IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 220
5452599

	BETWEEN	NEW ZEALAND AIRLINE PILOTS' ASSOCIATION IUOW INC Applicant
	A N D	MOUNT COOK AIRLINE LIMITED Respondent
Member of Authority:	James Crichton	
Representatives:	Dr Rodney Harrison QC with Clare Abaffy, Counsel for the Applicant David France, Counsel for the Respondent	
Investigation Meeting:	4 June 2014 at Auckland	
Date of Determination:	6 June 2014	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union (NZALPA) filed a Statement of Problem in this matter on 19 March 2014 advancing a dispute over the interpretation and application of a collective employment agreement and alleging breaches of good faith by the respondent airline (Mount Cook). Contemporaneously with the filing of that Statement of Problem, NZALPA also filed an application for removal of the whole matter to the Employment Court at Auckland in terms of the powers so to do under s.178 of the Employment Relations Act 2000 (the Act).

[2] A Statement in Reply was filed by Mount Cook on 8 April 2014 and in terms of that Statement in Reply, the application to remove the whole matter to the Employment Court is opposed.

Grounds for removal

[3] It is apparent from the pleadings and the submissions made to the Authority that the primary ground relied upon by NZALPA is that provided for in s.178(2)(a) of the Act. That provision allows the Authority a discretion to remove the whole or any part of a matter to the Court if an important question of law is likely to arise in the matter other than incidentally.

[4] A second ground is also relied upon. It is s.178(2)(d) of the Act which gives the Authority a broad discretion to remove a matter where it *"is of the opinion that in all the circumstances"* the Court should decide the question.

[5] The Authority has been referred to a number of dicta from the leading cases, particularly in respect of the determination of the question what amounts to an important question of law, and what does not.

[6] It has been suggested by some of the commentators that there is now an inbuilt bias against the granting of removal applications because of the inquisitorial nature of the Authority's practice which sets it apart from the more traditional adversarial trial arrangements of a Court of record. This particular view is said to be supported by reference to various sections of the Act including in particular s.143 which, in relation to the institutions, sets out the objects of the decision-making process on a step-by-step basis.

[7] The former Chief of the Authority, Member Dumbleton, set this view out elegantly in *New Zealand Amalgamated Engineering & Related Trades IUOW v. Carter Hold Harvey Ltd* (AA172/02, 10 June 2002) in the following terms:

> *Although the removal applications in s.178 of the Employment Relations Act 2000 are almost identical to those found in the now repealed Employment Contracts Act 1991, they must be read in the context of the 2000 Act and its objectives, particularly in relation to the role of the employment institutions, the Mediation Service, the Authority and the Employment Court. Under the 1991 Act, removal was from one strata of adversarial or trial process in the Employment Tribunal to another of the same process in the Employment Court. Under the 2000 Act, removal is from the new and distinctive type of dispute resolution process of investigation in the Authority, to the more routine adversarial or trial process conducted by the Employment Court. It seems clear that where judicial intervention is required in an employment relationship problem, the Act intends to promote a lower level of this with an investigative process being used in preference to a trial. The purposes of the Act in this regard must*

> *be given due weight when considering any removal application under s.178. ...*
>
> *The objective of the legislation is to have as many employment relationship problems as possible resolved by the parties themselves, with or without mediation. If that is not possible, then the more user friendly procedure of the Authority may be applied and the more corrosive adversarial process of the higher Courts avoided.*

[8] That said, in my judgment, the Authority ought not to be looking for reasons to reject an application for removal but rather seek to apply the law as it stands. It is a truism that the statute provides for removal applications to be made on certain bases and there are a significant number of judicial pronouncements about how to apply the words of the statute. In my considered view, the Authority's role is to deal with the day-to-day judicial resolution of the bulk of employment relationship problems that the parties are unable to deal with themselves with or without the intervention of the Mediation Service. The particular statutory construct in which the Authority sits makes it well able to address issues predominantly of fact, including quite complex factual matrixes. Conversely, it does not seem to me to be the Authority's role to deliberate upon matters which impinge on the expertise of the Court in deciding questions of law.

[9] So the question is whether NZALPA can persuade me that there are one or more important questions of law likely to arise in the present proceeding other than incidentally. That onus of course rests on NZALPA.

[10] Next, the Authority must decide the importance of the question, recognising that the question need not be either difficult or novel. Factors such as whether the resolution of the issue might affect large numbers of future employment relationships or have broad consequences for employment law generally may be helpful, but central to the Authority's task must be the question whether the legal issue identified is *"decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it"*: *McAlister v. Air New Zealand Ltd* (AC22/05, 11 May 2005) summarising *Hanlon v. International Education Foundation (NZ Inc)* [1995] 1 ERNZ 1.

[11] Those matters relate effectively to the first leg of the Authority's inquiry. Having reached an affirmative answer to that inquiry, the removal of the issue to the Court is still within the Authority's discretion and in that regard, it is apparent on the cases that the approach the Authority must take is effectively a negative one to

determine whether there are any relevant factors against removal. In *Auckland District Health Board v. X (No 2)* [2005] ERNZ 551, the Court emphasised the point I made earlier in this determination to the effect that the Authority's (para.[29]):

> *... 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.*

What are the grounds for removal?

[12] The first ground for removal concerns the interpretation and effect of clause 17 of the operative collective employment agreement between the parties. That clause provides generally for pilot members of NZALPA employed by Mount Cook to be able to join Mount Cook's superannuation fund.

[13] The Authority is told that until 28 August 2012, Mount Cook contributed to each pilot member's superannuation at the rate of 8.75%. There was a customary practice of inviting NZALPA's eligible pilot members to join the scheme and/or to join an alternative Air New Zealand scheme with the same contribution rate.

[14] The Authority is told that during bargaining for the operative collective employment agreement, Mount Cook procured a reduction in the employer contribution from 8.75% down to 7.5%. It is said this change was not communicated to NZALPA. The operative collective employment agreement was subsequently ratified by the parties. Then, some six months later, Mount Cook wrote to eligible pilot members of NZALPA indicating that the Mount Cook superannuation scheme was closing and offered them the opportunity of joining an alternative scheme but with a 7.5% employer contribution.

[15] NZALPA says that an important question of law arises in this respect because, put simplistically, NZALPA wishes to challenge the validity of the change in the superannuation contribution rate made by the employer and in order to do that it is going to need to engage not only with the respondent employer but also with, it is said, other legal persons including the trustees of the superannuation trust and potentially corporate entities other than the respondent employer, but corporate entities that have a relationship with the respondent employer.

[16] Mount Cook says that the fact that the documents in question are lengthy and require interpretation does not of itself constitute an important question of law.

[17] In relation to this question, I am not persuaded that NZALPA has made out its case. It seems to me that Mount Cook is right that if the matter is about the interpretation of documents and the relationship between those documents, provided the Authority can have access to the material in question (and this is an issue that I will return to), there is no reason in principle why the Authority cannot appropriately deal with the issue. Moreover, I have not been persuaded that on this ground anyway, there is any important question of law likely to arise other than incidentally.

[18] I turn now to the second ground which involves the contention that NZALPA, in challenging the validity of the resolutions allegedly made by the scheme trustees for Mount Cook, claims an important question of law will arise other than incidentally.

[19] Mount Cook says that because NZALPA does not seek any remedies against the scheme trustees for instance (or indeed any other third party), its only route in this jurisdiction is its present claim against Mount Cook and insofar as its allegations relate to matters to do with trust law, they are within the ambit of the High Court and not any of the employment institutions, including the Employment Court.

[20] I do not agree with that assessment of the position. The whole point of NZALPA's claim in this regard is that it wishes to attack the validity of the changes allegedly made by the trustees of the scheme in the employment institutions because, again to put it simplistically, those changes have impacted on its members and will continue to do so, and therefore those changes constitute part of an employment relationship problem of the sort which might be subsumed within s.161(1)(r) of the Act.

[21] This question is I am satisfied going to be *"decisive of the case"* or *"strongly influential in bringing about a decision of the case"* precisely because it involves the novel contention that because the decisions taken by the trustees have allegedly impacted on the employment relationships of NZALPA's relevant members who are employed by Mount Cook, it should be possible for NZALPA to argue the matter within the employment jurisdictions rather than having to take a claim to the High Court. I am satisfied that such a question is both *"difficult"* and *"novel"* as well as being determinative and looking at the issue in a practical way, it is the sort of issue which the employment law community could properly do with the guidance of a judicial enactment.

[22] The third important question relates to the issue of estoppel and the question really is whether, in not disclosing to NZALPA during bargaining that the employer contribution to the superannuation scheme had changed, Mount Cook was estopped from imposing the lower rate and thus the higher rate applied.

[23] Mount Cook says that the law on estoppel is well settled, including during collective bargaining and that therefore the Authority is perfectly capable of dealing with the issue. Moreover, Mount Cook draws my attention to a number of examples of decisions where the Authority has applied the law relating to estoppel including an earlier decision of my own.

[24] The essence of what NZALPA is seeking to do, is to wind back the superannuation contribution issue to the earlier higher contribution rate because it says that Mount Cook is estopped from imposing the lower rate having failed to disclose that change during the bargaining process.

[25] Mt Cook relied on *Aviation and Marine Engineers Association Inc v. Air New Zealand Limited* [2013] NZEmpC 172 as authority for the view that the law on estoppel was now settled and accordingly, the Authority was well able to apply the law as set out by the Court. Certainly it is true that this decision concerns, amongst other things, a failure to speak up by an employer during collective bargaining, and Chief Judge Colgan found that, in consequence *" it would be unconscionable to permit the defendant to now depart from those beliefs or expectations reasonably held by the plaintiffs…"* because that *"… belief or expectation was created and subsequently encouraged by the omissions of the defendant to assert otherwise in circumstances in which it was obliged to do so…":* paras. [346] & [344].

[26] Despite the obvious relevance of that decision, the test remains whether an important question of law is likely to arise in the instant case, other than incidentally, even where there is clear and relevant law on the point. I conclude that there is still an important question of law involved in the sense that, although the law may now be well settled on the point, nonetheless this issue will still be decisive or strongly influential in reaching a decision in the case, and accordingly it is appropriate that this question contribute to the balance of matters that sway me toward removal.

[27] I am not persuaded by Mount Cook's argument that I do not have sufficient information before me about what happened at bargaining to be able to draw a

conclusion on this issue. I am satisfied on the material before me that Mount Cook accepts that it did not disclose to NZALPA that there had been a change in contribution rate during the bargaining process. It makes that admission in its submissions and says that the reason it was not disclosed was effectively because it was not relevant and that was because there were no current NZALPA members affected by the change.

[28] The next issue of law identified by NZALPA is a variant of the third question relying on the same factual matrix but pleading a breach of the statutory duty of good faith rather than relying on the estoppel argument. This issue simply proceeds on the footing that by failing to disclose the change in the contribution rate by the employer, Mount Cook breached its statutory duty and that that issue of itself creates an important question of law.

[29] I have no difficulty in concluding that I do not accept that submission; the Authority is well able to deal with breaches of good faith, whether made during the course of collective bargaining or otherwise and does so regularly, and I am not persuaded by Dr Harrison's argument that there is anything unique or special about this particular alleged breach of the duty. Precisely because it is a statutory duty and is well understood by the Authority and its Members, it seems to me axiomatic that it is difficult to understand how an important question of law is likely to arise in an allegation which is, with respect, as straightforward as this one.

[30] The final important question of law according to NZALPA is the contention that Mount Cook ought not to be able to benefit from its failure to disclose material information to NZALPA by reducing its contribution rate.

[31] Mount Cook says this is simply another version of the fourth important question of law, the one concerning breaches of good faith. I do not accept that submission; it seems to me that this is a novel argument where, in effect, NZALPA is applying for relief because of its contention that Mount Cook is improperly seeking to benefit from its own wrongdoing in not disclosing the change in contribution rate.

[32] I incline to the view that this argument is more analogous to the reliance on the principle of estoppel than it is analogous to the breach of good faith argument, and therefore has more of the elements of an important legal question than not.

The residual discretion

[33] As will be evident from the foregoing section of this determination, I have concluded that some but not all of the important questions of law identified by NZALPA do indeed meet the legal test and in consequence, I must turn now to consider whether, in all the circumstances, there are factors against removal. I find that there are none. I am satisfied on the material before me that the matter is not of such urgency that an earlier hearing in the Authority would materially assist the parties and I am also of the view that the loss of, in effect, an appeal right by missing out the Authority's investigation and removing the matter directly to the Court is not going to materially prejudice these parties.

[34] Moreover, I have one final issue that I need to deal with and it is Dr Harrison's argument that the discovery processes available in the Court are more likely to be efficacious in the present factual matrix than the more informal approach mandated by the statute in the Authority.

[35] I accept the points made by both counsel that the Authority does have the power to require witnesses to attend on it and be examined as to matters in contention and to bring with them papers, materials, documents and the like which the Authority thinks are relevant to the issue. In addition of course, the Authority has a broad power in s.160 of the Act to call for evidence and information from the parties or from other persons.

[36] But I am bound to say that I agree with Dr Harrison's submissions that both those Authority powers I have just referred to effectively require the party to persuade the Authority that the material sought is going to assist the Authority with its investigation. Dr Harrison characterised this arrangement as *"more hit and miss"* than was the case with the Court's discovery process. That process of persuading the Authority that the material will assist the Authority in its investigation is a different process from the one applying in the Court but I am not persuaded it is a less satisfactory process, only a different one.

[37] In the end, I am satisfied that this matter is a matter that should be argued by lawyers in front of a Judge using the traditional trial process and with all the pre-trial orders able to be applied for in a formal adversarial process.

Determination

[38] I have been persuaded that I should remove the whole of the matter referred to in this determination to the Employment Court for hearing and eventual judgment, without the necessity for the Authority to investigate the matter first.

[39] In reaching that conclusion, I have satisfied myself that I believe that there are some of the questions identified by NZALPA which do constitute important questions of law that are likely to arise other than incidentally and I am satisfied that having reached that conclusion, there are no grounds on which I should exercise my discretion to retain the matter for investigation in the Authority. As a consequence, the parties will have access to the more formal interlocutory processes of the Court.

Costs

[40] As a dispute matter, the parties may well think that costs should lie where they fall. If that is not the position, then I reserve leave for one party to initiate costs fixing in the Authority by filing and serving submissions as to costs. The responding party then has 14 days from the date of receipt of the initiating party's costs submissions to file submissions of their own.

[41] Costs will then be fixed by me on the papers.

James Crichton
Member of the Employment Relations Authority