IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 329
3118621

BETWEEN	NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Applicant
AND	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	John Hall, counsel for the Applicant Charlotte Parkhill and Charlotte Evans, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 September and 2 November 2021 for the Applicant 18 October 2021 for the Respondent
Date of Determination:	18 July 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Airways, is the operator of air traffic and flight information services in New Zealand. The applicant, NZALPA, represents various Airways employees including all flight services operators whose terms of employment are covered by a Collective Employment Agreement. Some of those employees work at Kapiti Coast airport (NZPP).

[2] Airways has indicated it intends closing the flight service at NZPP and issued a notice purporting to do. NZALPA seeks to have that decision reviewed along with other ancillary claims including that Airways has misled it and breached its health and safety obligations.

[3] Airways denies that it has acted in a way likely to mislead NZALPA as to when their employment might be terminated given it is yet to issue notice and will not do so until it has completed a full and proper process. It also denies the other claims.

[4] More importantly at present is the fact Airways says the Authority has no jurisdiction ty consider the application. It is that issue this determination addresses.

The Authority's investigation

[5] The parties are in agreement the jurisdictional issue should be determined as a preliminary one. They also agreed it be determined on the papers which, in addition to the papers lodged with respect to the substantive claim, now include an agreed statement of facts which forms the basis of the "Background" outlined below, along with submissions on the preliminary matter.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[7] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[8] As already said Airways operates air traffic control and flight information services in New Zealand and NZALPA represents various Airways employees including flight services operators employed at NZPP.

[9] Those employees are covered by a collective agreement (the CEA) which contains, amidst other things a clause regarding consultation. It states that:

> Airways and NZALPA are committed to regular consultation and cooperation on an equal basis. For the purposes of these clauses "consultation" means all discussions, communications, participation in decision making, planning, and co-operation between the parties.[1]

[10] The clause goes on to state *One of the purposes of consultation is to achieve the objectives set out in Section 4 of the State Owned Enterprises Act 1986, and the delivery of efficient and effective services;* that both management and employees have responsibility for attaining those statutory objectives and that ... *the perspective and contribution of both management, employees, and their union, is an essential element to quality decision making and to the effective and efficient delivery of services*.

[11] It is further recorded that:

> In making this Agreement it is further recognised that the air transport industry is an essential service requiring seven days operation and is governed by the need for safety, the exigencies of airline schedules, movements of aircraft, and weather. The parties accept that compliance with the terms of the Agreement and development of a spirit of co-operation are essential for furthering the aims of the industry to the benefit of all concerned.[2]

[12] From 17 March 2020, until the commencement of a proposed change management process, Airways and NZALPA were meeting three times per week (Monday, Wednesday and Friday) to discuss the impact of COVID-19 on Airways.

[13] On Wednesday 1 April the two met for the purpose of Airways' CFO (James Young) presenting information regarding Airways' financial position to NZALPA and during a meeting on Wednesday 8 April 2020 Airways advised NZALPA that it was going to commence a consultation process regarding its provision of services the following week. That process envisaged the possible withdrawal of services from seven regional airports including NZPP.

[14] Airways advised that if the proposal relating to NZPP proceeded four positions might be disestablished there and that a decision as to what type of service would be provided would be made by the Civil Aviation Authority in view of various factors including an aeronautical study prepared under Part 139 of the Civil Aviation Rules by the relevant airport.

[15] Feedback was sought by 24 April 2020 but this was then extended to 8 May 2020 and significant feedback was given. This included feedback from NZALPA (albeit on 9 May but

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[1] Clause 1.2 of the CEA
[2] Clause 1.3 of the CEA

accepted by Airways); impacted staff and unaffected employees who provided the same or similar services at other locations.

[16] On 18 May 2020 Airways made the decision to continue with the process required to withdraw services, including from NZPP.

[17] On 19 May 2020 the Minister of Transport wrote a letter addressed to (among others) NZPP and the Shareholding Ministers of Airways but not NZALPA. It included the following:

> Since making the announcement, I can confirm that Airways has reiterated to me a number of points that I want to share with you.
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> 1. Now that Airways has formalised their intention to withdraw services, this does not immediately put job redundancies into effect nor immediately remove staff from towers, nor immediately terminate air traffic control services.
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> 2. The substantive redundancy decision has been made and staff have been informed, but redundancies will only be put into effect, if required, following a collaborative process with the airports involved, Airways, Civil Aviation Authority (CAA) and Air New Zealand.
>
>   Current levels of services will be retained until this process confirms an alternative approach.…
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> 7. If the aeronautical study and safety determination from CAA conclude that an air traffic control service is required, then Airways will provide that service, subject to discussions on how that service is paid for.

[18] Within the letter Minister Twyford also recognised that Airways had a duty to remain financially viable.

[19] On 25 May 2020, Airways released a Regional Tower Consultation – Decision Outcome Frequently Asked Questions document, explaining its decision to proceed with the process required to withdraw the Services.

