

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 447/10
5300566

BETWEEN MICHAEL TALBOT
 Applicant

AND NEW ZEALAND AIRLINE
 PILOTS' ASSOCIATION INC
 Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Talbot in person
 Richard McCabe, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received 7 and 17 September 2010 from Applicant
 14 September 2010 from Respondent

Determination: 18 October 2010

DETERMINATION OF THE AUTHORITY

- A. The New Zealand Airline Pilots' Association Incorporated has not breached rule 13(6) and (7) of the Rules of the New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated dated 21 November 2008.**
- B The applicant's employment relationship problem is dismissed.**
- C Costs are reserved.**

[1] This matter involves a dispute pursuant to section 161(1)(k) of the Employment Relations Act 2000 about an alleged failure of a union to comply with its rules.

[2] Captain Talbot sought a determination from the Authority that New Zealand Airline Pilots' Association Incorporated (NZALPA) had breached rule 13(6) and (7) of the Rules of the New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated dated 21 November 2008 (the Rules) by referring a complaint back to an investigative subcommittee (the Subcommittee) to consider a legal opinion submitted by the complainant after the Subcommittee had reported back to the Board of Management (BoM) that the complaint had not established a prima facie case to answer.

[3] NZALPA says rule 13(6) & (&) does not prevent the BoM from referring a complaint back to the Subcommittee, and that it was proper for it to do so in this case because the complainant produced new information, in the form of a legal opinion, which the BoM resolved should be considered by the Subcommittee before finally disposing of the matter. It notes that although the Subcommittee did consider the complainant's legal opinion, it concluded that its original decision, that there was not a prima facie case, stood.

[4] NZALPA says that it did not act ultra vires, because its reference back to the Subcommittee was consistent with its wide powers to manage its own business under the Rules, and in particular rule 26.

Facts

[5] The facts in this matter were not in dispute, and were provided to the Authority via a statement of facts produced by the parties. Whether these facts established a breach of the Rules was a matter which was dealt with on the papers.

[6] On 22 October 2009, one of NZALPA's members (L) raised a complaint of prejudicial conduct against Captain Talbot, arising from the content of a fax dated 29 September 2009 which he had sent to the NZALPA's Air NZ Council and the NZALPA Industrial Director. The fax referred to Captain Talbot's view of the actions of L and other past union representatives in connection with prior Air New Zealand bargaining.

[7] L alleged that the content of the fax was extremely offensive and insulting and amounted to abuse of him as an officer of the union and of the other named parties as former NZALPA representatives.

[8] Rule 13(1) states:

For the purposes of this Rule, conduct that is “prejudicial to the best interests of the union or any of its members” may include the following conduct: [...]

(f) Assaulting or abusing any officer of the Union or of a branch or of any member.

[9] On 22 October 2009 L raised a formal complaint against Captain Talbot of prejudicial conduct as per rule 13(1)(f).

[10] On 28 October 2009 the BoM, pursuant to rule 13(5), referred L’s complaint to an investigatory subcommittee. Rule 13(5) states:

When a complaint is brought to the attention of the Board of Management, the Board of Management shall refer the complaint to a three person investigatory subcommittee established from time to time by the Board of Management.

[11] Rule 13(6) states:

The investigatory subcommittee shall consider whether the complaint establishes a prima facie case to be answered and, at the conclusion of those considerations, shall report back to the Board of Management in writing stating either that “the complaint does establish a prima facie case to be answered” or that “The complaint does not establish a prima facie case to be answered” and giving its reasons for its decision. The decision of the majority of the investigatory subcommittee shall be the decision of the investigatory subcommittee.

[12] On 30 November 2009, the Subcommittee reported back to the BoM that [t]he complaint does not establish a *prima facie* case to be answered, and gave its reasons for that.

[13] Rule 13(7) provides that:

*Where the investigatory subcommittee reports to the Board of Management that the complaint does not establish a *prime facie* case to be answered, the Board of Management shall forthwith advise the complainant in writing, enclosing a copy of the Subcommittee’s report, that the complaint will not be further pursued.*

[14] On 9 December 2009 the BoM wrote to L and the Captain Talbot enclosing a copy of the correspondence it had received from the Subcommittee.

[15] On 4 February 2010 L submitted a legal opinion from Professor Bill Hodge of Auckland University Law School on whether Captain Talbot's fax amounted to a breach of rule 13(1)(f), and requested that his complaint and Professor Hodge's opinion be referred back to the Subcommittee to consider because it had not had legal advice available to it when it had considered his complaint.

[16] This request was considered by the BoM at a meeting held on 24 February 2010, at which it resolved:

That the investigatory subcommittee review their decision on [L]'s prejudicial conduct complaint against Captain Mike Talbot, considering the legal opinion provided to the Board of Management.

[17] The BoM duly referred the complaint and legal opinion back to the Subcommittee, and Captain Talbot was advised of that on 15 March 2010.

[18] On 13 May 2010 the Subcommittee issued a second report to the BoM which stated that after reviewing L's complaint and Professor Hodge's legal opinion it had concluded that the complaint *does not establish a prima facie case to be answered*, and it gave its reasons for that.

[19] At its meeting on 26 May 2010 the BoM received the Subcommittee's second report. It subsequently wrote to L and Captain Talbot on 4 June 2010 advising that the Subcommittee had reviewed its decision and reconfirmed its initial view that the complaint did not establish a prima facie case to be answered. The parties were also expressly advised that the complaint was not going to be pursued.

Determination

Legal principles

[20] The Rules must be interpreted in the same way as any other contractual instrument; *NZALPA v Registrar of Unions* [1989] 1 NZILR 544. The Court of Appeal in *Walker v Mount Victoria Residents Association Inc* [1991] 2 NZLR 520 held that:

The rules of an incorporated society, which by definition does not exist for profit, but normally for purposes of mutual interest and concern for its members, and so is likely to function informally rather than formally, must in my view be construed sensibly and realistically so as to give them practical and workaday effect.

[21] I recognise that rule 26 places the union under the control of the BoM, which holds wide powers in relation to the management of the affairs of the union. An example of the breadth of its management function is seen in rule 26(2) which give the BoM the power to *take any action as in its opinion may be necessary to promote the interests of the union and its members*, and rule 26(5) which provides that any resolution, direction or other decision of the BoM is binding. Whether there has been a breach of rule 13(6) & (7) must be interpreted within that wider context.

Rule 13(6) & (7)

[22] The starting point when determining whether there has been a breach of rule 13(6) & (7) is to examine the obligations imposed with reference to the words used in that rule. Rule 13(6) & (7) does not expressly address the BoM's ability to refer a complaint back to an investigatory subcommittee after it has received a report on whether or not there is a prima facie case to answer.

[23] I find that omission means the BoM is not on the face of it limited or precluded by rule 13 from referring a matter back to an investigatory subcommittee. I therefore need to go on to consider whether such action is prohibited by any other rule or is contrary to NZALPA's objects or any other BoM powers.

[24] I have reviewed the Rules and not found any rule which expressly prevents the BoM receiving additional information about a complaint, or once that has occurred, from determining how best to address that. It was open to the union to limit the BoM's powers in this way, so I consider it significant that it has not actually done so.

Union's objects as per rule 3

[25] I find that the BoM's actions in dealing with the new information was not contrary to the stated objects of the union as set out in rule 3. I also consider that BoM's resolution that the Subcommittee review its decision in light of the legal opinion, can be viewed as being consistent with the union's rule 3 objects.

[26] Rule 3(d) records one of the objects of the union as being *to afford legal protection for members in any matter concerning the activities of the union*. Captain Talbot's fax criticised L (and others) for (amongst other things) their prior collective bargaining activities. L's complaint objected to that criticism.

[27] I therefore consider it consistent with rule 3(d) for the BoM to take steps to ensure that the Subcommittee had all relevant information (including a legal opinion) before it finally disposed of L's complaint. The BoM's resolution to refer the new information back to the Subcommittee was consistent with achieving that, so cannot be said to be an improper action.

[28] Rule 3(q) provides that one of the objects of the Union shall be *to do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the Union*. This clearly gives the BoM broad powers to deal with matters which arise, but which have not been expressly dealt with in the Rules, such as the scenario which arose in connection with this matter. Its actions were also consistent with this wide and express object.

BoM's functions and powers

[29] The functions and powers of the BoM are contained in rule 26. Without limitation to the BoM's general powers and functions, pursuant to rule 26(3)(f) it has the power to:

*Appoint any subcommittee to exercise any of the powers of the Board of Management to be stated in writing at the time of the appointment, and appoint any person to that subcommittee as it sees fit, and **such subcommittee shall continue in existence until the Board of Management resolves otherwise.*** (emphasis added)

[30] Further support for the BoM's resolution to refer the matter back to the Subcommittee can be found in rule 26(2), which states:

*The Board of Management shall take **any action as in its opinion may be necessary to promote the interests of the Union and its members**, to implement the policy of the Union, to require members of the Union to comply with the terms of any applicable collective arrangement, and to foster a spirit of confidence and good fellowship within the Union.* (emphasis added)

[31] I consider that the BoM's actions in ensuring that all aspects of the complaint about the alleged abuse of a union official (L) had been fully and properly considered by the Subcommittee, was an action that was necessary to promote the interests of the union and its members, and as such was consistent with its functions and powers.

[32] It is also arguable that the Professor Hodge opinion was a report *submitted on any matter* which the BoM had the power to review pursuant to rule 26(3)(a) and that the resolution referring the matter back to the Subcommittee amounted to the issuing of written directions on matters relating to the attainment of the objects of the union, in accordance with its express power to do so pursuant to rule 26(3)(b).

[33] I find that the BoM had the power to resolve to refer the complaint back to the Subcommittee because the Rules expressly permitted it to make a binding resolution, and the nature of the resolutions it was able to make was not restricted, as per rule 26(5) which states:

Any resolution, direction or other decision of the Board of Management shall be binding on members, officers of the union and the officers of a Branch, and shall have effect according to its tenor. (emphasis added)

[34] Rule 26(3)(g) states:

Where any question arises that is not provided for in these Rules, or any doubt arises as to the interpretation of these Rules, the matter shall be decided by the Board of Management and its decision shall be binding on all members of the Union until such time as it is revoked by a meeting based or postal or online ballot of all financial members. (emphasis added)

[35] In relation to Captain Talbot's dispute about whether or not the BoM had the power to refer L's complaint and legal opinion back to the Subcommittee to consider, I consider that is a matter within the BoM's exclusive jurisdiction to determine pursuant to rule 26(3)(g), because it involves a question on an issue which had not been expressly provided for in the Rules.

Hierarchy of rules?

[36] I do not accept Captain Talbot's submission that the BoM's actions in resolving to refer the complaint back to the Subcommittee involved an inappropriate exercise of its rule 26 powers because they were being used to override rule 13(6) and (7) because I find such actions were not inconsistent with rule 13(6) & (7). Even if they were, I would not be prepared to interpret rule 26, which expressly gives the BoM wide and general powers, in a restrictive manner.

[37] Captain Talbot argues that it would be abhorrent to the general concept of justice and contradictory to the specific requirements of rule 13 to allow NZALPA to rely on rule 26 to reopen an investigatory subcommittee matter. I do not accept that submission. Rule 13 does not prevent the BoM from resolving to reopen a matter which it has referred to an investigation subcommittee.

[38] I am mindful that the practice of the Courts in relation to incorporated societies has been to ensure compliance with rules and constitutions, but not to interfere much beyond that: *Hopper v. North Shore Aero Club* 6 December 2005, Williams J, CIV 2005 404-2817.

