IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 424/09
5123161

BETWEEN	MARK FRANCIS RAYMOND SIMICH, ALASTAIR MURRAY STEWART RUSSELL, BRYAN TOURELL, KENNETH CARRAN MACLEAN FINLAYSON, CHRISTOPHER ROBERT JAMES PETERS, WILLIAM MICHAEL BENGE, PETER MATTHEWS, PHILIP ROWAN Applicants
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	J Roberts, counsel for applicants K Thompson, counsel for respondent
Submissions received:	30 October, 9 and 11 November 2009
Determination:	27 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by the above applicants for the removal of a matter to the Employment Court, made under s 178 of the Employment Relations Act 2000. Section 178 reads in part:

> '178. Removal to court
>
> 1. Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the court

for the court to hear and determine it without the Authority investigating the matter.

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.'

[2] The application for removal relied firstly on the ground set out in s 178(2)(a), namely that an important question of law is likely to arise in the matter other than incidentally. However the application did not identify the question. I required its identification, and this determination addresses the questions identified in the applicants' submissions.

[3] Section 178(2)(d) was also relied on. The applicants say it is likely that any determination of the employment relationship problem by the Authority would be challenged in the Employment Court and it is preferable to avoid the delays in final resolution that would result. In addition they say previous age-related discrimination cases involving pilots have been heard in the Court, as this one should be. They say further that if this application is declined there will be an application to the Employment Court under s 178(3) for special leave for an order that the matter be removed.

[4] Air New Zealand Limited opposes the application in respect of both grounds.

Background

[5] Since the Authority has not yet investigated the matter, this account of the background is derived from the statements of problem and in reply.

[6] On dates ranging from 20 October 2003 (Mr Benge) to 29 March 2006 (Mr Peters) each of the applicants turned 60. Immediately before their birthdays all were employed as captains (or pilots in command, or "PIC") on the B747-400 aircraft type[1]. B747 aircraft principally flew routes to London (through the United States of America), the United States, and Japan (passing through United States airspace).

[7] The significance for a pilot of reaching the age of 60 is conveniently summarised in the following passage from the judgment of the Supreme Court in **McAlister v Air New Zealand Limited**[2]

> "[2]… at that time, in September 2004, the International Civil Aviation Organisation (ICAO) had promulgated a standard which prohibited a pilot from holding the position of pilot-in-command if the pilot had attained his 60th birthday. ICAO had issued a recommendation to this effect to its members, which include New Zealand. New Zealand, along with a number of other countries to which Air New Zealand flies, including Australia, Fiji, Germany, Japan, and the United Kingdom, had elected not to adopt the ICAO standard. However certain other destinations to which the airline flew had done so, including Hong Kong, New Caledonia, Singapore, Tahiti and, most significantly, the United States of America. In fact the United States Federal Aviation Administration (FAA) had made a rule in terms of the ICAO standard. Consequently after Mr McAlister turned 60 he could no longer act as pilot in command on Air New Zealand's flights to or through the United States. Air New Zealand had adopted a policy, which was not part of Mr McAlister's employment contract terms, as follows:
>
> > No pilot who has attained the age of 60 can hold the position of pilot in command on the 747 and 767 aircraft while the predominant operation of these aircraft is to or through territories and alternates that have adopted the ICAO and FAA regulations in relation to the age of pilots in command."

[8] By a communication dated 24 March 2006 ICAO notified its adoption of an amendment to an international standard contained in Annex 1 to the Convention on International Civil Aviation ("amendment 167"). The amendment would allow pilots to hold PIC positions up to the age of 65 on certain conditions. It would become effective on 17 July 2006, except where a majority of contracting states had expressed disapproval before that date. To the extent that the amendment became effective on 17 July, it would become applicable on 23 November 2006. States were also asked to inform ICAO before 23 October 2006 of any differences that would exist on

[1] Also referred to as the B744
[2] [2009] NZSC 78

23 November between their national regulations or practices and the whole of Annex 1 including amendment 167. ICAO drew attention to the fact that international standards in annexes to conventions have a conditional binding force, if the states concerned have not notified any difference.

[9] Air New Zealand says it provided notification of a difference, but remained uncertain of the position of the United States in particular until October 2006. The FAA then advised that it would allow foreign carriers to operate with PICs aged up to 65 on certain conditions. Accordingly when the amendment became applicable on 23 November pilots employed by Air New Zealand, and who had reached their 60th birthdays, could operate as PIC on flights to and through the United States once the FAA had issued the necessary amended Foreign Operator's Certificate.

[10] It appears that all but one of the applicants reached his 60th birthday before ICAO notified its adoption of amendment 167. All continued in their employment as pilots, but not as PIC on the B747.

[11] The continuation was in terms of their employment agreements as follows. Six of the applicants are bound by a collective employment between Air New Zealand and the New Zealand Air Line Pilots Association ("the NZALPA cea"), while the other two are bound by a collective employment agreement between Air New Zealand and the Federation of Air New Zealand Pilots Incorporated ("the FANZP cea").

[12] Clause 3.2.3 of the NZALPA cea, stated to be in force from the date of communication of ratification to 14 January 2008, applied where:

> "by virtue of the effect of domestic or foreign legislation relating to a pilot's age a Captain is prohibited from operating aircraft as a pilot in command to sufficient of the destinations and/or destination alternates of the fleet on which he is employed as to preclude his being able to be rostered in his current fleet in accordance with the prevailing rostering provisions…"

[13] Very broadly, and aside from arrangements for leave, the procedure involved the pilot making a stipulation as to the fleet and rank not sufficiently affected by the legislation to which he wished to be transferred. In the absence of a stipulation, or if any necessary training in respect of the transfer was not completed, the pilot would be

appointed to a first officer's position on the fleet on which the command had been held.

[14] Clause 3.2.2 of the FANZP cea, stated to be in force from 15 January 2005 to 14 January 2008, set out a similar procedure.

[15] From 23 November 2006 the applicants could again bid for PIC positions on B747 aircraft under the applicable scheme in their ceas. Since October 2007 five of them have been reinstated to PIC positions on the B747.

[16] The applicants' concerns include how, if it at all, their circumstances should have been addressed once notification of the adoption of amendment 167 had been received in March 2006, and whether they should have been reinstated to their PIC positions on 23 November 2006.

The employment relationship problem

[17] The statement of problem says expressly that the applicants have personal grievances under s 103(2)(b) of the Employment Relations Act in that:

a. being aware of the ICAO amendment, Air New Zealand failed to provide for their reinstatement to PIC positions on 23 November 2006; and
b. did not reinstate them to these positions on 23 November 2006.

[18] The statement of problem also says, under the heading 'discrimination on the basis of age from 60', that although the applicants could not fly as PIC on all international flights after they had turned 60, they could fly on certain international flights. It says Air New Zealand did not take steps to accommodate them, and did not offer them PIC positions on those flights where they were not restricted by their age. That form of words suggests a grievance under s 104(2)(a). However that was not specified, and whether the grievance was said to arise on or immediately after the 60th birthdays or at some subsequent although unspecified time was not clear either.

[19] Although the word 'demotion' appeared in the statement of problem, there was no express statement that any demotion was raised as a grievance under s 103(2)(b).

[20] For its part Air New Zealand denies that its actions amounted to demotion. It says the pilots' positions were 'changed' in accordance with the terms of their employment agreements. Regarding any wider response to the pilots' circumstances that may be necessary, Air New Zealand says further that the provisions in the cea were acted on and complied with and no grounds for personal grievances exist.

[21] I record in addition that Air New Zealand:

a. says aspects of the statement of problem are in effect disadvantage grievances which were not raised with it within the required 90 day period;
b. is concerned that the statement of problem treats the applicants as a group without proper reference to their individual circumstances; and
c. in a reference to the appointment and seniority system set out in the ceas, is concerned that the employment relationship problem affects the interests of other pilots whose employment may be adversely affected by the relief sought, and they should be notified.

The judgment of the Supreme Court in McAlister v Air New Zealand Limited

[22] Bearing in mind the framing of the questions of law for the purposes of this application, I set out relevant parts of s 104 of the Employment Relations Act:

> "104. Discrimination
> (1)… an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination[3] …
>
> a. refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion and transfer as are made available for other employees of the same or substantially

[3] Age is a prohibited ground of discrimination.

similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

b. dismisses that employee or subjects that employee to any detriment ….

[23] The discrimination provisions in the Employment Relations Act and Human Rights Act 1993 are linked. For present purposes relevant provisions in the Human Rights Act include s 30, which creates an exception in respect of otherwise unlawful acts of discrimination where age is a genuine occupational qualification for a position. Importantly, the Supreme Court concluded in **McAlister** that the ICAO/FAA rules amounted to genuine occupational qualifications.

[24] However the s 30 exception is subject to a further provision which reads:

> "35. General qualification on exceptions
> No employer shall be entitled, by virtue of any of the exceptions in this Part of this Act, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties."

[25] This is referred to as the 'reasonable accommodation' qualification. Mr McAlister's case has not yet concluded because the matter of 'reasonable accommodation' was remitted to the Employment Court. The Employment Court had not considered it necessary to address s 35 because it had found the ICAO/FAA rules did not amount to genuine occupational qualifications under s 30.

[26] Although Mr McAlister's position differed from that of the applicants, the comments of the Supreme Court on matters associated with s 35 are indicative of the scope of an inquiry into what amounts to 'reasonable accommodation' for an Air New Zealand pilot:

> "[44] The conclusion we reach that Air New Zealand had a defence under the s 30 exception to s 104(1(a) is of course provisional because it is subject to the employer establishing under s 35 that it was, reasonably, unable to adjust its activities to accommodate the restriction placed on Mr McAlister by the rule. …

> [45] Air New Zealand has to show that the activities it required Mr McAlister to undertake could not reasonably have been adjusted to enable him to concentrate on other duties while other pilots carried out the pilot-in-command functions on long-haul flights affected by the FAA restrictions. This, it seems to us, was always the critical area of dispute between the parties. … the question of reasonable accommodation is a matter of substantial dispute, turning on detailed consideration of what is possible in terms of the rosters which would have permitted Mr McAlister to have the flying hours to maintain his qualification."

The questions of law relied on under s 178(2)(a)

[27] The questions of law supporting the application for removal were framed as follows:

a. with reference to s 35 of the Human Rights Act, did Air New Zealand provide the applicants with 'reasonable accommodation';
b. did Air New Zealand's compliance with the provisions of the ceas wholly satisfy its obligation to 'reasonably accommodate';
c. should Air New Zealand have taken reasonable steps (as a reasonable accommodation or in good faith) to ensure the applicants would be reinstated to PIC positions from 23 November 2006;
d. did Air New Zealand discriminate unlawfully from 23 November 2006 until such time as each of the applicants was reinstated to a PIC position.

[28] Air New Zealand says the judgment of the Supreme Court in **McAlister,** as well as two earlier decisions of the Employment Court[4], have determined the relevant legal principles. It says the question of 'reasonable accommodation' was remitted to the Employment Court to be determined as a question of fact, and must also be determined as a question of fact in the present matter. Otherwise the resolution of this problem turns on the application of the provisions in the cea.

[29] Accordingly it says grounds for removal under s 178(2)(a) are not made out.

[4] Smith v Air New Zealand Limited [2000] 2 ERNZ 376; Air New Zealand Limited v Rush [2003] 2 ERNZ 344

[30] Question (a) was said in the applicants' submissions to arise because, while an application of the decision in **McAlister** confirms Air New Zealand discriminated against the applicants at age 60, the Supreme Court did not determine the 'reasonable accommodation' issue. Question (a) arises in this matter accordingly.

[31] The submission appears to be saying that **McAlister** means the 'changes' or 'demotions' from the positions of PIC on the B747 aircraft which occurred when the applicants reached the age of 60 were acts of discrimination. I have some difficulty with whether that was a reference simply to the fact that an action was taken on the ground of age, or whether it was intended to reflect the lawfulness of the action. If the latter was intended, in terms of the application of **McAlister** the lawfulness of any act of discrimination will not be resolved until the s 35 issues are determined. Thus it is at least true that the Supreme Court did not determine the 'reasonable accommodation' issue.

[32] Beyond that, it is not clear whether this question was intended to cover any part of the period prior to the events associated with the introduction of amendment 167. In that respect I have indicated a concern about the vagueness in the way the 'discrimination on the basis of age from 60' matter was set out in the statement of problem. Depending on the result of any clarification, the concerns set out at [21] may need to be addressed before this aspect can be taken any further.

[33] The applicants' submissions suggested that the matter of 'reasonable accommodation' was not determined in **McAlister** and therefore a question of law arises in respect of it. I do not accept that logic. It does not follow as a general proposition that, simply because the court did not determine the matter, a question of law remains in respect of it. There is no reason to assume without more that the matter of 'reasonable accommodation' must be determined as one of law, although nor can it be assumed without more that the matter can be determined as one of fact.

[34] It is conceivable that a question of law might arise in respect of the interpretation or application of s 35 of the Human Rights Act. There is still a difficulty in that none has been identified here and I am unaware of whether one has been raised for the purposes of any further hearing in the Employment Court in **McAlister**. I cannot take that matter any further.

[35] For these reasons I cannot say that question (a) fits the criteria in s 178(2)(a).

[36] Question (b), addresses Air New Zealand's view that this problem turns on the application of the ceas. The applicants commented in submissions in reply that: 'the collective agreements are not relied on significantly by the applicants, other than the fact that they exist as part of the context for the claims'.

[37] I understand that to mean there is no dispute about whether the terms of the ceas were complied with. Rather the question concerns whether compliance alone is enough, and if not, what additional action should Air New Zealand have taken in order not to be caught by 35 of the Human Rights Act. That is hard to answer without knowing whether there is a question of law arising out of the interpretation or application of s 35 itself.

[38] If I assume there is no such question, then I infer from the contents of the statement of problem that such action might include making available to the applicants opportunities for additional training to ensure they were qualified to resume as PIC on the B747. It may also be necessary to consider what rostering arrangements should reasonably have been made (and in respect of what period) to accommodate PICs who had turned 60.

[39] Practical matters of the above kind were referred to by the Supreme Court in **McAlister**, and it is likely such matters will be addressed by the Employment Court. They will involve significant questions of fact.

[40] Questions of the interpretation of provisions in the cea regarding training and rostering, for example, may still arise although none have been indentified. Such questions are usually dealt with in the Authority rather than the court, and it is not at present possible to say whether the questions - if they arise - indicate this matter should be heard in the court.

[41] For those reasons I cannot say that question (b) fits the criteria in s 178(2)(a).

[42] Questions (c) and (d) concern the events associated with the introduction of amendment 167. That matter was not addressed in **McAlister.**

[43] However there remains a difficulty with the framing of any questions of law arising, and the submissions in support.

[44] The submissions assumed again that the effect of **McAlister** was that the applicants were discriminated against at age 60. This raises the same difficulty as the one referred to in respect of question (a). From the perspective of the Authority parties often make generalised and sometimes emotive allegations of discrimination without reference to the statutory provisions regarding discrimination, creating difficulties when the Authority's task is to assess the matter with reference to those provisions.

[45] The submissions went on to say that, had the applicants not been discriminated against at age 60, they would have continued in their positions as PIC through to and beyond 23 November 2006. It was then said that questions (c) and (d) arose as a result. The submissions in reply further explained the questions in that, in respect of (c), the question was whether Air New Zealand should have taken steps to prepare the applicants for the change that was to occur as at 23 November 2006 (when amendment 167 became applicable) and what were the extent of those steps. In respect of (d) it was asserted that the question of whether Air New Zealand was discriminating against the applicants from 23 November 2006 was a question of law.

[46] Another way of putting question (c) would therefore appear to be: 'assuming the terms of the ceas were complied with, did the pending application of amendment 167 create additional obligations for Air New Zealand in terms of s 35 of the Human Rights Act. If so, what were they.'

[47] I accept a question of that kind involves a question of law arising other than incidentally.

[48] Question (d) is too broadly framed to address. Rather than creating further delay by requiring it to be framed in a way that will enable it to be addressed, I have considered the material available and attempted to put the question less broadly.

[49] It seems to involve the following: 'if by reason of fact and law - including a finding in respect of s 35 - the applicants were not discriminated against unlawfully in the period up to 23 November 2006, did the application of amendment 167 from that date mean:

> (i) sections 104 and 105 of the Employment Relations Act applied to the resulting circumstances to establish an act of discrimination on the prohibited ground of age (without hearing from the parties I do not consider it appropriate to go further regarding what the associated issues might be in respect of these provisions);
> (ii) even if the answer to the above is 'no', the pilots' age ceased to be a genuine occupational qualification from 23 November so that they were discriminated against unlawfully nevertheless.

[50] Again I do not go any further. On the basis of the kind of approach just set out, I accept that the application of amendment 167 raises important questions of law that have not been resolved. The questions arise other than incidentally.

[51] For these reasons I find that questions of law arise other than incidentally in respect of the application of amendment 167. Grounds for removal therefore exist under s 178(2)(a).

Discretion to remove under s 178(2)(d)

[52] I have identified several matters that may require clarification or a preliminary determination, and have expressed reservations about whether some meet the criteria for removal. However this matter is complex and I do not believe that any attempt to sever parts of it for investigation in the Authority would assist in the overall resolution of the problem. I am therefore of the opinion that in all of the circumstances the court should determine the entire matter.

Order for removal

[53] I order that the entire matter be removed to the Employment Court.

Costs

[54] Costs are reserved.

[55] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority