

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 99/10  
5161816

BETWEEN                      FLIGHT ATTENDANTS &  
   RELATED SERVICES (NZ)  
   ASSOCIATION  
   Applicant

AND                                AIR NEW ZEALAND LTD  
   Respondent

Member of Authority:        James Wilson

Representatives:             Stewart King for the applicant  
   Graeme Norton for the respondent

Investigation Meeting:      Determined on the papers

Determination:                4 March 2010

---

**DETERMINATION OF THE AUTHORITY**

---

**The statement of problem**

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

[2] In the statement of problem FARSA defined the problem as:

1. ...
2. *[Air New Zealand] seeks to limit the level of representation that an employee can choose to a single representative citing section 236 of the Act as the authority for that proposition.*

3. *[FARSA] submits that section 236 does not limit an employee to a single representative.*

4. *[FARSA] further submits that it is not for an employer to determine issues of representation for employees.*

[3] The statement of problem then outlines the circumstances of a particular case in which a member of the Association sought to bring multiple representatives to a meeting with her employer. This meeting was part of the employers disciplinary investigation of the employee's behaviour, which Air New Zealand describe as a *very low level issue and without complexity*. The company objected to the level of representation and, on that occasion, the employee and the Association agreed to reduce the number of representatives *in order to have the matter expedited*. FARSA subsequently wrote to Air New Zealand seeking to clarify the company's position regarding representation. In response Mr. Norton advised that, in the company's opinion, the issue of representation was dealt with by the relevant collective agreement which says:

*At an inquiry held by the airline concerning any Flight Attendant covered by this agreement, the Flight Attendant may invite a representative of his or her choice.*

However Mr. Norton went on to say:

*The contractual term enables a flight attendant to have a representative of choice, not multiple representatives. Clearly the individual is able to choose what that representative will be...*

### **The respective arguments**

#### *FARSA's position*

[4] In summary, FARSA have argued that the question of representation at such disciplinary meetings is covered by section 236(1) of the Employment Relations Act [the Act] which provides:

**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)...

...

And that section 238 of the Act provides that:

*The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.*

*Air New Zealand's position*

[5] Mr. Norton, in Air New Zealand's statement in reply argues that section 236 of the Act does not apply to the situation set out in FARSA's statement of problem and that the Act does not confer on an employee the right that is sought to be determined i.e. attendance at a disciplinary investigation meeting with a representative. Mr. Norton also submits that it is not within the Authority's jurisdiction and processes to proceed to determine what is a hypothetical and speculative question.

## Discussion and disposal

[6] The statement of problem filed by FARSA, while dealing with a slightly different factual situation, is very similar to another statement of problem filed by them, citing Pacific Blue Employment and Crewing Ltd. as respondent. In my determination of that matter issued on the same day as this determination, I said:

- **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.**

[7] While I accept Mr. Norton's point that FARSA’s application seeks a determination of what is an hypothetical and speculative question, my determination in the Pacific Blue case, set out above, addresses the same fundamental question as that posed by FARSA in this application. The determination in the Pacific Blue case will, I hope, clarify the issue at the core of the dispute between FARSA and Air New Zealand. I see no merit in issuing any further determination in the current case which is, with this determination, closed

**Costs**

[8] Costs are reserved and parties are urged to attempt to settle the issue between themselves in the first instance. If they are unable to do so, and if Air New Zealand wishes to pursue the question of costs, they should file and serve submissions within 28 days of the date of this determination. FARSA will then have 14 days in which to file a response.

James Wilson

Member of the Employment Relations Authority