IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 154/09
5160518

	BETWEEN	NEW ZEALAND AIR LINE PILOTS ASSOCIATION INC First Applicant
		GREGORY COOKSON Second Applicant
	AND	JETCONNECT LIMITED First Respondent
		JETSTAR AIRWAYS LIMITED Second Respondent
		QANTAS AIRWAYS LIMITED Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Rodney Harrison QC and Richard McCabe for Applicant Clayton Kimpton and Michael O'Brien for Respondent
Investigation Meeting:	12 May 2009
Determination:	15 May 2009

DETERMINATION OF THE AUTHORITY

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[1] This determination concerns an application for proceedings lodged in the Authority to be removed for hearing and determination by the Employment Court at first instance.

[2] The Air Line Pilots Association (ALPA) and Gregory Cookson, a pilot presently employed by Jetconnect Limited (Jetconnect), have lodged:

(i) An application for interim orders enjoining Jetconnect, Jetstar

Airways Limited (Jetstar) and Qantas Airways Limited (Qantas) from proceeding with plans to close the Christchurch base of Jetconnect from 10 June 2009; and

(ii) A statement of problem alleging that in making and moving to implement those plans:

(a) Jetconnect has breached terms of its Collective Employment Agreement (CEA) with ALPA and the good faith provisions of the Employment Relations Act 2000 (the Act); and

(b) Jetstar and Qantas had assisted those breaches.

[3] They also lodged an undertaking as to damages from ALPA, supporting affidavits from Captain Cookson and APLA's president Mark Rammell, and the application for removal of the proceedings to the Court.

[4] Jetconnect, Jetstar and Qantas oppose the removal application.

[5] The parties' representatives have lodged written synopses of submissions and presented oral argument on the removal application.

[6] I have dealt with this matter on the basis of urgency. I have done so mindful of the timetable set by the respondent companies for changes to their various services by 10 June 2009 and ALPA's submission that the matter needs to be resolved on an interim or substantive basis before then so as not to render nugatory rights that their members may have in respect of those changes.

How this employment relationship problem arose

[7] Jetconnect is a New Zealand registered subsidiary of Qantas. Qantas is registered with the Companies Office as an overseas company. Jetconnect currently operates airline services in Zealand and some Trans-Tasman services. Nineteen pilots employed under the CEA are based at Jetconnect's Christchurch base to fly planes bearing the Qantas livery.

[8] On 17 February 2009 Qantas announced Jetconnect would stop operating domestic services. Instead Jetstar – another Qantas subsidiary owned through the

Australian company, Jetstar Airways Pty Limited – would provide its New Zealand domestic services.

[9] Jetconnect's general manager Peter Quinn then advised ALPA that, as a consequence of those changes, Jetconnect's Christchurch base would close on 10 June 2009. Nineteen pilots and 33 cabin crew operating from that base would be affected. He advised that Jetconnect would enter a "consultative process" with those staff about the effect of the changes and what redeployment opportunities were available for them.

[10] The pilots were offered the opportunity to move to Auckland and fly trans-Tasman services for Jetconnect. They were also advised of the opportunity to apply for a job with Jetstar to continue to fly domestic services under a new individual employment agreement. Pilots were also offered a "severance arrangement" if they did not transfer to Jetconnect's Auckland base.

[11] Jetconnect and ALPA exchanged a number of letters about the terms for pilots relocating out of Christchurch and whether the company would pay commuting costs if those pilots and their families remained domiciled in Christchurch. When these issues were not resolved to its satisfaction, ALPA lodged the present proceedings in the Authority.

The employment relationship problem

[12] ALPA describes the effect of Jetconnect's plans as:

(i) closing Jetconnect's Christchurch operations base;

(ii) transferring Jetconnect's operations base to Auckland;

(iii) changing Jetconnect's passenger services from being domestic operations to Trans-Tasman operations;

(iv) transferring Jetconnect's present domes services business to Jetstar.

[13] It says this amounts to restructuring with a significant and adverse impact on its Christchurch-based members working for Jetconnect. It argues this triggered good faith obligations under s4 of the Act for Jetconnect to give APLA members information and an opportunity to comment before making a decision that was likely

to adversely effect their continued employment. It says Jetconnect breached those obligations and that Jetstar and Qantas aided and abetted those breaches.

[14] In addition to the statutory breaches ALPA says Jetconnect breached the restructuring requirements of its CEA that incorporate sub-part 3 of Part 6A of the Act.

[15] Alternatively it says the changes announced by Jetconnect amount to redundancy but the company has not complied with the CEA provisions on redundancy.

[16] The remedies sought are (i) declarations that Jetconnect has made the breaches of statute and CEA as alleged; (ii) penalties against Jetconnect, Jetstar and Qantas; and (iii) an injunction preventing Jetconnect from closing its Christchurch base.

ALPA's argument for removal

[17] ALPA applied for removal of these proceedings on the grounds that:

(i) novel and complex issues are involved concerning Part 6A of the Act and "a lifting of the corporate veil"; and

(ii) only the Court could order discovery and inspection of documents relating to the restructuring.

[18] It seeks an examination of the reality of how the restructuring decision was made within the Qantas group of companies. It hopes to refute an anticipated defence that decisions made at "head office level" by Qantas executives in Australia – and simply implemented locally by Jetconnect and Jetstar in New Zealand – are not subject to the alleged consultation requirements.

The argument of Jetconnect, Jetstar and Qantas

[19] The respondent companies oppose on the grounds that:

(i) there are questions of fact arising in the proceedings but no important questions of law;

(ii) the issues and questions fall within the usual matters before the

Authority; and

(iii) access to documents and necessary information can readily be achieved through exercise of the Authority's powers to take evidence and call for information, including by use of witness summonses to bring documents.

(iv) The alleged urgency of the proceedings does not in itself justify removal.

Is there an important question of law?

[20] Under s178(2) of the Act, the Authority may order the removal of a matter to the Court where an important question of law is likely to arise other than incidentally. Whether a question is important is not defined by whether it involves an unsettled, controversial or novel point of law.[1] The question need not be difficult and removal should not be refused because of a decision-maker's own opinion as to whether the answer to the question may be straight forward or obvious.[2] A question "*will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it*".[3]

[21] ALPA submits there are four such questions that would be decisive in this matter:

(i) whether Jetconnect breached good faith obligations under the Act and the CEA to consult ALPA and its members before the decision to close the Christchurch base was made or steps were taken to implement changes in operations; and

(ii) whether the changes announced in February 2009 amounted to "restructuring" as defined in Part 6A of the Act and referred to in the CEA; and

(iii) whether it was appropriate to "lift the corporate veil" in considering (a) whether Jetconnect had breached the Act and the CEA, (b) whether Jetstar and Qantas had incited or aided Jetconnect's breaches; and (c) what relief (both interim and permanent) is appropriate; and

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[1] *NZAEPMU v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74, 82.
[2] *New Zealand Baking Trades Union v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305, 308.
[3] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, 7.

(iv) whether Jetconnect has a defence to the claim of breaching the Act and the CEA because the relevant decisions were made by Qantas "head office" and not Jetconnect?

[22] Dr Harrison submitted that the second question – on the application of the legislative protections around restructuring – required Subpart 3 of Part 6A of the Act and a reference to it in the CEA to be read together. He also said that the question of remedies for any established breaches of Part 6A to be "*virgin territory*".

[23] However I accept Mr Kimpton's submission that whether the changes being made by the employer in the present case come within the s69OI definition of restructuring – and particularly if there was a "transferring" of business – was really a question of fact. I accept this would turn on factual difference or similarity between the services presently operated by Jetconnect and the services Jetstar plans to provide from 10 June 2009. It is not a question of law.

[24] The first, third and fourth questions, however, do raise more substantial questions of law. Taken together they raise aspects of a wider question about the extent to which the good faith obligations of the Act apply to decision-making by various entities within a corporate structure, including those overseas.

[25] Dr Harrison submitted that the actions of Jetconnect cannot be assessed without "*lifting the corporate veil*" and analysing the role of Qantas "*head office*" and Jetstar in making the announced changes.

[26] Mr Kimpton submitted that no issues of artificiality or sham were present and that the arrangements of Qantas and its subsidiaries are open and transparent so that no question of law around "lifting the veil" arises.

[27] I agree that the question may not best be described as being about the "corporate veil" but consider there is an important question of law raised about decision-making in a corporate structure. I do so because of the content of a letter from Jetconnect's General Manager Peter Quinn to ALPA dated 20 April 2009. In a thorough and clearly carefully considered letter, more than four pages long and dealing with a number of issues raised in correspondence by ALPA, Mr Quinn says

this about the respective positions of Jetconnect, Qantas and Jetstar:

> *The Qantas Group consists of several separate companies … Jetstar, Jetconnect and Qantas are operationally and legally separate from one another. The three companies have different business models, which are reflected in their employment arrangements.*
>
> *… It is unrealistic and impractical to seek to deal with such a range of complex relationships on some kind of global basis.*
>
> *The strategic decision to change Jetconnect's services was taken by Qantas in Australia. Given that the decision was taken by another company, offshore, Jetconnect was not in a position to consult with affected staff about the changes before the decision was made. I understand that in such situations the consultation requirements of the New Zealand company are altered to reflect that. (my emphasis)*

[28] The respondent companies have yet to lodge their statements in reply. While ALPA's urgency application was granted, I agreed (during a telephone conference with counsel) to the respondents' request that time for lodging replies not be abridged as the respondents were meanwhile willing to promptly reply to the removal application and to attend mediation. However the respondents' position to date plainly rests on the established principles around "*corporate separateness*"[4] implicit in the above extract from Mr Quinn's letter. He relies on the decision having been taken by the parent company Qantas in Australia to say the New Zealand subsidiary Jetconnect could not have done more, earlier to meet the requirements of s4(1A) of the Act for an opportunity for comment before that decision was made.

[29] However the specific factual situation is not quite so simple. Mr Quinn's letter implies Jetconnect's operational managers may not have known of the decisions being made by senior Qantas executives before they were announced publicly. That is not the same as saying that Jetconnect and Jetstar, as legal entities, did not 'know' about the proposed changes or were not in a position to seek employees' comments before decisions were made on which subsidiaries would fly what services and where.

[30] The New Zealand registered companies Jetconnect and Jetstar have three directors listed in Companies Office records – Alan Joyce, Colin Storrie and Cassandra Hamlin who, respectively, hold the positions of chief executive officer,

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[4] See *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd (No 2)* [1998] 3 ERNZ 786, 808 and *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768, 778 (EC, Colgan J).

chief financial officer and company secretary of Qantas. Mr Joyce and Mr Storrie are also directors of Qantas.

[31] Mr Joyce made a public announcement of changes to Qantas Group's New Zealand, China and India services on 17 February 2009. This included the changes to services provided in New Zealand by Jetconnect and Jetstar. The announcement to Jetconnect staff was made later the same day. It is reasonable to assume that Mr Joyce, at least, along with other senior Qantas executives, was involved in developing proposals for those changes some weeks or months ahead of their public announcement.

[32] While the decisions made and announced were ultimately in his role as Qantas CEO, Mr Joyce was also throughout this period a director of Jetconnect. On that basis it is arguable that Jetconnect – at least at the level of its directors, if perhaps not its operational managers in New Zealand – was aware of the proposal which might adversely affect the continued employment of Jetconnect pilots at the Christchurch base, triggering the obligations under s4(1A) of the Act.

[33] The Court of Appeal has stated that such a consultation obligation arises at the time "*when that still realistically can influence outcomes*".[5] However application of that principle to the present case – if as a question of fact it does apply – also runs up against the principles of corporate separateness referred to earlier, as well as questions of the 'reach' (if any) of such obligations when decisions regarding New Zealand businesses and their employees are made by corporate executives overseas. A decision on that point would be decisive or strongly influential in deciding the first, third and fourth questions referred to above and the case as a whole.

[34] I accept the question is important both in the specific circumstances of how decisions were made in this particular case and because resolution of it may be of wider significance to employers and employees generally. Whether it is a matter of the application of equity and good conscience in the employment jurisdiction or a lifting of the corporate veil, the application of s4 of the Act to the realities of decision-making within a corporate group in light of the "*long established statutory law of*

[5] *Auckland City Council v NZPSA Inc* [2003] 2 ERNZ 386 at [24].

incorporation of legal identities"[6] is an important question of law. As exemplified in the facts of the present case, many New Zealand businesses operate on the basis of key decisions being made by a corporate "parent" or "head office" based in Sydney, Melbourne, Singapore, or elsewhere overseas. How "*the consultation requirements of the New Zealand [subsidiary] company" are altered to reflect that*" – as referred to in Mr Quinn's letter above – is an important question of law. I am persuaded the questions raised are ones that the Court should hear at first instance.

Removal for purposes of discovery of documents

[35] I am not persuaded of the other ground, under s178(2)(d), on which ALPA sought removal – that it was necessary for the Employment Court's "*dedicated regime for mutual disclosure and inspection of documents*" to be deployed in order to ensure relevant documents were disgorged by all three respondent companies, particularly "*change planning documents*" held by Qantas.

[36] Mr Kimpton correctly characterised the Authority's powers under s160(1)(a) of the Act to call for evidence and information from parties – along with powers to summons witnesses to bring documents – as sufficient to ensure all the necessary and relevant documents would be available to all parties before the investigation meeting. Admittedly this would require more detailed preparatory steps than in what Dr Harrison called "run-of-the-mill" cases in the Authority, but suitable arrangements could be made to achieve satisfactory, comparable results.

[37] There may be some differences between the ability of the Court and the Authority's to require an overseas party to provide documents, or for officers of that party to answer a summons to bring documents. Both institutions may face similar problems with 'reach' to a party outside New Zealand. However the extent or effect of such problems, if any, was not conclusively resolved in discussion on the point with counsel. Neither was it clear that there would be any real or actual difficulties in the present case in having the respondents providing all relevant documents – including Qantas. Mr Kimpton advised that the respondents were willing to provide full disclosure in the Authority, confirmed by way of sworn affidavit.

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[6] *Seafarers (No 2)*, ibid, at 807.

Exercise of discretion

[38] Having accepted ALPA's case involves questions of law meeting the statutory test at s178(2)(a), I have considered whether there are any factors requiring me to exercise the discretion to nevertheless refuse the removal application. Mr Kimpton's submissions commended particularly the factors identified by the Court in *NZAEPMU Inc v Carter Holt Harvey Limited* [2002] 1 ERNZ 74 at [38]. I have considered each of those factors but find that, taken individually or together, the importance of the question of law raised in the particular circumstances of the present case weighs more heavily in favour of removal.

[39] For all the reasons given above I order the removal of the substantive application as set out in APLA's statement of problem. That leaves the question of whether the interim relief application should also be removed.

The interim injunction application

[40] ALPA sought removal of both the substantive proceedings and its interim relief application. Dr Harrison submitted that, should the Authority conclude the interim application was better determined in the Authority, the substantive proceedings should be removed to the Court in any event. Mr Kimpton confirmed that the respondents were ready and willing for the interim application to be determined in the Authority.

[41] Although I have carefully weighed the arguments for not removing the interim relief application, I consider it should also be removed to the Court to be heard and determined there at first instance. I do so for the following overlapping reasons.

[42] Firstly, much of what warranted removal of the substantive application would also need to be covered in hearing the interim application, specifically in relation to whether there was an arguable case.

[43] Secondly, I accept Dr Harrison's submission that the corporate decision-making issue is central to both the interim and substantive matters, and that it is whatever interim decision may be made before the business changes take effect that

will really determine whether there is any substance to the rights claimed by ALPA and its members. Without success at the interim stage, the outcome of the substantive hearing would be, as he put it, "*academic only*". If the Court is to deal with the actual substance of the case, at least as ALPA asserts it to be, it needs to have the interim application before it.

[44] Thirdly, as a matter of practicality rather than principle, it is likely to be more efficient and effective for the parties to have both aspects of the matter dealt with in one forum. This notion is supported, in part, by the s178(2)(c) ground for removal where other proceedings between the same parties on similar or related issues are already before the Court. While lodged at the same time as the substantive matter (now to be removed to the Court), the interim application is a separate matter. As it concerns the same parties and related issues, it may also be removed. In the exercise of the discretion to do so, I consider it should be removed.

[45] Fourthly, if any interim orders for relief are to be issued, the Court is then better placed to both decide and supervise those while preparations are made for hearing and decision on the substantive matter.

[46] Accordingly I also order removal of the interim relief application for hearing and determination by the Court at first instance.

Other arguments

[47] ALPA also sought removal under s178(2)(b) of the Act – that is on the grounds of urgency and public interest. While I have accepted urgent resolution of the proceedings is desirable for both the union and the respondent companies, the public interest element is not met – for reasons similar to those given by the Court in the *NZAEPMU* case (above) at [36] and [37].

Determination

[48] Under s178 of the Act I order removal to the Court of the matters raised in ALPA's statement of problem and application for interim injunction for the Court to hear and determine without the Authority investigating the matter.

[49] Any matter of costs in relation to the proceedings to date is reserved for the Court to consider in due course.

[50] At the time of arranging to consider the removal application, I also arranged for the parties to attend mediation on the issues between them on an urgent basis. With the co-operation of counsel this was scheduled for Thursday 14 May 2009. I understand this occurred and the parties were making arrangements to meet again in the coming week. I advised the parties on 12 May that I would issue a determination on the removal application by Friday 15 May so they would be aware of what next steps might be needed if they do not resolve the matter between themselves.

Robin Arthur
Member of the Employment Relations Authority