IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 199
5418525

	BETWEEN	FLIGHT ATTENDANTS AND RELATED SERVICES (NZ) ASSN First Applicant THE PERSONS LISTED IN SCHEDULE 'A' Second Applicants
	AND	AIR NEW ZEALAND LIMITED Respondents

Member of Authority:	Eleanor Robinson
Representatives:	Peter Cranney, Counsel for First & Second Applicants
	Andrew Caisley, Counsel for Respondent
Investigation Meeting:	On the papers
Determination:	20 May 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The issue that the Applicants, Flight Attendants and Related Services Assn (FARSA) and the Persons Listed in Schedule 'A" (the Second Applicants), (the Applicants), have identified is that the Respondent, Air New Zealand Limited (ANZL), breached the duty of good faith as set out in s.4 of the Employment Relations Act 2000 (the Act).

[2] Specifically the Applicants claim ANZL:

i. committed an act of good faith intended to undermine a collective agreement contrary to s. 4A(b)(ii) of the Act;

ii. acted in breach of the obligations imposed by s.4(6) of the Act not to advise and not to do anything with the intention of inducing the Second Applicants not to be covered by a collective agreement;

iii. committed a breach of good faith intended to undermine the employment relationship between FARSA and the Second Applicants;

iv. breached the obligations imposed by s.4(1A)(b) of the Act to be active, constructive, productive, responsive and communicative;

v. breached the obligation imposed by s.4(1A)(c) of the Act to give the Second Applicants access to information and an opportunity to comment; and

vi. breached the obligations imposed by ss 18 and 236 of the Act to recognise that FARSA is entitled to represent the Second Applicants in any matter involving their collective interests as employees and to represent the employees' individual rights.

Issues

[3] Mr Cranney for the Applicants seeks an order for removal to the Employment Court pursuant to s 178(2) of the Employment Relations Act 2000 ("the Act"), on the grounds that:

a. an important question of law is likely to arise in the matter other than incidentally;

b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court;

d. ....in all the circumstances the court should determine the matter.

[4] Mr Caisley, for the Respondent, neither supports nor opposes the application by the Applicants for removal, however submits that ANZL doubts that the statutory requirements for removal have been met.

Background Facts

[5] ANZL carries on business as a provider of Air Transport Services. To do this it owns and/or leases various aircraft. Cabin crew for these existing aircraft are provided:

a. In part by ANZL directly employing its own staff, and

b. In part by entering into arrangements for the provision of cabin crew with Air New Zealand Tasman Pacific Limited (TasPac). TasPac is a wholly owned subsidiary of Air NZ.

[6] ANZL and TasPac are each parties to various collective employment agreements with FARSA and the Engineering, Printing and Manufacturing Union (EPMU).

[7] Over the next three or four years, ANZL proposes to expand the number of services it offers, and to purchase and/or lease a number of new A320 and B787 aircraft. Air NZ intends that cabin crew for these new aircraft and existing B767 aircraft will be provided by TasPac and as a result, TasPac has a number of new positions that it wishes to fill.

[8] Some of the new positions to be created are covered by existing collective agreements (namely the positions crewing on A320 aircraft), and some of the new positions to be created are not covered by existing collective agreements (namely the positions crewing on B767 and B787 aircraft).

[9] On 17 April 2013 ANZL and TasPac advised FARSA, EPMU and relevant existing employees that:

a. TasPac intends to establish a number of new positions to provide cabin crew for certain new A320 and B7878 aircraft entering ANZL's fleet and existing B767 aircraft from September 2013 onwards; and

b. The process for the establishment of the new positions was called 'Project Choice'; and

c. All existing cabin crew employed by either ANZL or TasPac would have an opportunity to apply for the new positions, if they so wished; and

d. Some of the proposed new positions (ie the A320 roles) will be covered by existing collectives, but that some (i.e. the B767 and B787 roles) were not; and

e. Where union members were employed into proposed new positions covered by existing collectives, they would be employed on the relevant collective; and

f. Both FARSA and EPMU would have an opportunity to initiate bargaining for a collective agreement to cover the proposed new positions not covered by an existing collective (i.e. the B767 and B787 roles), if they so wished; and

g. No existing employee would be required to apply for any of the new positions – it being purely a matter of choice for each existing employees; and

h. There would be no redundancies as a result of Project Choice; and

i. Project Choice did not involve any proposal to make any changes to the existing collective agreements, i.e. all existing collective agreements would remain in place, unaltered, and every existing employee currently covered by an existing collective agreement was completely free to remain covered by that existing collective agreement if they so chose.

[10] ANZL states that although, as noted above, invitations have been extended to both FARSA and the EPMU to initiate bargaining for a new collective agreement to cover the new positions not currently covered by a collective agreement should they wish to do so, to date neither union has done so.

[11] ANZL further states that since notifying existing employees of the new vacancies TasPac has successfully concluded negotiations and entered into new employment agreements with approximately 350 employees. Where those employees are members of FARSA or EPMU and have been employed into roles covered by an existing collective agreement, they have been employed on the terms of the relevant collective. The employees commence employment in their new positions at various dates from approximately August 2013 onwards.

[12] Mr Cranney, on behalf of the Applicants, disputes, as submitted by ANZL, that Project Choice does not undermine any of the existing collective agreements, or that ANZL's intention is not to undermine any of the existing collective agreements.

[13] In particular, Mr Cranney submits that the tenor and purpose of the Project Choice materials was to induce members of FARSA to cease to be covered by the existing collective agreement and to encourage them to accept asserted greater security, lesser terms, and greater "opportunities" under new company-drafted and negotiation-free individual employment agreements.

[14] Mr Cranney claims that the Project Choice materials referred indirectly to the existing collective agreement (which has only recently been settled) using the phrase "*long standing restrictive practices*" which made it "*hard, or even impossible, to respond to market challenges*".

Removal Application and discussion

General Principles of Removal

[15] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[16] In the event that the party or parties applying for removal satisfy the tests set out in s.178 (2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[1].

First Important Question of Law

[17] Mr Cranney submits that a fundamental question of law arises from s.4A(b)(ii) and(ii) of the Act which prohibit breaches of good faith which are: "*intended to undermine ... a collective agreement"* (s.4A(b)(ii), or "*intended to undermine an employment relationship"* (s.4A(b)(iii).

[18] Mr Cranney further submits that neither the Authority nor the Court has conclusively and authoritatively determined what "*undermining a collective agreement"* means.

[19] Mr Cranney therefore postulates that the important question of law raised by this case is whether an employer who settles a collective agreement unlawfully undermines it contrary to s.4(b)(ii) if the employer:

i. Makes arrangements to offer individual agreements for the same work through a wholly owned subsidiary or otherwise on inferior terms;

ii. Breaches good faith obligations by preparing and springing the plan on the union without being active, constructive, open and communicative;

iii. Approaches FARSA members directly to induce them to abandon the collective agreement;

iv. Refuses to allow FARSA to represent members' individual or collective interests;

v. Directly and deliberately advises FARSA members not to be covered by the collective agreement contrary to s.4(6);

[1] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]

vi. Undermines the relationship between FARSA and its members by direct dealing to encourage abandonment of the collective agreement contrary to s.4A(b)(iii).

[20] Mr Cranney notes that the proceedings will need to resolve whether or not the actions complained of have: "*undermined ... the collective agreement"* which is partly a question of fact, but fundamentally a question of law.

[21] The leading case on what constitutes an important question of law is *Hanlon v International Educational Foundation (NZ) Inc*[2]. At page 8 the judgement the then Chief Judge Goddard stated:

> *First it is necessary to identify a question of law arising in the case other than incidentally; and secondly to measure the importance of that question ….*
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> *It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s. 94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. …*
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> *It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter 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.*

[22] Mr Caisley in his submissions addresses the question of whether either the Authority or the Court has addressed in an authoritative way ss. 4(6)(b), 4A(ii) and (iii) of the Act and submits that both the Court and the Authority have provided prior judicial consideration and guidance on ss. 4(6) and 4A(b)(ii) and (iii) of the Act.

[23] Mr Caisley submits that this is a well settled area of law and that a question of law does not arise.

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[2] [1995] 1 ERNZ 1

[24] In support of his submission that firstly s.4(6)(b) has been the subject of prior judicial consideration and secondly that the reference to an: "*intention to induce"* in the good faith context of the Act has a well-established meaning in employment law such that a question of law does not arise, Mr Caisley cites:

i. *Service and Food Workers Union Nga Ringa Tota Inc v Air New Zealand Ltd*[3] in which the Authority determined that a letter sent by the employer was a communication constituting a breach of good faith pursuant to s.4(6) of the Act;

ii. *Service Food Workers Union Nga Ringa Tota Inc v Pact Group*[4] which considered whether or not breaches of s.4(6)(b) could occur before and during collective bargaining;

iii. *Manufacturing & Construction Workers Union v Industrial Services Christchurch Ltd*[5] in which the Authority considered breaches under ss. 4(1) and 4(6) of the Act.

iv. *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd*[6] in which the Authority considered the issue of whether the employer had attempted to induce employees not to be involved in bargaining for a collective agreement.

[25] Mr Caisley submits in respect to ss. 4A(b)(ii) and (iii), which provide that any failure to comply with the duty of good faith set out in s 4 (1) of the Act is liable for a penalty if the failure was: *"intended to undermine"* an individual or collective employment agreement, that there is well settled judicial guidance on what the concept means and no new or important question of law arises.

[26] In support Mr Caisley cites *National Distribution Union v General Distributors Ltd*[7] in which a full bench of Employment Court interpreted the standard of proof for an "*intention to undermine"* which has subsequently been successfully applied by the Authority without legal issues in *Unite Union Inc v First Security Guard Services Ltd* [8] and *Eastern Bay Independent Industrial Workers Union Inc v B*[9]

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[3] (2008) 8 NZELC 99,288
[4] [2013] NZERA Christchurch 41
[5] Christchurch CA134/09, 21 August 2009
[6] Auckland AA 198/08, 3 June 2008
[7] [2007] ERNZ 120
[8] [2012] NZERA Auckland 192
[9] Auckland AA79/08, 7 March 2008

[27] Mr Caisley further submits that additional guidance can be derived from judicial consideration of the legal definition of "*undermining"* in the context of s. 32(1)(d)(iii) of the Act, citing *Association of University Staff Inc v Vice-Chancellor of the University of Auckland*[10]*;* and in *Christchurch City Council v Southern Local Government Officers Union Inc*[11] in which the Court of Appeal examined whether a communication by the employer to union members undermined bargaining.

Second Important Question of Law

[28] Mr Cranney submits that an important question of law arises in relation to the rights of unions to represent employees and the inter-relationship of s.4 and s.103A of the Act.

[29] Mr Caisley submits that a union's entitlement to represent its members in matters involving their collective interests, and to represent its members individual employee rights, is set out in ss. 18 and 236 of the Act, and is a settled area of law, citing: *Health Care Hawkes Bay Ltd v Bickerstaff*[12]*, Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd*[13], and *Marshment v Sheppard Industries Ltd*[14].

[30] Mr Caisley submits that the inter-relationship of s.4 and s. 103A with rights of unions to represent their members in s.18 and s. 236 of the Act has also been considered by the Court and the Authority when determining issues of good faith in the context of collective employment agreements and bargaining as set out in cases to which reference has already been made.

[31] Mr Caisley notes that ANZL does not dispute that FARSA has rights to represent its members and observes that assertions that some action or conduct by ANZL has infringed on FARSA's rights in respect of its members will be a factual enquiry.

Urgency

[32] Mr Cranney submits for the Applicants that the matter is of such a nature and of such urgency that it is in the public interest that it be immediately removed to the Court on the basis that:

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[10] [2005] ERNZ 224
[11] [2007] ERNZ 37 (CA)
[12] [1996] 2 ERNZ 419
[13] [2007] ERNZ 169
[14] [2012] NZEmpC 93

a. The matter involves a large number of employees whose position could be significantly worsened if the matter is not dealt with urgently and authoritatively; and

b. The issues arise in the aviation sector which is an area of crucial importance to the New Zealand economy, the travelling public and to employees and employers engaged in the sector.

[33] Mr Caisley submits that there are no issues of urgency that arise, specifically he notes that Project Choice will not affect the Applicants unless they choose to participate, and:

a. It does not involve any redundancies; or

b. Affect the continuity of employment of any employee; or

c. Require any employee to make any changes to their existing terms and conditions; or

d. Involve any proposal to make any changes to existing collective agreements between ANZL and FARSA and the EPMU.

[34] Further, working on the assumption that none of the Second Applicants applied for the Project Choice positions, they will continue to be employed in their current roles on their current terms and conditions of employment.

[35] Mr Caisley on behalf of ANZL states that ANZL is unaware that the Second Applicants' positions will be worsened significantly in the near future since to its knowledge there is no basis for this assertion. AANZL states that the Second Applicants will remain employed on their current terms and conditions of employment, doing their current jobs and flying their current aircraft.

Determination

Important Question of Law

[36] Having carefully considered all the submissions, whilst I consider that a question of law arises in this case, I am not persuaded that an important question of law arises which cannot be assisted by established legal precedents which can be applied to the particular factual matrix of this particular case.

[37] As His Honour Chief Goddard observed in *Hanlon v International Educational Foundation (NZ) Inc*[15]:

> *... I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law.*

[38] I consider that the issues that arise in this case are a mixture of both law, which as observed can be assisted by the legal precedents, and fact, in respect of which the investigative nature of the Authority is well designed to address.

Urgency

[39] I find that, on the basis of assurances from ANZL, there is no reason for accepting that the position of the Second Applicants (who have not applied for and been accepted for the new positions) will be worsened significantly unless this matter is dealt with urgently.

[40] Moreover I observe that this matter could be addressed in a timely manner by the Authority.

Public Interest

[41] Whilst this matter does involve a large number of employees, on the basis that I have found there to be no important question of law or an imperative for urgency, I consider that the large number of applicants does not of itself, argue persuasively in favour of removal.

[42] I accept that the aviation sector is an important one for the New Zealand economy, but I do not find that there is sufficient evidence that these proceedings will affect the New Zealand economy, the travelling public, or the employers and employees engaged in the sector.

[43] I find that there is no particular public interest which argues in favour of removal to the Court.

In All the Circumstances

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[15] [1995] 1 ERNZ 1

[44] In light of my findings as outlined above, I do not consider that this matter should be removed to the Court pursuant to s 178(2)(d) of the Act, however I proceed to consider whether the matter should be removed on the basis of the residual discretion of the Authority.

Residual Discretion

[45] In exercising its residual discretion the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[16].

[46] In *Auckland DHB v X (No2)*[17]the Court provided guidance on how the Authority's residual discretion in s 178(2) must be exercised:[18]

> *[T]he inquiry must not be on the desirability or undesirability of removing cases, generally because Parliament has decided some should be removed. Rather it should be on whether it may be undesirable to remove a particular case.*

[47] In *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Limited*[19] the Court identified discretionary factors which in that case argued against removal, and which I consider significant for this case, these being:

a. Questions of disputed facts, which Parliament had intended to be dealt with by the Authority at first instance;

b. The Authority was able to offer the parties a very prompt investigative meeting and determination of the problem;

c. The statutory right of challenge to the determination of the Authority which may be by way of a *de novo* hearing;

[48] I consider that these factors have a resonance in the present case. There are disputed areas of fact concerning the actions of ANZL and the effect of these regarding FARSA's claims involving:

a. The alleged undermining of the collective agreement;

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[16] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]
[17] [2005] ERNZ 551
[18] Ibid at para 29
[19] [2002] 1 ERNZ 74

b. The alleged intention to induce and encourage FARSA members not to be covered by the collective agreement;

c. The alleged use of deliberate strategies to diminish, reduce and eventually abolish the collective agreement; and

d. To allegedly replace that collective agreement with individual agreements bargained without FARSA involvement.

[49] The Authority is an investigative body and I find that these are factual areas which the Authority has been statutorily charged with investigating. As such it is more appropriate that the matter be dealt with at first instance in the Authority, and in this respect I note that there is an absolute right of challenge to the Court.

[50] The matter will involve an investigation into whether or not ANZL breached the duty of good faith under the Act; again I consider that this is an area in which the Authority has significant experience.

[51] In all these circumstances, I find that there are relevant factors against removal to the Court, such that I am not satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2)(d) of the Act.

[52] I determine that the Application for Removal should not be granted, but that the matter should be set down for an Investigation at first instance by the Authority.

[53] A telephone conference will be arranged with the parties to set the matter down.

Costs

[54] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority