

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 70  
5375360

BETWEEN                      JENNIFER KILPATRICK  
   Applicant  
  
A N D                              FLIGHT ATTENDANTS &  
   RELATED SERVICES (NZ)  
   ASSOCIATION (FARSA)  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Applicant in person  
   Blair Edwards, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Date of Determination:        28 February 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Kilpatrick) alleges a breach of good faith and an unjustified disadvantage grievance in respect of a dispute between herself and her then union, the respondent (FARSA).

[2]     FARSA says that Ms Kilpatrick's claims ought to be dismissed by the Authority as "*frivolous or vexatious*".

[3]     The material before the Authority discloses that there has been a dispute between Ms Kilpatrick and FARSA involving Ms Kilpatrick's membership for a period of FARSA's Welfare Committee.

[4]     In a communication to the parties on 27 November 2012, the Authority determined that it would deal first with the preliminary issue of whether there was a justiciable basis for the claim. The Authority made the point at the time that unless

and until it was satisfied that Ms Kilpatrick could bring a claim against her former union, there was no point in hearing evidence on the merits. The parties were given an opportunity to file written submissions in accordance with a timetable and both have now helpfully done so.

### **Issues**

[5] There are only two issues for determination in the present case, viz:

- (a) Whether Ms Kilpatrick has a personal grievance against FARSA; and
- (b) Whether FARSA has breached good faith in respect of Ms Kilpatrick.

### **Has Ms Kilpatrick suffered a personal grievance?**

[6] The Authority is satisfied that there is no basis in law on which Ms Kilpatrick can bring a claim for personal grievance against her former union, FARSA. This is essentially because there was never an employment relationship between Ms Kilpatrick and FARSA. FARSA is a union and does employ staff, but Ms Kilpatrick is not a staff member of FARSA. Rather, she is a member, or more accurately, was a member at the relevant time. As a member, and nothing more, she is not in an employment relationship with FARSA and in consequence, her primary application must fail.

[7] The Authority is satisfied then that Ms Kilpatrick has no legal standing to bring this claim because at the time of the events complained of, she was not an employee within the meaning of s.6 of the Employment Relations Act 2000 (the Act). That provision requires an employee to be a person “*employed by an employer to do any work for hire or reward under a contract of service ...*”.

[8] Ms Kilpatrick is clearly a person but the facts before the Authority do not disclose that she has been engaged by FARSA to do work “*for hire or reward*”, or that it is proposed that that work be performed “*under a contract of service*”. As to the hire or reward aspect first, it is apparent that Ms Kilpatrick’s membership of the Welfare Committee of FARSA was in her capacity as a member of the Union and not as an employee.

[9] There is no evidence that either party intended to create an employment relationship as a consequence of that membership of the Welfare Committee. Nor is

there any evidence that any documentation suggests that possibility. Nor is there any evidence of payment made by way of remuneration. There were payments made but they were in the nature of gratuities. They were modest in size and certainly not remunerative of any time or expertise involved. In fact, in summary, the Authority is absolutely satisfied that Ms Kilpatrick was a volunteer and as such none of the usual incidents of employment such as deductions for tax purposes or indeed any other documentation of the sort that would evidence an employment relationship, exist.

[10] It follows that as Ms Kilpatrick was not an employee of FARSA, she has no standing to bring a claim against FARSA in the employment jurisdiction pertaining to an allegation that she was disadvantaged by unjustified actions of FARSA. In essence, she is not an employee of FARSA and FARSA is not her employer.

### **Was there a breach of good faith?**

[11] This question proceeds on a slightly different footing because it is plain from the statute that, pursuant to s.4, for the purposes of the good faith obligation the parties include “*a union and a member of the union*” see s.4(2)(c) of the Act.

[12] In principle then, Ms Kilpatrick can look to FARSA to deal with her in good faith, as that concept is accepted in the jurisprudence.

[13] Ms Kilpatrick’s particular claims in relation to breaches of good faith revolve around the way in which she was treated by FARSA when it made a decision to withdraw an invitation for her to be a part of the Welfare team.

[14] The Authority has not been persuaded that there is any breach of good faith by FARSA in respect of Ms Kilpatrick. To reach that conclusion, the Authority has studied the constitution of FARSA which has been provided by its counsel. Amongst other things, the Authority notes that Ms Kilpatrick was invited to a meeting of the Welfare Committee; she was not elected a member of the Committee. It follows that, given her status as an invitee, she was vulnerable to having that status revoked at any time and that is precisely what happened.

[15] The invitation was effectively withdrawn by FARSA’s General Secretary, Mr Bentley. The Authority makes two observations about that action. The first is that Mr Bentley, as the General Secretary, is entitled, pursuant to the constitution, to

manage the affairs of FARSA. It follows that in withdrawing the invitation, Mr Bentley was acting in accordance with his legal powers.

[16] It is apparent also that Mr Bentley's action was hardly arbitrary or capricious. He spent fully three months trying to engage with Ms Kilpatrick on the issue and got no engagement from her.

[17] That being the position, Mr Bentley decided to withdraw the invitation which the Authority is satisfied he had the power to do. Although nothing turns on this, the Authority notes that the Welfare Committee does not appear to have any particular status in the constitution of FARSA; it does not appear to be referred to in the constitution and if anything that emphasises the power of the General Secretary to manage its affairs on behalf of the National Council.

[18] Given the good faith obligations that clearly exist between a union and one of its members, the Authority's decision might well have been different if it was not apparent that FARSA had gone to some lengths over some significant period of time to engage with Ms Kilpatrick. In the end though, FARSA's inability to contact Ms Kilpatrick during that period meant that there was no ability for her to put her side of the story. But because the Authority was satisfied that FARSA did everything it reasonably could to engage with Ms Kilpatrick, the Authority is not minded to accept Ms Kilpatrick's argument that there has been a breach of good faith.

### **Determination**

[19] FARSA says these proceedings are frivolous and the Authority is referred to the leading cases.

[20] First, it is plain from Schedule 2 clause 12A of the Act that the Authority has power to dismiss a matter it considers to be frivolous and any order the Authority makes may include an order for payment of costs and expenses against the party concerned.

[21] In *New Zealand (with exceptions) Shipwrights etc Union v. New Zealand Amalgamated Engineering etc IUOW & Ors* (23 November 1989, WLC111/89), Chief Judge Goddard cited with approval the words of Lush J in *Norman v. Mathews* [1916] 85 LJKB 857 in which that English Judge said that a frivolous case was one which "*no reasonable person could properly treat as bona fide*".

[22] With respect to the submission that this case is a frivolous one, the Authority is not satisfied that it meets the test. Perhaps it could be said in respect of the claim for unjustified disadvantage where Ms Kilpatrick's assertion that she is somehow entitled to treat her relationship with FARSA as one of employment is certainly well wide of the mark but the position is otherwise in respect of the alleged breach of good faith where plainly there is a statutory entitlement for unions to treat members with good faith.

[23] On the facts, the Authority is satisfied that FARSA has treated Ms Kilpatrick with good faith, albeit not to her satisfaction, but that is not the legal test. Given that only one of Ms Kilpatrick's claims fails, in effect for want of jurisdiction, the Authority is not minded to treat the whole proceeding as a frivolous one.

[24] Notwithstanding that, the Authority is satisfied first that Ms Kilpatrick was not an employee of FARSA and therefore is not entitled to access the protections available at law for employees in an employment relationship. It follows that her claim for unjustified disadvantage must fail.

[25] As to her claim for a breach of good faith by FARSA, she correctly identifies that she has the right to bring such a claim pursuant to statute but has not been able to persuade the Authority that, in the particular circumstances of this case, that claim is made out.

### **Costs**

[26] Costs are reserved on the footing that the parties are to engage with each other to see if costs can be resolved by agreement and failing agreement an application may be made to the Authority by either party and each will be required to file submissions in respect of the fixing of costs by the Authority.

[27] For the avoidance of doubt, the legal principle most important in a cost fixing exercise is that costs usually follow the event. It follows that as Ms Kilpatrick was completely unsuccessful in her claim, and FARSA will have incurred costs, FARSA will be entitled to seek a contribution to its costs from Ms Kilpatrick, if it chooses to pursue the issue.

James Crichton  
Member of the Employment Relations Authority