New Zealand Employment Relations Authority Decisions

Milne v Air New Zealand Limited (Auckland) [2018] NZERA 52; [2018] NZERA Auckland 52 (19 February 2018)

Last Updated: 28 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 52
3022894

BETWEEN KATHLEEN ANN BEATTIE MILNE

Applicant

AND AIR NEW ZEALAND LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person

David France, Counsel for the Respondent

Investigation: On the papers

Submissions: 19 January 2018

Determination: 19 February 2018

DETERMINATION OF THE AUTHORITY

A. The application by Kathleen Milne for a further investigation of her employment relationship problems with Air New Zealand Limited is declined.

Ms Milne's application

[1] In an application received by the Authority on 28 November 2017 Kathleen

Milne sought an Authority investigation of three problems she described in this way:

(A) An unfair process for resolve of harassment in the employment at mediation on 16 September 2004.

(B) An unfair process for resolve of the employment relationship at mediation on 16 September 2004 and at meetings at Inflight Services in October and November 2004.

(C) Unfair notice of termination on 9 November 2004 due to length of service, disparity of treatment, injury management and employment from overseas (Australia).

[2] Ms Milne began work for Air New Zealand as a flight attendant in 1972. She was dismissed in November 2004 on the grounds of medical incapacity. She had been medically certified as permanently unfit to fly and Air New Zealand said it had not been able to find any suitable and available alternative position she was qualified to perform.

[3] Authority determinations and Employment Court decisions on Ms Milne's subsequent litigation about the end of her employment relationship with Air New Zealand, and the circumstances that led to it, have included:

• A determination issued on 3 February 2011 finding Air New Zealand's

decision to dismiss Ms Milne was justified;1

• A determination issued on 13 July 2012 finding she could not pursue a further claim about her terms and conditions while employed by Air New Zealand;2

• A decision of the Court issued on 9 July 2014 striking out challenges by

Ms Milne to the Authority's determinations of 2011 and 2012;3

• A determination issued on 31 March 2016 declining to investigate a claim for damages that Ms Milne sought due to being unemployed since her dismissal;4 and

• A determination issued on 20 October 2016 declining to reopen the investigation carried out by the Authority in 2010 that had resulted in the

2011 determination.5

[4] The Court's decision in 2014 recorded that Ms Milne had not paid costs orders made by the Court and the Authority for:6

• $10,000 security for costs on the first challenge; and

• $1,250 costs in relation to that security for costs application; and

• $1,500 security for costs on the second challenge; and

• $500 costs in relation to that security for costs application; and

• $8000 costs in the Authority.

1 *Milne v Air New Zealand Limited* [2011] NZERA Auckland 45.

2 *Milne v Air New Zealand Limited* [2012] NZERA Auckland 236.

3 *Milne v Air New Zealand Limited* [2014] NZEmpC 101.

4 *Milne v Air New Zealand Limited* [2016] NZERA Auckland 98.

5 *Milne v Air New Zealand Limited* [2016] NZERA Auckland 353.

6 *Milne*, above n 3, at [11].

[5] The Authority's determination on Ms Milne's second application in 2016 concluded she was trying to re-argue her case but had not established any interest of justice that outweighed what Air New Zealand could reasonably rely on as the finality of the proceedings struck out by the Court in 2014.

[6] Against that background I adopted the following procedure to consider Ms

Milne's latest application. In a Member's Minute sent to the parties on 29 November

2017 I advised Air New Zealand was not required to lodge a statement in reply at that stage. I also observed that Ms Milne's latest application appeared to seek to continue litigation on matters the Authority and the Court had already decided could no longer be pursued. I provided an opportunity for Ms Milne to make submissions on the following three questions:

(i) Was there anything new or different about the content of her latest application that had not already be dealt with and determined, including by the investigation meetings that resulted in the Authority's determinations of 2011 and 2012 on the substantive issues?

(ii) Was there any reason her new application should not be dismissed without further investigation, as it had no prospect of success, for reasons similar to those given in the Authority's determination of 20

October 2016?

(iii) Was there any reason the Authority should not exercise its power under s 12A of Schedule 2 of the Employment Relations Act (the Act) to dismiss her latest application as frivolous or vexatious?

[7] Ms Milne used that opportunity to lodge a 14-page submission on 19 January

2018. Soon after Ms Milne asked to make further submissions about the 2011 determination but I declined to allow for that as

she already had an opportunity to make submissions and in those submissions had referred to that determination. Having heard from Ms Milne by way of her written submissions I considered that the preliminary issues she was asked to address could be resolved on the papers. No submissions from Air New Zealand were needed.

Anything new?

[8] Ms Milne submitted that the three problems labelled (A), (B) and (C), as set out in paragraph [1] of this determination, were not investigated in the process that led

to the determinations of 2011 and 2012. She said concerns she had about bullying and harassment were workplace conduct or practice not investigated by the Authority. Her submissions then gave her account of having made complaints during the period from 1996 to 2003, how her work injury leave and sick leave was dealt with during

2004, and discussions with company and union representatives about those issues. Those submissions included references to mediation held in September 2004 that had not resolved her concerns.

[9] The difficulty with Ms Milne's proposition that the Authority had not

considered those issues is revealed by the following paragraphs she cited from the

2011 determination. They appeared in that determination under a sub-heading reading "The claims of bullying and harassment". Those paragraphs showed those concerns, and evidence about them, were carefully considered in the Authority's investigation and its resulting determination:

[15] Although Ms Milne's allegations of bullying and harassment are not directly the subject of the present employment relations problem, I address them because they provide a context for the conclusions about Ms Milne's fitness to fly and the availability of suitable alternative positions.

[16] Ms Milne was still on sick leave when on 13 February 2004 she met with the inflight service co-ordinator, Mr McCloskey, and Theo Thomas, then the cabin crew manager. The meeting was to discuss the September

2003 incident as well as an earlier incident when Ms Milne complained that a senior member of the cabin crew had harassed her. The complaint concerned

a perception that the person had made disparaging remarks about Ms Milne's

leadership style. Ms Milne felt these matters were unresolved and was concerned about the procedure that was being followed.

[17] A more detailed discussion resumed on 16 February. It included a discussion about what process could be used to address Ms Milne's relationship concerns. Her attendance at a training course on dealing with difficult people was approved, she had access to an employee assistance programme (EAP), and Air New Zealand was prepared to manage her rosters so she would not be working with the individuals causing her concern.

[18] There were further meetings in 2004 during which incidents of concern to Ms Milne were discussed, including at least one Crew Relationship Management (CRM) meeting, but Ms Milne still considered that matters remained unresolved. She sought mediation, which went ahead in September

2004.

[19] Ms Milne also raised her concerns with the company's OSH division. Her complaint was passed to the Civil Aviation Authority (CAA) and a meeting to discuss it went ahead on 25 March 2004. The CAA issued its report later in the year.

[10] Ms Milne identified no new evidence on those issues that was not available at the Authority investigation in 2010 or that could not, with diligence, have been part of the evidence at that investigation.

[11] The same conclusion applied to concerns she raised over whether Air New Zealand had properly managed an arm injury and tinnitus she experienced during her employment. Again paragraphs she referred to from the 2011 determination showed those issues were carefully considered in assessing whether Air New Zealand's decision to dismiss her was justified in all the circumstances at the time.

Any prospect of success?

[12] If a claim pleaded in a statement of problem has no prospect of success, it is open to the Authority, after hearing from the applicant, to dismiss the claim without further investigation.7 There is a high threshold for that exercise of that discretion. Dismissing a claim is a serious step, reserved for clear-cut cases.8

[13] The claims labelled (A) and (B) could only succeed if the mandatory statutory veil of confidentiality on mediation was

lifted, by mutual agreement, on whatever was said during the September 2004 mediation.9 The history of the litigation, including Air New Zealand's success in getting the Court to strike out Ms Milne's challenges in

2014, showed there was no realistic prospect of successfully making any arrangement to remove that confidentiality. The Authority could not investigate what was said during mediation so there was no prospect of success on those claims.

[14] The second part of the claim labelled (B) concerned meetings Ms Milne had with managers in October and November 2004. Those interactions were analysed in paragraphs [50] to [71] of the 2011 determination. Ultimately the Authority found, for example in paragraphs [90] to [92], that the assessments and decisions made through and following those meetings were justified. As a result, the subject matter of the second part of Ms Milne's present claim labelled (B) and all of the claim labelled (C) have already been the subject of Authority investigation and determination.

Because the Employment Court struck out Ms Milne's challenge to that

7 *AFT v BCM* [2015] NZEmpC 234 at [47].

8 *Lumsden v SkyCity Management Limited* [2015] NZEmpC 225 at [39] .

9 Employment Relations Act 2000, s 148(1).

determination, the 2011 determination stands as a final decision about the justifiability of what Air New Zealand did and decided in the events that led to the end of its employment relationship with her. The principle of finality, applying the doctrine of *res judicata*, applies to end the litigation of the same point again and again. Accordingly those claims have no prospect of success. Give the clear-cut nature of that conclusion, and having heard from Ms Milne through her written submissions on the prospect that her application would not be investigated, those claims may be dismissed without further investigation.

Frivolous or vexatious?

[15] The Authority has the following power to dismiss some proceedings:10

12A Power to dismiss frivolous or vexatious proceedings

(1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.

(2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[16] For the purposes of that provision 'frivolous' has a more particular meaning than its ordinary use of being insignificant, unimportant or not having any serious purpose or value.11 As explained by the Employment Court in its decision in *Lumsden v SkyCity Management Limited* a matter is frivolous where it trifles with the Authority's processes and lacks the degree of seriousness required to engage the attention of the Authority.12

[17] Ms Milne's disappointment and disagreement with how her employment of more than 30 years with Air New Zealand came to an end more than 13 years ago clearly remains of personal importance and seriousness to her. However her attempts to continue litigation about those circumstances have reached a stage where they trifle with the Authority's process because the substance of her claims have already been determined in 2011 and 2012 and the Court has struck out the challenges to those determinations in 2014. In that context Ms Milne's current application is frivolous.

This is apparent when it is considered in the further context of her two unsuccessful

10 Employment Relations Act 2000, Schedule 2, clause 12A.

11 See Concise Oxford Dictionary (10th edition, 2002) and Concise Oxford Thesaurus (OUP 2007).

12 [2015] NZEmpC 225 at [37].

applications in 2016 (for damages and for a reopening of the 2011 investigation). All three applications have sought to re-argue matters already decided on the same evidence. They all have had to fail for, essentially, all the same reasons given in the Authority's two determinations in 2016.

[18] Proceedings may be held to be vexatious where:13

(a) recognition of the constitutional importance of the right of access to the Authority and Court must be balanced against the desirability of freeing respondents from the burden of groundless litigation.

(b) The proceeding has no reasonable basis or such proceedings have been initiated persistently.

(c) Attempt have been made to re-litigate issues already determined.

(d) A litigant is found to have an improper purpose in commencing proceedings.

[19] Ms Milne's application was not improper in the sense of being pursued for an ulterior purpose but, given the application of the res judicata principle, had no reasonable basis and was one of what has become three attempts to persist with such proceedings trying to re-litigate issues already determined. Ms Milne has already had and exercised her constitutional right of access to the employment institutions. Given those outcomes her attempt to pursue proceedings in which she cannot succeed must be balanced with the desirability of freeing Air New Zealand from litigation for which Ms Milne has established no grounds to continue. In that light her present application was not only frivolous but also vexatious.

[20] In reaching that conclusion, it was important to consider the following observation of the Court in its 2014 decision dismissing her challenges:

[33] I consider it relevant, having regard to the overall interests of justice, that Ms Milne's claims have been heard and determined already by the Authority. She has a strong view that the claims have merit and that they ought to be heard but this is not a case where the plaintiff's claims have yet to be decided by an independent body. It is apparent, from a perusal of the Authority's two determinations, that Ms Milne's complaints have been fully considered and rejected. I accept Mr France's submission that this is not a case involving an attempt to have the plaintiff's claims dismissed in the absence of any hearing whatsoever.

13 *Gazupan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206 at [67].

[34] Standing back and considering the overall interests of justice, I am satisfied that both proceedings ought to be struck out. It is time for these proceedings to be brought to an end. I accept that the defendant will face significant prejudice if the proceedings are allowed to dawdle on. ...

Order

[21] For the reasons given in this determination Ms Milne's application is

dismissed without further investigation on the following grounds:

(i) She has no new or different evidence that has not been considered, or was not available, at the time of the earlier investigations and determinations.

(ii) It has no prospect of success. (iii) It is frivolous and vexatious.

Costs

[22] Costs are reserved. Air New Zealand was not given an opportunity to apply for any legal costs incurred in respect of Ms Milne's two applications in 2016. Given the conclusions reached in this latest determination, that approach had to be reassessed. Although Air New Zealand was not put to the expense of formally responding with a statement in reply to Ms Milne's most recent application, it may have incurred some costs in respect of advice concerning that application. If so and it wishes to have a costs award considered, Air New Zealand may lodge a costs memorandum to which Ms Milne would then have the opportunity to respond.

Robin Arthur

Member of the Employment Relations Authority
