

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 386
5518119

BETWEEN CAPTAIN DAVID BROWN
 AND CAPTAIN GLEN
 SYCAMORE
 Applicants

A N D NEW ZEALAND BASING
 LIMITED OF HONG KONG a
 wholly owned subsidiary of
 CATHAY PACIFIC
 AIRWAYS LIMITED OF
 HONG KONG
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Garry Pollak, Counsel for the Applicants
 Mark Lawlor, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 17 September 2014

DETERMINATION OF THE AUTHORITY

- A. The claims of the applicants, Captains Brown and Sycamore under File No.5518119 are removed to the Employment Court pursuant to s.178(2)(a) and (d) of the Employment Relations Act 2000 (the Act);**
- B. No order as to costs.**

[1] By consent, the application for removal of this matter was determined on the papers.

The Employment Relationship Problem

[2] On 10 September 2014, the applicants and the respondent filed a joint statement of problem in which they seek declarations:

- As to whether the law of New Zealand (NZ) or the law of Hong Kong applies to their employment relationships,
- If NZ law applies, including the Human Rights Act 1993 (HRA) which prohibits discrimination in employment on the grounds of age, whether the respondent, New Zealand Basing Limited (NZBL) can rely on the exception to this prohibition contained in s.24 of the HRA which applies to employment on a ship or aircraft, not being a NZ ship or aircraft; and
- Determining the lawfulness of NZBL's intention to terminate the employment of both the applicants, Captain Brown and Captain Sycamore (the Captains) when they reach the age of 55 years being the age of retirement in their employment agreements.

[3] Contemporaneously, a joint application for removal of the matter to the Employment Court was filed together with a joint application that the Authority accord urgency to the matter.

[4] The parties through their respective counsel have attempted to resolve the matter and have attended mediation but such attempts at resolution have not been successful.

[5] I convened a telephone conference with counsel and heard submissions on the issues. Counsel agreed the application for removal of the employment relationship to the Employment Court could be determined on the papers.

Employment of the Captains

[6] The Captains are employed by NZBL as Senior Captains to fly A340 and A330 aircraft for Cathay Pacific Limited (Cathay Pacific) of which NZBL is a wholly owned subsidiary. Both NZBL and Cathay Pacific are incorporated in Hong Kong. The Captains are based in Auckland, NZ.

[7] Both Captains have been flying for Cathay Pacific since the early 1990s and have been based in both Hong Kong and in NZ. Following the incorporation of NZBL, both Captains signed employment agreements with NZBL and were based in Auckland, NZ. The employment agreements signed by the Captains included the usual conditions of employment relating to pilots but also included the following provisions:

2. ***Application of Law***

2.2 *These Conditions of Service, which form part of the contract of employment between the company and the officers, will in all cases and in all respects be interpreted in accordance with the law as set out in the various applicable ordinances of the Hong Kong Special Administrative Region (Hong Kong SAR).*

[8] And further such conditions are included in clause 35:

35. ***Retirement***

35.1 *The normal retirement age is fifty five (55) years of age. An officer will be deemed to have reached Normal Retirement Aged on the day on which the Officer reached his/her fifty fifth (55th) birthday.*

[9] In 2009, the Captains had the opportunity of agreeing to slightly different terms and conditions of employment, including a retirement age of 65. However, neither of the Captains elected to transfer to the new employment agreement at that time. The Captains subsequently requested to transfer to the new employment agreement in order to avail themselves of the retirement age of 65. NZBL refused their request.

[10] The Captains turn the age of 55 years in March and in September 2015. An issue has arisen between the parties as to whether or not the HRA and possibly the NZ Bill of Rights Act apply to the situation. The Captains' position is that the law of NZ applies and not the law of Hong Kong and under the HRA, it is unlawful for NZBL to discriminate against them because of age.

[11] NZBL contends that the laws of Hong Kong and not NZ apply to the situation. NZBL claims that the retirement age for the Captains under their employment agreements is 55 and such retirement age is lawful under the laws of Hong Kong.

[12] NZBL further contends that in the event the HRA is deemed to apply, it is able to rely on the exception contained in s.24 of the HRA in that its aircraft are foreign registered and employment was engaged outside NZ.

[13] The Captains dispute this interpretation of s.24 of the HRA and say it does not apply to them as they were both employed in NZ and are based in NZ.

The Removal Application- s.178(2) of the Act

[14] Both Mr Pollak and Mr Lawlor, counsel for the Captains and NZBL jointly seek to have the entire matter removed urgently to the Employment Court on the grounds that there are important matters of law arising.

[15] It is contended that there are important legal issues arising in respect of the applicable law governing the employment of the Captains. The Captains are New Zealand citizens based in New Zealand but whose employment is bound by an employment agreement to which the laws of Hong Kong purportedly apply. Questions of whether New Zealand legislation including the HRA and the NZ Bill of Rights Act arise in respect of this particular situation.

[16] The issues arising are novel and apparently have not been dealt with by either the Employment Relations Authority or the Employment Court.

[17] Further, the issues to be determined are important and relevant not only to the Captains who turn 55 years next year, but to a number of other pilots employed by NZBL who reside in New Zealand and are approaching the age of 55 years.

[18] The other issue relates to urgency. The applicants are due to turn 55 years next year. It is important that the questions of law are dealt with and concluded before they reach the age of 55 years at which time their employment is to be terminated through retirement.

[19] The principles when considering applications to remove matters to the Employment Court are summarised in *McAlister v. Air New Zealand Limited*¹. In *McAlister*, it was held that the question of law must be an important question of law and it was not necessary that the question should be difficult or novel.

¹ AC 22/05, 11 May 2005 at paras.[9] and [10]

[20] I am persuaded that the matters arising are important questions of law. There are important issues of law as to the applicability of the law of NZ or of Hong Kong and the interface in the particular circumstances with the HRA.

[21] Further, there will be a number of employees who will be affected by the decision. The other matter which I take into consideration is the fact that the parties require the matter to be dealt with urgently given the Captains turn 55 years of age next year.

[22] In summary, there are important questions of law which arise other than incidentally. The Court has not yet considered the questions and the Court's decision may impact upon a number of employees. It is important for the Court to provide direction.

[23] Although removal only requires one ground under s.178(2) of the Act to be made out, I also find that removal is appropriate is under s.178(2)(d) of the Act.

[24] Section 178(2)(d) of the Act requires the Authority to be of the opinion that in all the circumstances the Court should determine the matter. The matter is an urgent one of importance to a number of employees.

Order

[25] The Authority orders pursuant to s.178(2)(a) and (d) of the Act, the removal of the joint statement of problem to the Employment Court.

Costs

[26] As this is a joint application, there is no order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority