

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 75  
5401872

BETWEEN                      NEW ZEALAND AIRLINE  
   PILOTS ASSOCIATION INC  
   Applicant

A N D                              EAGLE AIRWAYS LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:            Clare Abaffy, Counsel for Applicant  
   David France, Counsel for Respondent

Investigation Meeting:      On the papers

Submissions Received:      5 February 2013 from Applicant  
   19 February 2013 from Respondent

Date of Determination:      4 March 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      The claims of New Zealand Airline Pilots Association Inc under file number 5401872 are removed to the Employment Court pursuant to s.178(2)(a) and (d) of the Employment Relations Act 2000;**
- B.      Costs are reserved.**

[1]      By consent, the application for removal of this matter was determined on the papers, following written submissions by the representatives of each of the parties.

## **The employment relationship problem**

[2] New Zealand Airline Pilots Association Inc (NZALPA) and Eagle Airways Limited (Eagle) were, during 2011 and 2012, engaged in bargaining for a replacement collective agreement. A collective agreement between NZALPA and Eagle was concluded following bargaining and is effective from 3 December 2012 until expiry on 2 April 2015.

[3] On 21 September 2012 during bargaining between NZALPA and Eagle for this collective agreement, another union, the Federation of Air New Zealand Pilots (FANZP) issued Eagle with notice pursuant to s.42 of the Employment Relations Act 2000 (the Act) initiating bargaining for a collective agreement.

[4] At the time FANZP issued notice to initiate bargaining and during subsequent bargaining with Eagle, FANZP had no members employed by Eagle.

[5] Following initiation of bargaining, Eagle notified its employee pilots of the existence and coverage of the bargaining with FANZP.

[6] On 20 December 2012, a statement of problem was filed by NZALPA in the Employment Relations Authority alleging that bargaining between Eagle and FANZP for a collective agreement was unlawful. NZALPA seeks orders that the initiation of bargaining by FANZP and the subsequent bargaining were unlawful, in breach of Eagle's obligations to act in good faith and cannot take place in circumstances where FANZP has no members employed by Eagle.

[7] In its statement in reply, Eagle does not dispute these facts, but states the Act does not prohibit it from bargaining with FANZP for a collective agreement and contends there has been no breach of the Act by it. Eagle further questions NZALPA's standing to take legal action in respect of FANZP's initiation of bargaining and undertaking bargaining with Eagle for a collective agreement in circumstances when FANZP had no members employed by Eagle.

## **The removal application**

[8] Ms Abaffy for NZALPA seeks to have the entire matter removed urgently to the Employment Court and relies on s.178(2)(a) and (d) of the Act in support of her application. Mr France for Eagle, opposes the application.

[9] The Authority may order removal if it is satisfied one of the grounds in s.178(2) of the Act have been met. I find that s.178(2)(a) and (d) have been met.

[10] Section 178 is set out below, and the submissions on which NZALPA's application are grounded are highlighted:

**178. Removal to Court**

- (1) *The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.*
- (2) *The Authority may order the removal of the matter, or any part of it, to the court if –*
  - (a) ***An important question of law is likely to arise in the matter other than incidentally; or***
  - (b) *The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or*
  - (c) *The court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
  - (d) ***The Authority is of the opinion that in all the circumstances the court should determine the matter.***
- (3) *Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*
- (4) *An order for removal under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.*
- (5) *Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
- (6) *This section does not apply –*

- (a) *To a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
- (b) *Without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

### **Question of law**

[11] The key question of law posited in Ms Abaffy's application for removal of the matter to the Employment Court, is whether initiation of, and bargaining for, a collective agreement in circumstances where FANZP has no members employed by Eagle, is lawful. Mr France accepts this is a question of law, but contends that it is not an important question of law as required by s.178 of the Act, and accordingly says the matter should not be removed to the Court.

[12] The second related question is whether the actions of Eagle in notifying its employee pilots of the existence of the bargaining with FANZP when none of those pilots were members of FANZP, is a breach by Eagle of its obligations of good faith. Eagle says this is not a question of law, it is rather a matter of statutory interpretation and of fact and is not an important question of law as required by s.178(2)(a) of the Act.

[13] The third question is whether NZALPA has standing to take legal action against Eagle. Eagle is of the view this is a question of fact, is not of public interest and therefore does not satisfy the criteria of s.178 for removal to the Court.

### **Grounds for removal**

[14] Ms Abaffy and Mr France both referred me to the key principles the Authority must consider when dealing with applications to remove matters to the Employment Court. The principles are summarised in *McAlister v. Air New Zealand Ltd* AC22/05, 11 May 2005, at paras.[9] and [10]:

[9] *The principles to be applied in such an application were discussed by the Chief Judge in Hanlon v. International Educational Foundation (NZ) Inc. In summary these are:*

- (1) *An application for special leave under s.178 of the Employment Relations Act 2000 carries the burden of persuading the Court that an important question of law is likely to arise in the matter other than*

*incidentally, or the case is of such a nature and of such urgency that the public interest calls for its immediate removal to the Court. It is necessary to identify a question of law arising in the case other than incidentally.*

- (2) *It is necessary to decide the importance of the question.*
- (3) *It is not necessary that the question should be difficult or novel.*
- (4) *The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It 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 the case or a material part of it.*

[10] *Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.*

[15] The central issue in this case relates to the ability of a Union to negotiate a collective agreement with an employer when the Union attempting to negotiate has no members employed by the employer party to the bargaining.

[16] The Act is silent on the issue. The parties accept that a collective agreement under s.5 of the Act is one binding on one or more Unions and one or more employers and two or more employees. At the time of initiating and participating in bargaining for a collective agreement with Eagle, FANZP had no members employed by Eagle and so could not conclude a collective agreement.

[17] Part 4 of the Act deals with recognition and operation of Unions. Section 12 of the Act confers a right on registered Unions to represent their members in collective

bargaining. If a Union such as FANZP has no members, the question which arises is whether the Union can participate in bargaining for a collective agreement.

[18] Sections 18, 41 and 42 of the Act are also relevant as they relate to a Union's right to represent its members, initiate bargaining and bargain for a collective agreement.

[19] It is my view that this central issue is an important question of law which arises other than incidentally. The Court has not yet considered the question and these provisions, as they relate to initiation of, and bargaining for, a collective agreement, will apply to and may impact upon a number of employers, Unions, their members and employees. It is important for the Court to provide direction.

[20] Although removal only requires one s.178(2) ground to be made out, I also find that removal is appropriate under s.178(2)(d) of the Act.

[21] Section 178(2)(d) of the Act requires the Authority to be of the opinion that in all the circumstances the Court should determine the matter. The matter is of importance to a large number of employers, Unions, their members and employees, and will be of wider public interest in terms of employment law legislation generally.

### **Order**

[22] The Authority orders pursuant to s.178(2)(a) and (d) of the Act, the removal of NZALPA's claims to the Employment Court.

### **Costs**

[23] Costs are reserved.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**