[39] I therefore do not consider it appropriate to imply into the Rules, restrictions on the union's ability to run its own affairs and conduct its own business, particularly in light of the wide and general powers conferred in rules 3 and 26. If such restrictions are to be imposed on the union's ability to manage its affairs then these should be expressly stated in the Rules. It was open the union to restrict the BoM's ability to receive new information after it has received an investigatory subcommittee report, so I recognise that it did not do so. Captain Talbot's dispute applicant effectively ask the Authority to impose just such a restriction on the BoM, and I decline to do so.

[40] Captain Talbot submits that Rule 26(3)(e) constrains NZALPA to *specifically follow the code in rule 13, in respect to matters of discipline* and that it has not done so with L's complaint. I appreciate that rule 26(3)(e) gives the BoM the power to [d]iscipline members in accordance with Rule 13 of these Rules, but refer to my finding that it has acted in accordance with the obligations imposed by rule 13(6) and (7).

[41] Rule 13 deals with three different stages and accordingly three possible different committees which may be in a complaints process, namely the investigatory subcommittee; the disciplinary committee; and the appeal committee. The rule that Captain Talbot alleges has been breached relates to the investigation stage only of the complaint process. This matter did not get past the investigatory stage, so no disciplinary action was ever commenced, and it follows that the BoM could not have breached rule 13 in respect of disciplinary matters.

Functus officio?

[42] Captain Talbot argued that the Subcommittee's report to the Board dated 30 November 2009 meant the matter was *funtus officio*, so could not be revisited. He submitted that to find otherwise would enable the BoM to continue sending matters back to an investigatory subcommittee until it provided the BoM with a report consistent with the outcome the BoM sought, which he said would allow the BoM to have an improper involvement with, and influence over the outcome, of complaints. Captain Talbot also submitted that the purpose of a complaints process was to avoid the potential for political interference in complaints.

[43] I consider the wording in rule 13(6) & (7) is clear and unambiguous, so I do not need to have regard to the parties' alleged intentions when drafting it.

[44] I find that the Subcommittee was not *funtus officio*, because there was no resolution by the BoM pursuant to rule 26(3)(f) to end the Subcommittee's function in relation to L's complaint. It had merely received a report back from the Subcommittee, and it communicated that to L and Captain Talbot. The communication of the Subcommittee's report in itself did not dispose of the complaint or disestablish the Subcommittee.

[45] The BoM's letters to L and Captain Talbot on 9 December 2009 did not comply with the rule 13(7) requirement to advise the complainant in writing *that the complaint will not be pursued further*. This form of words was not used at all, in contrast to the BoM's letter to L dated 4 June 2010 which stated *the Board of Management will not pursue your complaint under rule 13 any further*.

[46] I therefore find that the requirements of rule 13(7) were not met until 4 June 2010, so the Subcommittee was still in existence, and not *funtus officio*, at the point it received the complainant's legal opinion.

Did rule 13(7) prohibit the reference back to the Subcommittee?

[47] I do not accept Captain Talbot's interpretation of rule 13(7) which would mean that an investigatory subcommittee's report to the BoM is final, and can never be revisited under any circumstances. I accept Mr McCabe's submission that such an analysis is in direct conflict with:

- (a) The *prima facie* nature of the Subcommittee's investigation, and the meaning of *prima facie*;
- (b) The substantial powers conferred on the BoM under Rule 26;
- (c) General legal principles as to how incorporated society rules are to be construed.

[48] To interpret rule 13(7) in the manner advocated by Captain Talbot would in my view impose significant restrictions on the union's autonomy to deal with its own internal affairs, in circumstances where it has obviously chosen not to limit itself in that way.

Conclusion

[49] I find that NZALPA has not breached its Rules, and therefore determine that the applicant's employment relationship problem is dismissed.

Costs

[50] Costs are reserved. The parties are encouraged to resolve costs themselves. If that is not possible, the respondent has 14 days within which to file its costs memorandum, with the applicant having 14 days thereafter to file a memorandum in response.

[51] No costs memorandums will be considered outside this timeframe without prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority