

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 29/08
5085717

BETWEEN BRIAN HUNT
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Jills Angus Burney, Counsel for Applicant
 Kevin Thompson, Counsel for Respondent

Investigation Meeting: 4 and 5 December 2007 at Christchurch

Determination: 31 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hunt) alleges that he was disadvantaged by unjustified actions of the respondent (Air New Zealand) and further contends that he has a wage arrears claim as a consequence of Air New Zealand's various breaches of the Holidays Act and the collective employment agreement.

[2] Air New Zealand resists Mr Hunt's claims on the footing any claim that Mr Hunt might have relates to his dealings with ACC through Air New Zealand as an accredited employer and therefore is not appropriately dealt with in this jurisdiction.

[3] Mr Hunt is a long serving employee of Air New Zealand and is employed at Christchurch International Airport as a storeman.

[4] As a member of the New Zealand Engineering Printing & Manufacturing Union (the Union) Mr Hunt is covered by the terms and conditions set out in the

applicable collective employment agreement with Air New Zealand, the aircraft engineering employees collective employment agreement.

[5] Air New Zealand provides self administered cover of the statutory entitlement which their employees have under the Injury Prevention, Rehabilitation and Compensation Act 2001 (the IPRC Act).

[6] There is a contractual relationship between the Accident Compensation Corporation (ACC) and Air New Zealand; the operative agency within Air New Zealand is styled the Air New Zealand Accredited Employer Programme (the AEP).

[7] Pursuant to s.182 of the IPRC Act 2001, accredited employers such as Air New Zealand are able to provide accident compensation entitlements to their employees and in so doing, act as the agent of the ACC.

[8] In the sections of the IPRC Act that follow s.182, that statute sets out a framework by which accredited employers can *provide at their own cost entitlements in relation to work related personal injuries suffered by their employees during a claim management period*. Broadly, there are two different structures available; where the case management is provided by the employer itself or where the case management is contracted out by the employer.

[9] When Mr Hunt suffered his initial injury, the ACC case management was provided by a contractor, Catalyst Risk Management Limited (Catalyst), although ACC case management is now provided directly by Air New Zealand.

[10] On 23 September 2003, Mr Hunt suffered a neck sprain while working and his claim for ACC cover was accepted by the AEP. A consequence of that acceptance was that Mr Hunt was provided with treatment for the neck injury including neck surgery.

[11] The nub of Mr Hunt's complaint is a shoulder condition which he developed during his recovery from the neck surgery.

[12] Mr Hunt sought to make a further claim under the IPRC Act in relation to the shoulder problem on the footing, inter alia, that the shoulder problem was related to the original injury to his neck sustained on 23 September 2003.

[13] Coverage for this subsequent ailment was declined and Mr Hunt sought a review of that decision which was unsuccessful. Mr Hunt then paid privately for surgery to his shoulder and during the surgery proper and the recuperation from it, Mr Hunt sought to take sick leave pursuant to the relevant provision in the collective employment agreement (the CEA).

[14] Mr Hunt contends that Air New Zealand refused to grant him all the sick leave that he needed to recover from the shoulder surgery notwithstanding the provision of in effect unlimited sick leave in the CEA.

[15] Mr Hunt also contends that Air New Zealand harassed him by unilaterally changing arrangements in respect to sick leave already made for him and forcing him to take annual leave to complete the recuperation from his shoulder surgery.

[16] A further head of alleged harassment is that Air New Zealand is alleged to have threatened Mr Hunt with the prospect that his continuity of employment was in issue by referring to the employment agreement being *frustrated* by his continued absence from duties.

[17] For its part, Air New Zealand denies that it refused a proper application for sick leave, says that at the time that the episode in question arose, Mr Hunt was in fact fit to return to duty albeit on a *limited duties* basis. That issue, Air New Zealand contends, was resolved satisfactorily by Mr Hunt electing to take annual leave.

[18] Air New Zealand also denies any impropriety in raising the question of the continuity of Mr Hunt's employment and, through a human resources adviser, Air New Zealand opined that it was not able to keep Mr Hunt's position on the permanent full time staff open indefinitely without an understanding of Mr Hunt's medical prognosis. Air New Zealand says that those observations were, in all the circumstances, proper ones and ones that a fair and reasonable employer could be expected to make in the circumstances that the airline found itself in. In particular, Air New Zealand points to the significant time that Mr Hunt had already had on sick leave and the fact that the shoulder surgery from which he was then recovering was private surgery unconnected with the workplace and therefore not a medical procedure which Air New Zealand automatically had a right to have information about.

[19] During the balance of calendar 2006, after Mr Hunt returned to restricted duties on 18 January 2006, Mr Hunt's emotional and mental health status came into issue as he perceived the continuing failure of the AEP provider to agree various treatment protocols as part of his recovery plan.

[20] Mr Hunt became acutely anxious and unwell at work and on 29 August 2007 a medical certificate was provided by Mr Hunt's general practitioner which effectively removed Mr Hunt from the workplace from that date until 23 January 2007. During that period Mr Hunt received *his full wage entitlement as an ACC wage compensation*.

Issues

[21] The following issues need to be determined by the Authority:

- (a) Jurisdiction to hear the claim;
- (b) The wages claim;
- (c) Notification of the personal grievance;
- (d) The frustration of contract argument.

Jurisdiction

[22] Air New Zealand argues that there is no justiciable claim because all of the matters relied upon by Mr Hunt in his proceedings are in fact complaints about the way in which his accident compensation claim was dealt with and thus outside the jurisdiction of the Employment Relations Authority. It is true that, in his oral evidence, Mr Hunt said *All my issues come back to the way the ACC issues were managed*.

[23] The reason that it is said the claim falls outside the jurisdiction of the Employment Relations Authority is that, because it is actually a complaint about the ACC treatment of Mr Hunt and his injuries, it is covered by the IPRC Act and that Act specifically precludes action relating to ACC matters being progressed in any other jurisdiction. The IPRC Act is, as a matter of law, a code and s.133(5) of the IPRC Act specifically prohibits the Authority from inquiring into matters within the ACC domain.

[24] Air New Zealand also says that, even if that primary submission was not accepted, it is supported as to its conclusion by the effect of s.161 of the Employment Relations Act 2000. Section 161 broadly gives the Authority power to investigate matters pertaining to employment relationship problems. Air New Zealand says that the matter brought before the Authority by Mr Hunt is not an employment relationship problem at all, but a problem Mr Hunt has with the way in which he has been treated by the AEP provider.

[25] Air New Zealand acknowledges that the AEP provider is in fact Air New Zealand Limited or its contractor, but it points out that, in that role, Air New Zealand or its contractor is acting exclusively as the agent of the ACC and not in its *primary* role as the employer of Mr Hunt.

[26] With one exception, which I will come to shortly, I accept Air New Zealand's submissions that the claim must fail for want of jurisdiction. The essence of Mr Hunt's complaint is that he was not treated properly in relation to his suffering personal injury by accident and the fact that Mr Hunt is also an employee is not central to the fundamental relationship under challenge, which is the complaint about to the way those personal injuries by accident were dealt with by the appropriate service provider.

[27] Mr Hunt says that because the appropriate service provider was either Air New Zealand itself or a contractor acting for Air New Zealand (Catalyst), then his employer and the service provider were one and the same and he can bring his claim in the Authority.

[28] That argument is flawed for two basic reasons. The first is that the effect of the IPRC Act prevents the Authority having jurisdiction. The terms of s.133(5) are clear. That provision simply provides that a person having rights under the IPRC Act (which plainly Mr Hunt does) has no ability to receive remedies or be heard in any other forum including specifically the Employment Relations Authority.

[29] It is clear from the factual matrix that Mr Hunt pursued his rights under the IPRC Act at various points during his lengthy recovery from his two injuries. That being the position, he can hardly now be heard to say that he has no rights under the IPRC Act when plainly he has already (and on more than one occasion) been seen to exercise them.

[30] The second reason that I reach the conclusion I do is that I accept the second submission of Air New Zealand that, broadly, the nature of Mr Hunt's claim does not fall within the terms of s.161 of our own Act. I am satisfied that Mr Hunt's claim is not in fact a claim about his employment at all, but rather a claim about the nature of the treatment that he received as a consequence of his suffering personal injury by accident.

[31] The only area where I consider the submission of Air New Zealand fails is in relation to Mr Hunt's complaint about the behaviour of Ms Mary-Ann Farr, a human resources adviser with Air New Zealand. In essence, Mr Hunt complains that Ms Farr harassed and threatened him by alluding to his prolonged absences as a basis for Air New Zealand claiming *frustration of contract*.

[32] Because that issue is the only matter that I think falls within the jurisdiction of the Authority, I return to what I refer to as the *frustration of contract* issue later in this determination.

Wages

[33] Mr Hunt alleges that he was not paid sums to which he was variously entitled as earnings-related compensation, sick pay and holiday pay.

[34] As to the first of those, earnings-related compensation, that is not a matter for the employment jurisdiction for reasons I have enunciated in the previous section of this determination. As to sick pay and holiday pay, the evidence discloses that Mr Hunt was paid sick pay and holiday pay when he applied for it and that there were no applications for either, declined.

[35] However, the essence of what Mr Hunt is seeking is what amounts to a retrospective reclassifying of the nature of the leave in question.

[36] In essence, Mr Hunt is saying that he should have been paid earnings-related compensation through the ACC system rather than sick leave or annual leave which he applied for and had granted in order to maintain his income.

[37] Quite clearly, this is again an example of Mr Hunt seeking to progress a claim, which is properly one to be addressed through the processes contemplated by the IPRC Act, as if it were an employment relationship problem.

[38] Even assuming that it was possible to retrospectively adjust the basis of remuneration in the way that Mr Hunt seeks, I am very clear that it is outside the ambit of the Authority to contemplate such relief.

[39] However, it is appropriate to note that in its closing submissions, Air New Zealand repeated an offer which had been made in the lead up to the investigation by the Authority, that Air New Zealand would engage with Mr Hunt and his Union to try to meet Mr Hunt's needs on this part of his claim by a voluntary agreement. I commend to Mr Hunt and his Union the notion that they accept Air New Zealand's offer and that the parties collaboratively engage with each other with a view to trying to resolve the wages issue by agreement.

Notification of the personal grievance

[40] The personal grievance raised by Mr Hunt was notified to the employer under letter dated 16 October 2006. Although there was an earlier communication in which the possibility of the raising of a personal grievance was alluded to, Mr Hunt accepted during the investigation meeting that the operative date was the 16 October 2006 letter. It follows that the only matters which can be considered as *within time* are matters which happened after 16 July 2006.

[41] As Air New Zealand correctly points out, this aspect alone creates very real difficulties for Mr Hunt because, first of all, the only potential grounds on which Mr Hunt might be deemed to have an employment relationship problem (and therefore potentially a personal grievance) relate to the activities of Ms Farr, the human resources adviser, and to Mr Hunt's contention that Ms Farr *harassed* him in respect of the suggestion that he was *frustrating his contract* by being absent due to ill health. It is common ground that the only occasions on which Ms Farr could be said to have engaged in the conduct complained of were two meetings, one in December 2005 and the other in March 2006, both well outside the period for the raising of a grievance within time.

[42] But there is another problem with the grievance raised. The employer is entitled to be given a sufficient degree of particularity in relation to the grievance so as to enable it to respond appropriately and, if possible, resolve the grievance satisfactorily. The grievance notified on 16 October 2006 was about the management

of Mr Hunt's ACC matters, a subject which I have already determined is outside the ambit of the Authority's jurisdiction.

[43] Accordingly, I must find that there was no viable personal grievance raised within time in respect of the only matter on which there was any prospect of a personal grievance arising, namely the complaints about Ms Farr's purported comments.

Frustration of contract

[44] Mr Hunt alleges that he was *distressed* by Ms Farr's references to *frustration of contract*. It was contended for Mr Hunt that, by Ms Farr alluding to the possibility that, by the extent of absences, an employee could frustrate their employment agreement, Ms Farr was putting undue and unreasonable pressure on Mr Hunt not to take additional leave notwithstanding that he needed it for recuperation purposes.

[45] I do not accept the thrust of this argument. First, as I have already made clear, I am satisfied that there was no personal grievance raised in relation to this particular issue, either in respect of the particularity of the personal grievance that was raised on 16 October 2006, or in relation to the timing of the raising of the grievance which meant that any issue relating to the so-called *frustration of contract* argument would have to be out of time.

[46] It is clear that the only matters that can be relied upon by Mr Hunt, setting aside the absence of any personal grievance having been properly raised, that pertain to the *frustration of contract* argument, are observations made by Ms Farr in the course of two meetings, one in December 2005 and the second in March 2006.

[47] Ms Farr quite properly acknowledges that the comments attributed to her were in fact made, although she denies the particular words, but were made in the context of a wider discussion and was certainly not intended to put pressure on Mr Hunt. She made the point in her oral evidence that she felt obligated to refer to the issue for the sake of completeness. I accept Ms Farr's evidence on that matter at face value.

[48] Much of the evidence about what Ms Farr was supposed to have said comes from a Union delegate, John Kaye, whose evidence I am afraid I found completely unreliable as he firmly and unequivocally gave testimony about what happened at a meeting at which he clearly was not present.

[49] Even assuming that Ms Farr went further than she ought to have (and I do not reach that conclusion at all), Mr Hunt faces another insuperable hurdle in that Ms Farr clarified her views once Mr Hunt made it clear to her that he was troubled by what she said or was alleged to have said. There was an email exchange between Mr Hunt and Ms Farr on 28 March 2006 wherein Ms Farr makes it absolutely clear that *frustration of contract would not be applicable to you at this point in time*.

[50] It follows that I am not satisfied that there is any ability for Mr Hunt to rely on the contention that he was affected to his disadvantage by an unjustifiable action of his employer in referring to *frustration of contract* as, first, the employer was never notified within time of a personal grievance in this regard; second, Air New Zealand, through Ms Farr, referred to the matter only twice in the context of wider discussions on each occasion; and thirdly, immediately Mr Hunt indicated his anxiety about the matter, Air New Zealand, through Ms Farr, clarified its position and made clear that there was no issue as that time.

Determination

[51] For the reasons that I have advanced in the foregoing analysis, I am not persuaded that Mr Hunt has made out his claim either in respect of the alleged disadvantage supposedly sustained as a consequence of an unjustified action by Air New Zealand, or in respect of his wage arrears claim.

[52] Despite that, I commend to Mr Hunt and his Union the proposal that they engage with Air New Zealand in order to take up the latter's offer to try to reach an agreement in relation to the issue of Mr Hunt's wages claim. Air New Zealand is to be commended for repeating its offer in that regard and I commend to Mr Hunt and his advisers the prospect of taking that offer up and engaging with the employer to seek a resolution of that matter any way.

[53] This is a continuing employment relationship and despite the difficulties that the parties have had with each other, I accept without reservation the assurances that Air New Zealand has conveyed through its counsel that the airline wishes the employment relationship with Mr Hunt to continue. I urge Mr Hunt to accept that assurance at face value and to engage collaboratively with Air New Zealand to seek to resolve the wages claim issue on some basis that each party thinks acceptable.

Costs

[54] Costs are reserved.

James Crichton
Member of the Employment Relations Authority