

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 280/10
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
 Beau Scott for the respondent

Costs submissions
received: 9 April 2010 from the applicant
 30 March 2010 from the respondent

Determination: 11 June 2010

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 4 March 2010 (AA 98/10) I said:

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.*

[2] In that determination I reserved the question of costs and requested the parties to attempt to reach agreement between themselves. Unfortunately they have been unable to do so and Mr Scott has now filed a submission seeking an award of Pacific Blue's actual costs of \$9623.82. Mr King for FARSA has opposed this request and suggests that costs should lie where they fall.

The submissions

[3] In his submissions on behalf of Pacific Blue, Mr Scott says that FARSA were unsuccessful in obtaining the determination they sought by their application and that Pacific Blue need not have incurred any costs if the Union had taken a reasonable and constructive approach to matters of representation, rather than a litigious one.

[4] For FARSA Mr King argues that the outcome of this case has advanced the issue of representation during the disciplinary process and the result is therefore important and useful and will benefit both the applicant and Pacific Blue by focusing attention on what a fair and reasonable employer would do in disciplinary meetings. He says that the Union should not be dissuaded from working to discover such outcomes through applications to the Authority (by an award of costs) and the company should also recognize the benefits it will receive from the resolution of the issue. He says that the benefits that flow from such inquiries are mutual and that costs should rest in this case where they fall.

Discussion

[5] The principles on which the Authority should award costs are now well-established and are set out in the Employment Court's judgment in *PBO Ltd. v Da Cruz* [2005] 1 ERNZ 808. In this case FARSA made application to the Authority seeking to require Pacific Blue not to restrict the number of representatives an employee could bring to a disciplinary investigation meeting. Pacific Blue opposed this application and argued that the conduct of a disciplinary investigation is a matter for the employer and the employer is entitled to restrict the number of representatives. It is clear that my determination substantially favoured Pacific Blue's position. In this respect, and following the principle set out in *Da Cruz* that costs should follow the event, Pacific Blue is entitled to recover at least a proportion of its costs.

[6] Having said that Pacific Blue is entitled to recover a portion of its costs, it is necessary to look at the level of costs incurred, whether that level of costs was reasonable and the appropriate level of contribution the Union should make. By agreement this matter was determined on the papers. Even if an investigation meeting had been required, any award of costs would have been much less than that proposed by Mr Scott. While I accept that the questions posed by FARSA were novel, in the sense that they had not been previously considered by the Authority or the Court, it is difficult to reconcile the level of costs Pacific Blue incurred with what was, when compared to many Authority investigations, a relatively straightforward case. While the company were required to file submissions there was no necessity for preparation of witness statements or attendance at an investigation meeting. Based on this comparison with other cases the award of costs must be relatively modest.

Determination

[7] **FARSA are to pay Pacific Blue Employment and Crewing Limited \$750 as a contribution to their costs.**

James Wilson

Member of the Employment Relations Authority