IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 525
5341970

BETWEEN	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA INC First Applicant
AND	VA'A NGAKAU Second Applicant
AND	SONNY TUITI Third Applicant
AND	KEVIN MEHANA Fourth Applicant
AND	SALA PARKER Fifth Applicant
AND	PACIFIC FLIGHT CATERING LIMITED First Respondent
AND	PRI FLIGHT CATERING LIMITED Second Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Tim Oldfield, counsel for Applicants Liz Coats (30 June 2011) and Rob Towner (21 July 2011), counsel for Respondents
Investigation Meeting:	30 June and 21 July 2011
Submissions Received	29 July, 8 and 9 August 2011
Determination:	12 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment by Pacific Flight Catering Ltd (PFC) or PRI Flight Catering Ltd (PRI) of members of the Service & Food Workers' Union Nga Ringa Tota Inc. (SFWU) became affected by restructuring.

[2] This occurred when work PFC had been carrying out under contract to an international airline, providing food catering services, was tendered for successfully by LSG Sky Chefs New Zealand Ltd (LSG), a competitor of PFC. PFC's contract expired and LSG became contracted to the airline from 23 February 2011 to perform the same work.

[3] Provisions of Part 6A of the Employment Relations Act 2000 allow for employees who provide work in specified categories (which include food catering services) and who are affected by restructuring, to transfer their employment to the new employer performing the work. The SFWU members became affected by a 'subsequent contracting' situation as defined in subpart 1 of Part 6A. Under those provisions they elected to transfer their employment to LSG, the new employer. The second to fifth applicants, Mr Va'a Ngakau, Mr Sonny Tuiti, Mr Kevin Mehana and Ms Sala Parker, were among those who transferred.

[4] Under subpart 1 of Part 6A, in a restructuring transferring employees are to be employed by the new employer on the same terms and conditions as they had with the old employer, PFC or PRI in this case. The employment by the new employer of transferring employees is also to be treated as continuous with regard to service-related entitlements such as paid annual holidays and other forms of leave.

Access to wages, time, holiday and leave records

[5] Section 130 of the Employment Relations Act requires every employer to keep a wages and time record showing certain information, including the wages paid to the employee in each pay period. Under s 130 the employer must, if requested by an employee or authorised representative of an employee, immediately provide access to, or a copy of, or an extract from, the wages and time record relating to the employee at any time in the six years preceding the request.

[6] Sections 81 and 82 of the Holidays Act impose similar requirements in relation to the keeping of a holiday and leave record by an employer and access to that

record by an employee or authorised representative. The information to be recorded includes the employee's entitlement to annual holidays.

[7] To assist its members with the transfer of their employment following the restructuring, SFWU sought to help them establish with LSG the terms and conditions and service related entitlements that had applied to their employment up to the date of transfer. In particular copies of wages and time, and holiday and leave, records were requested from PFC by the SFWU to verify the wage rates and annual holiday entitlements of the affected employees.

[8] The SFWU wrote to PFC in February, March, April and May 2011 requesting this information on behalf of 12 members for a period of 12 months prior to their transfer. PFC's unfavourable responses to those requests led the SFWU to apply to the Authority for enforcement by remedies of compliance and penalties to require the company to provide the information sought.

[9] After mediation had been undertaken between the SFWU and PFC early in June 2011, the Authority began an investigation. Initially the union and PFC were the only parties involved. Later the SFWU sought to include four of its members (the second to fifth applicants) and PRI Flight Catering Ltd (PRI) a company closely linked to PFC.

Role of Authority in the investigation

[10] Under the Employment Relations Act, at ss 157 and 160, the Authority in discharging its investigative role is required to establish the facts of an employment relationship problem and make a determination of the problem according to the substantial merits of it. In doing so the Authority is to have no regard to technicalities but is to concentrate on resolving the employment relationship problem, however described.

[11] In this investigation the Authority's main objective has been to obtain for the employees who transferred to LSG access to wages and time, and holiday and leave, records relating to their employment by PFC or PRI. There is no dispute that such records were kept for the applicant employees and that PFC or PRI had continued to hold those records and the information they contained in their possession or control after the transfer of employment in February 2011.

[12] The information in wages and time and holiday and leave records belongs as much to employees as to their employer and technicalities are not to prevent employees from being given the recorded information. To obtain it for them, during the investigation the Authority twice issued directions or orders requiring the information to be made available.

[13] In final submissions the parties advised that the transferring employees or their authorised representative the SFWU have now been given access to the relevant wages and time records. Incorporated in them is also holiday and leave information for each employee.

[14] Further investigation of the penalty claims may be necessary but the disposal of claims for other remedies can now be recorded as follows.

Remedies applied for

[15] They were;

(i) By statement of problem lodged on 26 April 2011;

i. Compliance with a determination of the Authority ordering PFC to pay a penalty for breach of good faith, and

ii. Compliance with s 130 of the Employment Relations Act 2000, and

iii. Penalties for breach of s 130.

(ii) By amended statement of claim lodged on 27 June 2011;

- Compliance with s 82 of the Holidays Act 2003.

Remedies of its own motion considered by the Authority

[16] They were, compliance with s 130 of the Act and penalties under s 134A of the Act for obstructing or delaying an investigation.

[17] A compliance order is not required to be made against PFC under s 137 of the Act, whether on application by any party or by the Authority of its own motion, as

since the claim was lodged PFC has complied with the determination of 19 January 2011 by paying in full the penalty that had been awarded against it by the Authority for breach of good faith.

Compliance with s 130 of Employment Relations Act

[18] With regard to s 130, the Authority found it unnecessary to issue a compliance order of its own motion once PFC had provided records to the SFWU within a few days of the 30 June investigation meeting. The remaining records were provided after a summons was issued by the Authority on 11 July to Ms Gerda Gorgner, HR Manager of PFC, requiring her to produce them.

[19] The application by the SFWU for compliance with s 130 of the Act was withdrawn in the union's final written submissions made on 29 July. The SFWU acknowledged that the all wages and time records had been produced to it shortly after the 21 July investigation meeting.

Compliance with or enforcement of Holidays Act

[20] Compliance with any provision of the Holidays Act 2003 is not a remedy available under s 137 of the Employment Relations Act. Although the SFWU's claim was amended to seek "enforcement" of the Holidays Act, presumably by penalty, under s 76 of the Holidays Act a Labour Inspector is the only person who can claim a penalty in the Authority for breach of that Act.

[21] In any event I am satisfied that the holiday and leave information that had been sought is contained in the wages and time records that have been produced.

Penalty for obstructing or delaying investigation

[22] In all the circumstances I do not consider it is necessary for the Authority to determine whether any person or party breached s 134A of the Act. If there was any obstruction or delay it may have been excusable in the circumstances, and given the disclosure of information that occurred quickly after the 30 June investigation meeting any obstruction or delay would have been relatively limited.

[23] The summons issued to Ms Gorgner on 11 July 2011 is discharged.

Penalty claim for breach of s 130

[24] I accept the submissions made by counsel Ms Coats and Mr Towner for PFC and PRI that a union does not have standing to enforce in its own name or for itself, s 130 of the Employment Relations Act. The rights and obligations under s 130 in relation to wages and time records are a feature of an employee's personal employment relationship with an employer and are enforceable by the employee. Although a union too has an employment relationship with an employer, the terms and conditions of it do not extend to access to wage and time records by the union for itself. A penalty can be sought by a union for breach of any collective agreement containing provisions similar to s 130(2) in it, but that is not the basis of the claim in this case.

[25] The statement of problem lodged in April by the SFWU was therefore defective in this regard. The amendment to that claim in June 2011 did not cure the defect, as the applicant party remained solely the union. No claim was made by the four applicant employees until 13 July 2011. PRI was also added as a respondent at the same time.

[26] I consider those July amendments were effective to bring before the Authority a claim for penalties brought by four employees against two companies. Section 221 of the Act gives the Authority a discretion to at any stage of an investigation order that parties be joined. The section is permissive and should not be read down to limit the Authority's ability to recognise that a claim has been made to it. The second amended statement of problem contains all of the claims made by all of the applicants against all of the respondents including PRI. It was served on the respondents who replied to it comprehensively in a statement in reply dated 21 July 2011.

[27] This occurred on the application of a party, the SFWU, and at the direction of the Authority of its own motion. Following a telephone conference on 7 July the Authority issued directions for any amended statement of problem to be lodged by 14 July and for any amended statement in reply by 21 July. The parties complied with those directions.

[28] While an amendment to a 'nullity' for some purposes may be considered ineffective and the appropriate course is for claims to be brought afresh by new applicant parties against new respondent parties, in the Authority such technicalities

should not obscure the substantial merits of an employment relationship problem or defeat the Authority from resolving the problem, however described.

[29] Technical requirements for bringing a claim to the Authority are at s 158; "proceedings before the Authority are to be commenced by the lodging of an application." The second amended statement of problem was such an application, and it was replied or responded to.

[30] I find that the claim for penalties brought by four former employees of PFC against that company and PRI has been presented to the Authority for investigation and determination. I direct accordingly.

Opportunity for further investigation

[31] Before the penalty claims can be finally determined I consider that an opportunity must be given for evidence from the applicant employees and from PRI to be heard and cross-examined if required. The respondents may question all four employees about their represented status as applicants, although Mr Ngakau and Mr Tuiti have already given evidence establishing that they wanted to be joined to the claim brought by SFWU for penalties.

[32] The identity of the employer is relevant to the question of liability for any penalty and is still to be determined. Mr Ngakau and Mr Tuiti have given evidence that they were employed by PFC and there was a finding to that effect expressly made by the Employment Court in *Matsuoka v. LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, at para [26]. Neither employee was challenged on his evidence in that regard in either the Employment Court or the Authority. PRI will have the opportunity to give evidence to show that it was the employer of all four applicant employees and not PFC, as alleged at para 3.2 of the second amended statement in reply.

[33] After further evidence has been given the Authority will determine which respondent was the employer (it is possible in law that both were), whether the employer breached s 130(2) of the Employment Relations Act and if so what penalty should be imposed.

[34] I find that any such breach could only have occurred after the SFWU sent its letter of 11 May 2011 to Ms Gorgner. The letter and its attachments overcame the

previous objections that the employees had not authorised their union to represent them in requesting access to the wages and time records. If there was a breach it continued at the most for about six weeks until shortly after the investigation meeting of 21 July, when the remaining wages and time records were produced.

[35] It should be taken into account by the Authority in fixing any penalty (if it finds there was a breach) that the refusal to provide access to the wage records after 11 May was less a flagrant one and more a misguided attempt to confine the publication of the information in the records. PFC in my view was wrong to try and do this, because the data in the records was the employee's personal information and belonged as much to each individual employee as it did to the employer. PFC or PRI was not entitled to put conditions on the use any employees or employee's agent made of that historical record and the personal information in it.

Further investigation meeting

[36] The Authority will now consult with counsel before setting a date for an investigation meeting, giving an opportunity for further evidence to be heard in the investigation of the penalty claims lodged on 13 July. If the parties do not wish to present further evidence or cross-examine any witnesses or make further submissions, a final determination will be made on the basis of the material already provided to or obtained by the Authority.

[37] As settlement of the original problem has been reached by PFC or PRI with eight other employees affected by the restructuring, the parties may consider trying to resolve the penalty claims themselves through further mediation, but no direction is made in this regard.

Costs

[38] Costs are reserved for further directions to be given in a final determination.

A Dumbleton
Member of the Employment Relations Authority