

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 265
3045635

BETWEEN SEAOOLOUMALO LOLI
Applicant

A N D VIRGIN AUSTRALIA (NZ)
EMPLOYMENT AND
CREWING LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Michael O'Brien, counsel for the Applicant
Jessie Laphorne and Joseph Williams, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions Received: 17 January and 7 February 2019 for the Applicant
31 January 2019 for the Respondent

Date of Determination: 3 May 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

**A. The application for removal of this matter for the Employment Court to
hear and determine is declined.**

B. Costs are reserved.

Employment Relationship Problem

[1] Seaoouloumalo Asa Taliilagi Loli was employed by Virgin Australia (NZ) Employment and Crewing Limited (VANZ or the company) as a flight attendant.

[2] In August 2018 Mr Loli, whilst still employed by VANZ, filed a claim in the Authority against the company.¹ He claimed that he had been subject to unjustified actions by VANZ to his disadvantage and that the company had breached its duty of good faith. Those claims related to Mr Loli's suspension by VANZ and a disciplinary process which was in progress at the time. VANZ denied Mr Loli's claims.

[3] VANZ initiated the process after an issue raised by a staff member. The allegations being investigated concerned Mr Loli's actions during a flight on 18 February 2018, including in relation to a passenger. Mr Loli denied the allegations.

[4] The parties were directed to mediation which they attended but no resolution was reached. Mr Loli was dismissed.

[5] In November 2018 Mr Loli filed a second claim, which included personal grievance claims for disadvantage, discrimination and dismissal as well as breaches of good faith and penalties.² VANZ again denied the claims.

[6] Although the issues in the second claim appeared to largely or entirely capture those in the first claim, as well as add new claims, Mr Loli did not wish to withdraw the first claim. I decided to hear both claims together.

[7] Mr Loli has now applied for the matter encompassed in both proceedings to be removed to the Employment Court. The application is made pursuant to s 178(2)(a) and (d) of the Employment Relations Act 2000 (the Act). VANZ opposed removal.

[8] The parties agreed that the removal application could be dealt with on the papers. Submissions were received from both parties.

[9] I have not recorded everything received from the parties but have stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.³

The disciplinary process

[10] I will outline the disciplinary process relatively briefly, as some of the reasons for removal raised for Mr Loli relate to that process.

¹ File number 3035733.

² File number 3045615.

³ S 174E of the Act.

[11] On 26 June 2018 Mr Loli was phoned and advised that there would be a meeting the following day. Mr Loli was suspended either at the meeting or shortly thereafter.

[12] Mr Loli remained suspended until September 2018 whilst VANZ undertook an investigation and disciplinary process. Requests for information were made on his behalf. VANZ issued a revised letter of allegations. It is fair to say that both parties objected to aspects of the other's delay or conduct during the process.

[13] A request was made for VANZ to provide information regarding the identity of the passenger in question. VANZ's position was that the passenger was not named in the allegations thus his involvement was not relevant to the investigation, that all relevant evidence on that issue had been provided and in any event, the provision of any further identifying information would involve an unreasonable breach of the passenger's privacy.⁴ At some point VANZ also referred to not having this information.

[14] On 5 September 2018 VANZ notified Mr Loli of its preliminary view that the allegations were established on the balance of probabilities, that these amounted to serious misconduct and that summary termination of Mr Loli's employment was the most appropriate outcome.

[15] Mr Loli's representative responded although VANZ did not regard the response as providing a substantive reply on the issues. An issue was raised about the person who had been leading the investigation (Leader, Crew Development) not being impartial and having acted inappropriately as regards a witness. Impartiality concerns were also raised regarding a more senior VANZ manager (Head of Cabin Crew) who the company had identified to be the person making the decision on the outcome of the process. VANZ did not accept these allegations.

[16] A meeting was proposed but did not occur. The parties disagreed on timeframes and other issues.

[17] On 19 September 2018 the Head of Cabin Crew emailed a letter to Mr Loli, via his representative, terminating his employment. Mr Loli's representative responded that he was flabbergasted to have received the email and the company's

⁴ Letter VANZ to Mr Loli's representative 24 August 2018.

finding. He sought a retraction of the decision and for a meeting to be set up for Mr Loli to respond to the allegations.

[18] VANZ wrote noting that it would not retract its decision but would “as a matter of goodwill” consider any written submissions by Mr Loli and whether there may be “cause to reconsider its decision”.

[19] A response from Mr Loli and a letter from his representative were provided. VANZ remained of the view that its decision to terminate Mr Loli’s employment for serious misconduct was justified. The previous decision was confirmed.

Removal

[20] The Authority has discretion to remove the matter, or any part of it, to the Employment Court. Under s 178(2) of the Act four possible grounds for removal are identified. It is only necessary to establish one of the tests under s 178(2) of the Act in order for removal to be granted.⁵

[21] Mr Loli relies on:

- (i) there being important questions of law likely to arise in the matter other than incidentally (s 178(1)(a)); and
- (ii) in all the circumstances the Court should determine the matter (s 178(1)(d)).

Important questions of law?

[22] Guidance on the predecessor to s 178(1)(a) was provided by Chief Judge Goddard in *Hanlon v International Educational Foundation (NZ) Inc*:

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question is resolved. That is not an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law in general. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet.

⁵ *Auckland District Health Board v X (No. 2)* [2005] 1 ERNZ 551.

Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law is likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.⁶

[23] More recently Chief Judge Inglis identified that questions of law need not be complex, tricky or novel to be important.⁷

[24] VANZ emphasised that to meet the test under s 178(2)(a) the issues must arise other than incidentally. It relies on *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment*⁸ where the Court held that a matter arises other than incidentally where the outcome of the proceedings will turn on the answer. I note that the parties in that case had agreed to that point and the decision was made on that basis.

[25] The application for removal here is based on four areas which are identified as involving important questions of law. These are all said to relate to the unjustified dismissal claim. I will consider each of these individually. VANZ does not accept that any of these matters involve important questions of law. It is also critical of the lack of identification in the statement of problem for the second matter⁹ of the issues which Mr Loli says are important questions.

Good faith issue

[26] The first issue identified for Mr Loli as important relates to good faith. Do the requirements in s 4 of the Act apply to an employer's reconsideration of a decision to dismiss an employee, that is having made a decision to dismiss but then indicating that it would reconsider that decision, is an employer, in concluding that reconsideration, obliged to comply with the requirements of s 4 regarding good faith?

⁶*Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

⁷*Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

⁸*Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].

⁹ File number 3045615.

[27] Submissions from Mr O'Brien on behalf of Mr Loli identify whether the good faith duty was still operative as a novel question, specifically:

- (a) By stating it would assess whether there was any cause to reconsider that decision VANZ was accepting that it was reviewing its decision. The Head of Cabin Crew's letter of 11 October 2018 refers to reviewing all the information; and
- (b) Mr Loli had sought that VANZ retract its decision to terminate which would have had the effect of keeping the employment relationship on foot. This is said to raise a novel question over the interpretation of s 4(a) of the Act.

[28] However, in its letter of 21 September 2018 VANZ stated "please note that Virgin Australia will not be retracting this decision."

[29] VANZ submits that there was no employment relationship between the parties once the decision to dismiss has been made (and communicated) and thus there was no duty of good faith applicable at that time. Submissions in reply for Mr Loli note that VANZ cited no authorities in support of that proposition and thus suggests it is a novel and important question of law.

[30] However, the Court has considered whether the relationship of good faith continues after the employment relationship has ceased and found that it does not. In *Balfour v Chief Executive, Department of Corrections* Judge Shaw found that the employment must be current for good faith as defined in s 4 of the Act to apply.¹⁰ More recently in *Idea Services Ltd (in Stat Man) v Barker*, Judge Inglis, as she was then, held that there was no scope for arguing that the good faith requirements applied after the employment relationship has ended.¹¹

[31] Although the circumstances in those cases are not the same as in Mr Loli's case, I do not accept that this is a novel question as the law is settled.

¹⁰ *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31]

¹¹ *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112 at [19]

Alleged misconduct involving a third party

[32] The second important question of law claimed by Mr Loli relates to the passenger. Where the allegation is that an employee has engaged in alleged misconduct involving a third party (in this case a passenger or customer) and the employee denies the allegation, is the employer obliged to:

- (i) Provide details of that customer's identity to the employee and is s 4(1B)(a) of the Act operative? and/or
- (ii) Attempt to speak to the third party?

[33] Mr O'Brien submits that whilst *Vice-Chancellor of Massey University v Wrigley*¹² and the subsequent amendment to ss 4(1B) and 4(1C) of the Act dealt with personal information in relation to other employees, questions privacy of others, in this case a customer, and whether those rights trump an employee's rights to natural justice and potentially to call that customer as a witness in support of his denial.

[34] VANZ says it has not refused to provide 'confidential information' (defined in s 4(1D) and accordingly the exception set out in s 4 (1B)(a) is irrelevant.

[35] While there may be no reference made by VANZ during the disciplinary process to s 4(1)(B) or (D) of the Act, the company did refer to provision of such information, if held, to involving an unreasonable breach of the passenger's privacy. Section 4(1B) does not affect the employer's obligations under the Privacy Act 1993.¹³

[36] However, I am not satisfied that this matter will arise other than incidentally. This matter is said to relate to Mr Loli's dismissal claim. The focus under s 103A of the Act is on the employer's actions. The more significant question is whether there was an obligation on VANZ to attempt to speak to the passenger. Whether VANZ complied with its procedural obligations under ss 4 and 103A of the Act in that regard, is a question of fact which can be determined by the Authority in its investigative capacity.

¹² *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 3

¹³ S 4(1C)(a)(ii) of the Act

Obligation to examine evidence

[37] The third question of law identified for Mr Loli concerns Mr Loli's cell phone. Does the employer have a positive obligation to examine evidence an employee has offered to provide, where the evidence goes to the foundation of the employer's allegation and subsequent finding? In this case, the foundation of the finding is said to be that Mr Loli had taken a picture of the events alleged on his phone as proof that it occurred. He denies that such a picture exists. Was the employer obliged to examine the phone that Mr Loli indicated he was willing to provide (having already provided copies of the sequence of photos from the day in question)?

[38] I am not satisfied that there is an important question of law likely to arise in terms of this issue. Under s 103A(2) of the Act I must look at whether the employer's actions, and how the employer acted were what a reasonable employer could have done "in all the circumstances at the time". Justifiability thus needs to be assessed in the context of the circumstances which existed at the time.

[39] The offer of the phone was made in Mr Loli's response on 26 September 2018. At that time the decision to dismiss summarily had been made and communicated to Mr Loli and VANZ had refused to retract its decision when asked. Therefore it is hard to see how I could take it into account when assessing whether the decision to dismiss was justified.

New decision-maker

[40] The final issue of question of law identified for Mr Loli concerns the issue of the decision maker. Where the employer appoints a new decision maker because of allegations made of bias against the initial decision-maker, is the new decision maker bound to meet with the employee and key witnesses to make his or her own assessment of credibility rather than relying on the credibility assessment undertaken by the original decision-maker?

[41] There appears to be a dispute regarding whether there was a change of decision-maker and if so, whether this was because of the allegations of bias made by Mr Loli.

[42] However, submissions for Mr Loli appear to change the focus from bias to the introduction of a new decision-maker (for any reason). They state that regardless of

the reason for the replacement, it was incumbent on the new decision-maker as a maker of factual findings to have assessed credibility of witnesses by directly speaking to them, rather than relying on the assessment of the original decision-maker (Leader Crew Development).

[43] VANZ submissions identify the Leader Crew Development as the only maker of factual findings, with the Head of Cabin Crew making the final decision as to the appropriate outcome.

[44] There are a number of Employment Court decisions which look at issues relating to the decision-maker and the involvement of others in the process.¹⁴ I am not satisfied that an important question of law arise here other than incidentally.

The Court should determine in all the circumstances?

[45] The removal application states that there will be an extensive evidential foundation in this case and key issues around witness credibility and allegations of bias and discrimination, which mean that this matter should be dealt with by the Employment Court due to:

- (a) The importance cross-examination will play in the hearing and the Court's transcription of evidence service. It is suggested that any risk of perjury is reduced by the real time recording of what is said in evidence; and
- (b) The need for Mr Loli to access the regulated disclosure (discovery) regime given the significant amount of information he alleges that VANZ has withheld.

[46] VANZ asserts that the Authority's investigative process is better suited for the type of inquiry required in this case.

[47] Factual complexity of itself is not sufficient to justify removal.¹⁵ The case requires investigation of the facts and the application of those facts to the law, including a consideration of whether VANZ complied with its obligations under ss 4 and 103A of the Act. Those tasks are within the Authority's purpose and functions.

¹⁴ See for example, *Ioane v Waitakere City Council* [2003] 1 ERNZ 104, *AFFCO New Zealand Ltd v Nepia* (unrep) Wellington WC 25/07, 28 September 2007, and *Timu v Waitemata District Health Board* [2007] ERNZ 419

¹⁵ *New Zealand King Salmon Co Ltd v Cerny* [2012] NZEmpC 195

[48] Mr Loli relies also on the Court's case management regime.¹⁶ However, the Authority has a broad discretion to make orders regarding procedure in such a way that suits the particular case.

[49] The Authority does not operate a discovery process in the same way the Court does. The Authority may order disclosure of documents from the parties and require witnesses to attend with documents if necessary.

[50] VANZ points out that the Court's discovery regime would not apply due to Mr Loli seeking penalties against VANZ. Regulation 39(2) of the Employment Court Regulations 2000 specifies that the regulations setting out the discovery do not apply in penalty cases.

[51] That regulation creates an exception in proceedings to the inter-parties disclosure process in the Court, allowing a respondent to claim a privilege against self-incrimination, with the Court then deciding whether disclosure will infringe that right.¹⁷

[52] Mr Loli also refers to the availability of the Court's video links for witnesses to give evidence from overseas, which will be operative in this case given a number of Mr Loli's witnesses are based overseas. There is no detail provided regarding which witnesses or the countries from which they would need to give evidence from. However, the Authority's Auckland office now has video-conferencing facilities. On occasions the Authority also permits the use of Skype or other electronic applications to allow witnesses to give evidence at a distance and a screen is available for such sessions.

[53] In terms of the questioning of witnesses, representatives are entitled to cross-examine witnesses in the Authority. The investigative nature of the Authority's questioning of witnesses may well assist in the determination of the issues. Alternatively, the Authority is able to adopt a more adversarial procedure of allowing counsel to cross-examine first, followed by any remaining questions from the Authority.

¹⁶ Regulations 55 to 59 of the Employment Court Regulations 2000

¹⁷ *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 86

[54] It is true that the Authority does not operate as a court of record and evidence is not usually allowed to be recorded. However, I am not satisfied that this is a sufficient basis of itself to justify removal. The Authority's long standing practice in the vast majority of cases has not been to record proceedings.

[55] Considering all of the matters discussed above, I am not satisfied that this is a matter which the Court should consider at first instance.

Conclusion on removal

[56] I have not found that there are any important questions of law which are likely to arise other than incidentally in this proceeding. I am also not satisfied that in all the circumstances the Employment Court should consider this matter in the first instance. I therefore decline the application for removal.

Costs

[57] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority