IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 376
3047493/ 3058232

BETWEEN	THE NEW ZEALAND AIRLINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED First Applicant
AND	MICHAEL BRADSHAW Second Applicant
AND	ELLIOTT WELLS Third Applicant
AND	SAMUEL HERD Fourth Applicant
AND	TIMOTHY LAWRENCE Fifth Applicant
AND	THOMAS PORTER Sixth Applicant
AND	BENJAMIN HAYS Seventh Applicant
AND	LACHLAN BYLTHE Eight Applicant
AND	JOFFREY LINARES-ROBIN Ninth Applicant
AND	VIRGIN AUSTRALIA (NZ) EMPLOYMENT IN CREWING LIMITED First Respondent
AND	VIRGIN AUSTRALIA AIRLINES PTY LIMITED Second Respondent

Member of Authority:	TG Tetitaha
Representatives:	J Roberts/S Houliston, counsel for the Applicants M Lawlor/J Williams, counsel for the First & Second Respondent
Investigation Meeting:	On the papers
Submissions [and further Information] Received:	18 April 2019 from the Applicants 16 and 30 April 2019 from the Second Respondent
Date of Determination:	25 June 2019

DETERMINATION OF THE AUTHORITY

A. I remove proceedings numbers 3047493 & 3058232 to the Employment Court pursuant to s178(2)(a)(c) and (d) Employment Relations Act 2000.

B. Costs reserved.

Employment Relationship Problem

[1] This is an interlocutory application arising from a statement of problem seeking compliance orders and remedies for unjustified disadvantage grievances. Central to the dispute is the interpretation of Part 8 clauses 78, 80 and 83 of the parties 2013 collective agreement.

[2] This decision deals with none of that. This determination deals with a multi-layered application by the second respondent involving a notice of objection to jurisdiction and an application for removal to the Employment Court.

[3] The notice of objection to jurisdiction submits there is no employment relationship between the second respondent and the applicants and therefore I have no jurisdiction to hear this matter under s161Employment Relations Act 200 (ERA).

[4] The application for removal submits there is an important question of law involving the employer status of an overseas parent company of a New Zealand subsidiary and its wide

ranging implications, 'lifting the corporate veil" and the law relating to triangular employment relationships. Further the Authority is not established to resolve complex legal issues more suited to the Court's formal processes.

Jurisdiction

[5] It is useful to start with the notice of objection to jurisdiction. Realistically this objection seeks for the second respondent to be struck out as a party to litigation between the applicants and first respondent.

[6] The Authority has the power to order a party be removed under s221 Employment Relations Act 2000 (ERA). There is little doubt I have jurisdiction to deal with the matter of whether the second respondent was the employer of the second to ninth applicants.

Removal to Court

[7] Section 178 of the Employment Relations Act 2000 (ERA) sets out the basis on which a party may apply to remove a matter to the Court to hear and determine. The second respondent seeks removal upon the bases set out in s178(2)(a) and (d) below:

> **178 Removal to court**
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> (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
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> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
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> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (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; or
>
> (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
>
> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

Is there an important question of law?

[8] The second respondent submits the important question of law is "whether an overseas parent company of a New Zealand subsidiary should be held to be the/an ultimate employer

of employees of that subsidiary". It further submits that this question will involve determining whether there is reason to "lift the corporate veil" and enquire into the second respondent's business structures.

[9] It further submits that this will have wide-ranging implications on the numerous businesses/employers in New Zealand which have parent companies overseas and a New Zealand subsidiary which employs employees in New Zealand.

[10] It goes on to state there are potentially important implications as a point of law with regard to triangular employment relationships and refers to *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150.

[11] The applicant disagrees and submits it is a question of fact "whether there is reason to "lift the corporate veil" in inquiring into the second respondent's business structures" as submitted. It states that whether the second respondent is the employer of the second to ninth applicants or is also the employer along with the first respondent, is incidental to the dispute regarding the bid import process in advertising vacancies.

[12] The applicants refer to existing precedents on this "question of law" for example *Bryson v Three Foot Six Limited* [2005] NZSC 34 (real nature of employment), and for example *Orakei Group (2007) Limited v Doherty* [2008] ERNZ 345 (question of joint employment) and *LSG Sky Chefs Limited v Prasad* [2018] NZCA 256 (question of triangular employment).

[13] The applicants acknowledge the fact of legal precedent on particular issues is not determinative, but in this case demonstrates that the question articulated is not as important as the second respondent contends. Finally, the applicants submit the application for part removal fails completely under this limb. If the jurisdiction question posed is a question of law, it is not one of importance. However, the jurisdiction question is a question of fact.

Is the second respondent's employer status incidental?

[14] For the purposes of making compliance orders and determining unjustified disadvantages, it is essential to have the appropriate employer party/parties before the Court. Therefore the dispute about the employer status of the second respondent is not an incidental matter.

What is the state of the law relating to triangular relationships?

[15] There are only two cases including *Prasad* that have dealt with triangular relationships primarily involving labour hire companies.[1]

[16] This matter does not involve a labour hire company but a slightly different scenario of an oversea parent company utilising a New Zealand subsidiary to employ the second to ninth applicants. The employment obligations of overseas parent companies have not to my knowledge been dealt with by the Courts in any substantive way. This makes the decision about the status of the second respondent important to the development of employment law.

[17] This decision shall affect how overseas parent companies employ workers in New Zealand. There is little doubt it may have far reaching effects for how overseas companies conduct their business in New Zealand.

[18] Finally I am also aware a bill known as the Employment Relations (Triangular Employment) Amendment Bill is currently in its third reading before Parliament. The law is about to significantly change and dicta on situations such as this one will assist in its future application.

[19] In my view there is an important question of law arising other than incidentally about "whether an overseas parent company of a New Zealand subsidiary should be held to be the/an ultimate employer of employees of that subsidiary".

[20] I am inclined to grant the application for removal as a consequence.

Should the Court determine the matter?

[21] The second respondent submits that this part of the matter is likely to involve a complex analysis of legal issues regarding the nature and overlap of commercial structures and employment relationships. It submits that the nature of these issues are better suited to the formal processes of the Court and its' specialised expertise in determining points of law in the employment context.

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1 *McDonald v Ontrack Infrastructure Limited* [2010] NZEmpC 132.

[22] The applicant disagrees. It says the same witnesses will give evidence of the parties respective employment arrangements, the bid import process and the advertising of vacancies will be the same evidence. The applicant submits there will be a significant number of documents, witnesses and the determination of the Authority is likely to be the subject of a de nova challenge. However if I was to remove this part of the claim it is submitted the entire claim should be removed as a consequence.

[23] In my view there is a basis to remove this matter under s178(2)(d) due to its legal and evidential complexity. The documentation required to be filed regarding the control exercised by the overseas parent company over its subsidiary is likely to be substantial and the subject of several interlocutory decisions. This is not suitable for the Authority's informal processes.

[24] I also remove this matter under s178(2)(c) as I have determined to remove part of the claim about the second respondent's employer status under s178(2)(a). Given the same witnesses shall be giving evidence in both matters it is more efficient for one jurisdiction to deal with this in the first instance. I am mindful any decision I make shall be appealed in any event.

[25] I remove proceedings numbers 3047493 & 3058232 to the Employment Court pursuant to s178(2)(a)(c) and (d) Employment Relations Act 2000.

[26] Costs are reserved. It seems appropriate given the importance of the matter for costs to lie where they fall.

TG Tetitaha
Member of the Employment Relations Authority