

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 98/10
5159201

BETWEEN FLIGHT ATTENDANTS &
 RELATED SERVICES (NZ)
 ASSOCIATION
 Applicant

AND PACIFIC BLUE
 EMPLOYMENT & CREWING
 LTD Respondent

Member of Authority: James Wilson

Representatives: Stewart King for the applicant
 John Rooney for the respondent

Investigation Meeting: Determined on the papers

Submissions received: 31 August a & 2 October 2009 from the applicant
 22 September 2009 from the respondent

Determination: 4 March 2010

DETERMINATION OF THE AUTHORITY

The statement of problem

[1] In its statement of problem the Flight Attendants & Related Services (NZ) Association (FARSA) seeks a determination from the Authority regarding a dispute between it and the respondent, Pacific Blue Employment & Crewing Ltd. (Pacific Blue). The dispute arises from FARSA's interpretation of section 236(1) of the Employment Relations Act (the Act).

Background

[2] The events which led to FARSA bringing this matter to the Authority relate to a disciplinary investigation carried out by Pacific Blue. The details of the specific investigation and its outcome are not relevant.

[3] The sequence of events started with FARSA being asked by one of its members to represent her during a disciplinary investigation. Mr King, for FARSA, advised Pacific Blue that for various reasons FARSA would be bringing three representatives to accompany the employee during the disciplinary meetings. At the investigation meeting FARSA was advised that the employee was entitled to only one person to represent her and that the meeting would not go ahead while all three representatives were present. In support of this position the company, according to FARSA, quoted section 236 of the Act. After some discussion the investigation meeting continued, it appears with all three representatives present.

[4] Following the disciplinary meetings Mr Beau Scott (Specialist Advisor – People for Pacific Blue) wrote to FARSA saying:

I wish to advise that in future, unless there are exceptional circumstances that necessitate the attendance of multiple representatives, Pacific Blue will not allow (multiple representatives to attend a disciplinary investigation meeting) again

FARSA's Questions

[5] The Employment Relations Act, at section 236 says:

236 Representation

(1) Where any Act to which this section applies confers on any employee the right to do anything or take any action-

(a) in respect of any employer; or

(b) in the Authority or the Court, -

That employee may choose any other person to represent the employee for the purpose.

(2) Where any Act to which this section applies confers on any employer the right to do anything or take any action-

(a) in respect of any employee; or

(b) in the Authority or the Court, -

That employer may choose any other person to represent the employer for the purpose.

(3) ...

(4) The Acts to which this section applies are –

(a) This Act

(b)...

...

[6] FARSA, in its statement of problem has asked the Authority to answer the following questions

a. Does the reference made in the section to the words: “choose any person to represent the employee” enable the employer to limit the attendance of multiple representatives, at a disciplinary meeting to either:

i. a lawyer and a lay person acting as an advocate? Or

ii. multiple lawyers? Or

iii. multiple lawyers and a barrister? Or

iv. multiple lawyers and multiple barristers?

b. If the answer to any of the questions 1 above is ‘yes’, then:

(i) What is the authority for (Pacific Blue’s) use of the term exceptional circumstances as referred to (in the letter from Mr Scott to FARSA cited in [4] above)

(j) What is the meaning of the term ‘exceptional circumstances’

3. Would section 236(1) continue to have any effect if a clause in an individual employment agreement made reference to representation in a singular as opposed to the plural?

The submissions

[7] The parties supplied me with detailed submissions, including reference to a number of relevant precedent cases, which I have taken the liberty of summarizing as follows:

FARSA's submissions

[8] FARSA says:

1. A disciplinary meeting held by an employer is *(an) action by an employer in respect of (an) employee* in terms of Section 236(1) of the Act and an employee is entitled to choose *any other person* to represent them in such meetings.
2. When the parties disagree the employee is entitled to decide who and how many people will represent them. There is nothing in the Employment Relations Act to suggest that representation must be confined to only one person and that it is for the employee to determine what level of representation is appropriate.
3. A Union, in this instance FARSA, is entitled to represent a member employee, and it is for the employee, in terms of section 236, to authorize that representation, not the employer.

Pacific Blue's submissions

[9] In response Pacific Blue says:

- Section 236 of the Act does not apply to the disciplinary process. The disciplinary process is run according to managerial prerogative, subject to the obligations of good faith contained in section 4 of the Act and the obligation to act as a fair and reasonable employer as provided for in section 103A.
- If section 236 does apply then the section must still operate subject to the general obligations of good faith and does not confer an unlimited right on the employee to determine the extent of the representation.

[10] Of particular relevance to its position Pacific Blue quotes the Authority's determination in *Gurnell v School Centre Irene Ltd.* [Member Dumbleton, 22 January 2008, AA 18/08] where the member said:

Such (disciplinary) meetings are not convened pursuant to a statutory right to "do anything or take any action" and the meeting was therefore not an occasion or situation within the meaning of section 236.

Pacific Blue also quoted the Employment Court in *Air New Zealand Ltd v. Hudson* [2006] ERNZ 415, where Judge Shaw said:

Given that (the employer) were in charge of the way the investigation was proceeding, they had a responsibility to advise Ms Hudson that it was inappropriate for Ms Rorke to be a representative as she was a potential witness. (Emphasis added)

Discussion

[11] I agree with my colleague in *Gurnell*. Meetings conducted by an employer as part of a disciplinary investigation *are not convened pursuant to a statutory right to "do anything or take any action"* and do not fall within the meaning of section 236. How an employer undertakes such investigations is a matter for the employer. The employer's conduct in this regard may be judged in hindsight by the Authority or the Court in terms of the employer's obligation to act in good faith, any relevant provisions of the employee's employment agreement, and in terms of the requirement in section 103A of the Act i.e. the Authority will consider whether *the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all circumstances at the time....*

[12] Good faith and the generally well understood concepts of what is fair and reasonable would normally require the employer to accept that an employee is entitled to be represented during any disciplinary investigation. While the nature and extent of that representation would usually be a matter for the employee there may be circumstances in which the employer is justified in placing restrictions on that representation. Every situation must be considered according to its own circumstances and it is impossible to make any statement regarding what is fair and reasonable which would have universal application.

Determination

[13] In answer to the questions posed by FARSA

- **Meetings convened by an employer as part of a disciplinary investigation regarding the alleged conduct of an employee are not convened pursuant to a statutory right to "*do anything or take any action*" and do not fall within the ambit of section 236 of the Act.**
- **Whether or not an employer has conducted their investigation meeting in a fair and reasonable manner, including whether or not an employee was allowed proper and appropriate representation, will be judged against the employer's statutory duty to act in good faith, any relevant provisions of the employee's employment agreement, and *by considering whether the employer's actions, and how the employer acted, was what a fair and reasonable employer would have done in all the circumstances at the time....***
- **Every case will be considered on its merits and according to its particular circumstances and it is impossible to make any statement regarding what is fair and reasonable which would have universal application.**

Costs

[14] Costs are reserved in the hope that the parties will be able to reach agreement on the issue between themselves. Should they be unable to do so, and in the event that costs are sought, Pacific Blue should file and serve submissions within 28 days of the date of this determination. FARSA will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority