

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 100  
3047493

BETWEEN	NEW ZEALAND AIRLINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED AND OTHERS Applicants
AND	VIRGIN AUSTRALIA (NZ) EMPLOYMENT AND 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 Respondent

Investigation Meeting: On the papers

Submissions Received: 15 January 2019 from the Applicant  
25 January 2019 from the First Respondent

Date of Determination: 25 February 2019

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**DETERMINATION OF THE AUTHORITY**

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**A. I grant leave for the applicants to serve the second respondent overseas. Costs reserved.**

## **Employment Relationship Problem**

[1] The applicants apply for leave to serve a statement of problem upon the second named respondent Virgin Australia Airlines Pty Limited (VAA). The second respondent resides outside of New Zealand. They also seek reduction of the time for filing a statement in reply. The First Respondent opposes these applications.

## **Application for Leave**

[2] Clause 4A Schedule 2 of the Employment Relations Act 2000 and Regulation 19A of the Employment Relations Authority Regulations 2000 states any document relating to a matter before the Authority may be served outside of New Zealand with leave. The Act and Regulations are silent on the requirements for the grant of leave to serve overseas in the Authority.

[3] The Court has a similar jurisdiction under clause 5A Schedule 3 of the Employment Relations Act 2000. The granting of leave is governed by its regulations. Regulation 31A(5)(c) allows service to occur in cases where “the overseas party is a necessary and proper party to the proceedings brought by the plaintiff against a person who is to be, or has been, served in New Zealand.” This is an appropriate basis for considering the grant of leave to serve overseas by the Authority.

[4] The applicants submit leave to serve the second respondent because it is a proper party to the proceedings. In particular it submits the first respondent Virgin Australia (NZ) Employment and Crewing Limited (VANEC) was not acting independently of VAA because:

- Two directors of VANEC are also executive officers in VAA;
- Prior to 19 March 2012 a New Zealand based company Virgin Australia Airways (NZ) Ltd trading as Pacific Blue was the sole shareholder in VANEC;
- VANEC is an “employment cost centre” for VAA;
- Other VAA employees provide direction and control of New Zealand based Pilots;
- VAA made the offers of employment to the second to ninth applicants;
- Determining the employer of the second to ninth applicants requires VAA’s presence before the Authority.

[5] VANEC submits VAA is not a proper party to this proceeding because:

- The collective agreement (CEA) that is the subject of this dispute was concluded with VANEC not VAA;
- The first applicant initiated and has been bargaining with VANEC only;
- The CEA distinguishes between the employer company (VANEC) and Virgin, Virgin Group and/or VAA;
- At no stage prior to filing have the applicants questioned the validity of VANEC status as the employer;
- The Statement of Problem seeks to enforce the terms of the CEA against VANEC only. The notion of VAA being an employer has not been raised in this case;
- There is a separation/distinction between Virgin's New Zealand operations and the Virgin International and Australian operations;
- VANEC trains and pays the applicant Pilots. The training is based in Christchurch and Auckland;
- Clause 37.1(b) CEA expressly prohibits VANEC outsourcing its Pilot labour to other entities within New Zealand or internationally; and
- There is a high threshold that has not been met for the Authority to 'lift the corporate veil' and enquire into a possible agency relationship between VAA and VANEC.

### **Determination**

[6] The starting point must be the parties pleadings. This should set out who should be required to be present for determination of this matter. The statement of problem has named VAA as the second respondent and pleads VANEC is acting as its agent in this dispute. Whether this is evidenced is a matter for hearing. I cannot at this stage assess the strength of the evidence about the alleged agency relationship.

[7] Following service VAA can (and most likely shall) apply to sever/remove themselves as a party. If successful they may seek costs.

[8] The application to reduce time for filing a statement in reply is not made out. Personal grievances were raised on 19 June 2018 in respect of matters that had occurred on 9 and 19 March 2018. This matter was filed on 4 December 2018 – 9 months after the actions that gave rise to this matter. I refuse to reduce the time for filing a statement in reply in the circumstances.

[9] Accordingly I grant leave for the applicants to serve the second respondent overseas. Costs reserved.

**TG Tetitaha**  
**Member of the Employment Relations Authority**