[20] On 8 June 2020, Airways gave notice to the Director under CAR172.163(a) (Civil Aviation Rules) of its intention to withdraw services from NZPP on 10 September 2020. That notice included the following text:

> As you know, on 19 May 2020 Airways made the decision to withdraw air traffic (**ATC**) services at seven regional aerodromes. We then commenced a process to work collaboratively with relevant stakeholders, including impacted aerodromes, the general aviation community, and Air New Zealand to support the Authority's assessment of what, if any, ATC services were required at the impacted aerodromes....

> Airways now wishes to give notice under Rule Part 172.163 of its intention to withdraw Aerodrome Flight Information Services (**AFIS**) from Paraparaumu Aerodrome on 10 September 2020.
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> Airways considered several factors to arrive at the decision to withdraw AFIS from Paraparaumu Aerodrome. These included:
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> a. the current and projected air traffic volumes at each aerodrome;
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> b. Airways' responsibility as a State Owned Enterprise to operate as a successful business; and
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> c. the expectation from shareholding Ministers that Airways would right-size its business and rationalise its workforce.
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> Airways remains committed to working collaboratively with relevant stakeholders and looks forward to ongoing engagement with the Authority.

[21] On 9 September 2020, Airways gave notice to the Director that it had decided not to withdraw services from NZPP on 10 September 2020. Within the notice, Airways indicated a new date of 10 March 2021.

[22] Once again that did not occur and on 3 May 2021 Airways wrote to the Civil Aviation Authority formally withdrawing its September notice. As at November 2021 no Flight Service Officer's at NZPP had been made redundant though the parties remain in dispute.

Discussion

[23] In essence, and admittedly augmented with other claims, NZALPA has brought proceedings in the Authority alleging that Airways acted unlawfully in purporting to give notice of an intention to withdraw from providing air flight information services ('AFIS') at Kapiti Coast Airport.

[24] NZALPA seeks a "review" of this decision while Airways says the Authority lacks the jurisdiction to do so.

[25] In saying it has the ability to pursue its claims NZALPA argues:

(a) "…that where an employee seeks judicial review of a statutory decision of their employer that gives rise to an alleged disadvantage, that employee is only able to pursue judicial review of that decision through the Employment Relations Authority;

(b) [Airways] made a decision that related to employment relationships when it chose to notify the Civil Aviation Authority that it intended to withdraw services from NZPP.

(c) That decision is not a disadvantage itself but has given rise to a separate alleged disadvantage which is not the subject of this preliminary matter."[3]

[26] As already said Airways denies its actions, such as they may be, are reviewable in the way sought by NZALPA. Airways believes:

(a) The statutory framework it operates under allows it to withdraw services on 90 days' notice under Part 172.163(a) of the Civil Aviation Rules. The contracts agreed between Airways and relevant third party aerodromes (airports) may also be terminated by Airways.

(b) If Airways gives notice to the Civil Aviation Authority that it is to withdraw the services from a regional aerodrome, this initiates a process led by the Civil Aviation Authority which require the aerodromes to produce an aeronautical study under Part 139.131 of the Civil Aviation Rules.

[27] Airways position can then be summarised with extracts from the introduction of its submission.[4] It says:

(a) The judicial review by NZALPA will require a detailed analysis of the powers of Airways under the Civil Aviation Rules.

(b) In summary, NZALPA has claimed that, before Airways commences any consultation with NZALPA members about the impact or potential impact of any withdrawal of air traffic services at NZPP, Airways must first notify and take certain steps in accordance with the Civil Aviation Rules. This includes considering the assessment of the Chief Executive of the Civil Aviation Authority in relation to the aeronautical study required by Civil Aviation Rule 139.131.

(c) It is in reliance on this assertion that NZALPA claims that the consultation under the Employment Relations Act 2000 and the collective agreement in place

[3] NZALPA summation in opening its submission at paras [1] to [3]
[4] Airways submission at paras [2] to [7]

between Airways and NZALPA dated 2018 – 2021 ('Collective Agreement') was premature. Airways disagrees with the assertion.

(d) Airways further submits that when making decisions relevant to clause 1.2 of the Collective Agreement, Airways has not expanded its duty under section 4(1)(c) of the State Owned Enterprises Act 1986 to give NZALPA a right to demand that the following communities be consulted on decisions by Airways that concern its section 4(1)(c) duties:

(i) the aviation community of Civil Aviation Act 1990 licence holders who utilise NZPP; and

(ii) the local community in Kapiti who utilise NZPP and its airspace as passengers and consumers of aviation services.

(e) It is submitted that if NZALPA is alleging a breach of duty to the general public, which it appears to be doing, this falls outside the scope of being an employment relationship problem and, therefore, the Employment Relations Authority does not have jurisdiction in relation to the claim."

[28] Both parties then expand on their opening with detailed submission which have been considered but not recorded as permitted by s 174E of the Act.

[29] That said there is reference to the Supreme Court's decision in *FMV v TZB*[5] which, despite the fact it dealt with a question involving a conflict between a tort action and a personal grievance as opposed to an exercise of statutory power and a personal grievance, I consider determinative in this instance.

[30] In *FMV v TZB* the majority held that if a claim "reflects a problem that relates to or arises from an employment relationship" it comes within the exclusive jurisdiction of the Authority, even it could be framed another way. If the claim could be framed in terms of one or more of the examples in s 161(1)(a)–(qd), it *must* be brought before the Authority; if not, then it will be a question of "whether the problem nevertheless relates to or arises out of an employment relationship." Specifically the Court said:

> [94] …given the test is factual, it will not matter whether other causes of action may also arise from the controversy between the parties. That a controversy can also be pleaded without reliance on what is described (with unhelpful

[5] *FMV v TZB* [2021] NZSC 102

> circularity) as an "employment right or interest"…does not itself take it outside the scope of "employment relationship problem". All that matters is whether the controversy arose during the course of the employment relationship and in the work context. This necessarily means that if a controversy can be framed in terms of one or more of the examples in s 161(1)(a)–(qd), it must be brought in the Authority as an employment relationship problem…If it does not fit within any of those examples, it will then be a question of whether the problem nevertheless relates to or arises out of an employment relationship in terms of the open-textured introductory language of s 161(1) and the catch-all in paragraph (r).
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> [95] It is therefore misleading to ask whether a pleaded claim is an employment relationship problem. Claims cannot be problems in the factual sense; problems can only give rise to claims. The correct question is whether the claim reflects a problem that relates to or arises from an employment relationship.
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> …
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> [127] The meaning consistent with the legislative intent, therefore, is that, as a starting point, employment relationship problems that can be framed as any of the examples in s 161(1)(a)–(qd) must be framed that way and cannot be brought in any other jurisdiction. Only where an employment relationship problem cannot be framed in any way except as a tort claim does the exception in s 161(1)(r) apply. This is, in any event, the most sensible construction of the text of the provision. It recognises that the tort exception sits inside s 161(1)(r) and so should only affect the subclass ("any other action") in that clause. There is no good textual or purposive reason to treat it as if it modifies the other 28 examples in s 161(1).

[31] That then requires a consideration of what actually has been claimed. NZALPA actual pleadings are that:

(a) Airways purported exercise of a statutory power gave rise to a breach of its good faith obligations under s 4 of the ERAct 2000 in a range of ways but perhaps most importantly for present purposes in that Airways failed to consult with NZALPA in good faith;

(b) Airways has disadvantaged NZALPS members in their employment … by conducting consultation with its members separate and prior to the conduct of the aeronautical study and prohibiting its members from participating in the study; and

(c) Airways has disadvantaged its members by failing to minimise health and safety risks that emanate from public reaction to the possibility of NZPP's closure and/or consult on those.

[32] It is here I note what I consider an issue and that is the frequent use of the words "judicial review" in the submissions. An illustration of this is in Airways opening and the

phrase “The judicial review by NZALPA…” (paragraph [27](a) above). There can be no question the Authority does not have jurisdiction to consider a judicial review application but it does have jurisdiction to consider claims that Airways has breached its duty of good faith and/or disadvantaged its members by virtue of their inclusion in the Authority’s jurisdiction as ss 161(1)(a), (b), (e) and (f) of the Act.

[33] A reading of NZALPA’s claims shows that that is what is being pleaded. The claims are that Airways has breached a consultation clause between the parties, acted contrary to the duty of good faith and disadvantaged NZALPA members. Those are all matters clearly within the Authority’s jurisdiction and as the Supreme Court said in *FMV* if a claim can be framed in a way that has it fall within the Authority’s jurisdiction, then it does.

[34] This must be especially so with respect to the good faith claims given the fact there is a duty to consult where an action is being considered that might have an adverse impact on an employees’ continuing employment which a decision that might lead to the closure of their workplace might conceivably do.

[35] I also have to suggest the health and safety claims appear to be stand alone and not ones that the process pursuant to the Civil Aviation Rules appear to directly impinge upon. Airways might wish to reflect on this.

[36] Similarly NZALPA might wish to reflect on its claims and in particular the disadvantages relating to consultation as it appears Airways decision to withdraw its notice has not been reversed and it therefore follows there might be a challenge establishing there has in fact been any disadvantage.

[37] Those issues, however, I leave to the parties.

Conclusion and orders

[38] For the above reasons I conclude the Authority has jurisdiction to hear NZALPA’s claims. An Authority Officer will soon contact the parties in order to make arrangements to advance them.

[39] Costs are reserved[6] but given the interlocutory nature of this determination I consider they are best left till the substantive claims have been resolved. If either party disagrees that party shall have 14 from the date of this determination to lodge a memorandum on costs. The other party will then have a further 14 days to lodge a reply memorandum.

Michael Loftus
Member of the Employment Relations Authority

[6] www.era.govt.nz/assets/Uploads/practice-note-2.pdf