other second applicants.

(iii) ***Dispute***

[15] The key aspects of the alleged dispute between the parties are the issue of whether the roles of the six launch masters are substantially the same and whether the process, including the selection criteria, comply with the terms of the CEA.

(a) *Roles*

[16] The respondent submits the roles of the variable permanent launch masters differ significantly from those of the permanent Milford Sound masters. The applicants reject that view and further say the term *variable permanent launch master* is of recent origin and was in fact coined by the respondent alone.

(b) *Selection criteria*

[17] Without detailing the criteria to be applied in the selection process, the applicants submit these were developed without input from the Guild and, further, that the weight to be applied to various criteria disadvantages Guild members.

[18] The respondent denies it is required to consult with the Guild under the relevant sections of the CEA and, further, says that the prerogative of company management allows it to determine the skill sets and other attributes it wishes to retain.

[19] Considering these issues, I find there is an arguable case. Whether, as counsel for the applicants submits, it is *strongly arguable* is yet to be established.

**Adequate alternative remedy**

[20] In this matter, it is difficult to accept that monetary remedies would compensate the second applicants for the loss of their permanent employment in the event that came about from the exercise of a disputed process. While there is no guarantee they will not be selected, at issue here is a dispute over the process being applied. Until that issue is resolved, the risk is that, should they be selected, the only recourse is a challenge to the justification for their dismissals. That is clearly unsatisfactory given the dispute over the process.

**Balance of convenience**

[21] At issue here is the detriment either party is likely to suffer should the interim relief not be granted on the one hand, or be granted on the other.

[22] It is clear the respondent requires two fewer launch masters due to the reduction in tourist numbers. It submits it needs to finalise the selection issue in order to finalise its summer schedules at Milford Sound, and have that and other sales material to its offshore agents as promptly as possible. It says further delays will inhibit that essential activity and as a result sales may be lost. Should that occur, the respondent submits it will impact on other operational requirements.

[23] The applicants submit the affidavits of Messrs King-Turner and Conrad spell out very clearly the detriment the second applicants will suffer in the event they lose their jobs. Again, it is not necessary to detail the contents of those affidavits, but clearly the impact of such a loss is clearly set out.

[24] I find the balance of convenience tips slightly in favour of the applicants in this matter.

**Overall justice**

[25] The Authority, to assess this element, needs to stand back as it were and consider all aspects of the application. In doing so, I find the overall justice favours the granting of interim relief. The present situation is unsatisfactory for both parties. However, I will attempt to mitigate those effects as best as I am able.

**Determination**

[26] Having considered the issues set out in the as yet untested evidence before the Authority, I grant the interim relief sought by the applicants.

[27] The substantive investigation is scheduled for 23-25 June 2009 which will limit the potential detriment to the respondent. Until the whole matter is determined, the status quo, including the undertakings given by either party, is to be maintained.

[28] However, I can see no reason to preclude the respondent from proceeding with its marketing and sales activities based on a reduced schedule of sailings at Milford Sound. Two positions are to be dispensed with and the sailing schedules are not at

issue in this case. The present matter involves which launch masters will be aboard those vessels come summer.

**Costs**

[29] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority