New Zealand Employment Relations Authority Decisions

Urquhart v Aviation Security & Anor AA 234/07 (Auckland) [2007] NZERA 631 (6 August 2007)

Last Updated: 18 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 234/07 5083688

BETWEEN GLENN URQUHART

Applicant

AND	AVIATION SECURITY First Respondent
AND	AIR NEW ZEALAND LTD Second Respondent

Member of Authority: Vicki Campbell Representatives: Glenn Urquhart in person

Bridget Flemming for First Respondent Kevin Thompson for Second Respondent

Submissions Received: 18 July 2007 from Applicant

16 July from First and Second Respondents

Determination: 6 August 2007

DETERMINATION OF THE AUTHORITY

[1] This determination deals with a preliminary issue of whether the Authority has jurisdiction to determine Mr Urquhart's claim against Aviation Security and Air New Zealand based as they are, on a contended breach of the Privacy Act 1993. Due to the nature of the claims this preliminary determination has been dealt with on the papers by consent.

Employment Relationship Problem

[2] Mr Glenn Urquhart is a commercial pilot. He worked for Aviation Security from 2003 until he resigned. Mr Urquhart says he received a conditional offer of employment from Air New Zealand Ltd to work as a Flight Dispatcher. The offer was subject to a reference check being undertaken. Mr Urquhart accepted the conditional offer of employment subject to confirmation following the requisite checks.

[3] Mr Urquhart says he had been in conflict with his employers at Aviation Security throughout his employment and for that reason gave specific instructions

to the Human Resources manager that he had been offered a position and that he did not wish to have the contents of his file

revealed to anyone.

[4] In addition to this Mr Urquhart points out his employment agreement expressly prohibits information being provided to an external source including the provision of personal references.

[5] Mr Urquhart subsequently discovered that "Resume Check", a company engaged by Air New Zealand to undertake reference checks on potential employees had contacted Aviation Security for a reference. He says that as a result of that contact and the information provided by Aviation Security, his offer of employment with Air New Zealand was not confirmed.

[6] Mr Urquhart claims Aviation Security has breached his employment agreement and seeks damages, a penalty and a compliance order.

[7] Mr Urquhart filed a statement of problem in the Authority on 3 April 2007.

[8] In its statement in reply Aviation Security denied Mr Urquhart had any actionable claim against it. Aviation Security says that on 1 March 2007 Mr Urquhart resigned of his own volition and that resignation was accepted by Aviation Security. By agreement between the parties Mr Urquhart was not required to work out his notice period and his employment ended on 5 March 2007.

[9] Aviation Security accepts that on or about 2 March 2007, a senior employee of Aviation Security had a conversation with an Air New Zealand employee regarding Mr Urquhart. The content of that discussion is in dispute. I am therefore not able to make any findings as to what was said or by whom.

[10] However, subsequently, Mr Urquhart was advised he was no longer a suitable candidate for the job at Air New Zealand. Mr Urquhart questioned the backtracking by Air New Zealand but to no avail. He found himself no longer employed by Aviation Security and no chance that an unconditional offer would now be forthcoming from Air New Zealand.

[11] On 14 May 2007 Mr Urquhart filed an amended statement of problem in the Authority. The amended statement of problem cited Air New Zealand as an additional respondent to his claim and set out his claims as being:

In the case of Air NZ:

By seeking a reference without my authorisation they have breached the Privacy Act, Principle 11. "Limits on disclosure of personal information."

In the case of Aviation Security Service:

By revealing personal information pertaining to my work and performance record and offering personal opinions about my character, they have breached the Privacy Act, Principle 11, "Limits on disclosure of personal information". Further they are in Breach of their Policy and Procedures manual in that they have a duty of care not to reveal personal information to a third party. They are also in breach of an agreement between myself and Peter Francis to specifically not provide negative feedback to a prospective employer.

[12] The issue for this determination is whether the Authority has the jurisdiction to determine Mr Urquhart's personal grievance, based as it is, on an alleged breach of the Privacy Act 1993.

[13] The Privacy Act 1993 provides a statutory code by which the privacy of individuals is protected. The statute annunciates a series of principles which guide and inform the central tenets of the Act. The principle relied on by Mr Urquhart is principle 11 which provides for limits to be placed on the disclosure of personal information.

[14] Both respondents submitted that because Mr Urquhart's amended statement of problem only refers to a breach of the privacy principles the Authority has no jurisdiction to deal with Mr Urquhart's claim.

[15] The Authority has no jurisdiction to determine questions of privacy under the Privacy Act. This question has already been determined judicially by the Employment Court in *NZ Amalgamated Engineering etc IUOW v Air NZ Ltd* [1004] 1 ERNZ 614 at para 218 which states:

At the heart of the Privacy Commissioner's submission, and not contested by any party or intervener was the fundamental proposition that the Privacy Act 1993 does not give rights or impose obligations that are enforceable in this or any other Court of law. Questions of statutory privacy are to be dealt with by a discrete and exclusive procedure involving, amongst others, the Privacy Commissioner and the Human Rights Review Tribunal.

> [16] Further, in *New Zealand Public Service Association Inc v Southland Regional Council* [2005] NZEmpC 124; [2005] 1 ERNZ 1008, the Court held that the Employment Relations Authority has no right to determine questions of privacy, and that to find a breach of an employment agreement:

... based upon a breach of the Privacy Act would be to enforce a privacy principle in a Court of law contrary to s.11(2) of the Privacy Act.

> [17] The Court went on to hold that it is for the Privacy Commissioner in the first instance, to determine any breaches of the Privacy Act, not the Court or the Employment Relations Authority.
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> [18] I do not take it from Mr Urquhart's statement of problem or submissions to the Authority that he contends he was an employee of Air New Zealand. I am satisfied that Mr Urquhart was made a conditional offer of employment but that offer was never made unconditional. Mr Urquhart's claims against Air New Zealand, based as they on upon a contended breach of the Privacy Act, are not able to be determined in the Authority and are properly being dealt with by the Privacy Commissioner. Mr Urquhart's claim against Air New Zealand therefore must fail. I am unable to assist him any further with this claim.
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> [19] Mr Urquhart's claim against Aviation Security goes further than to allege a breach of his employment agreement as a result of a breach of the Privacy Act. Mr Urquhart also alleges breaches of the terms of the employment agreement, and Aviation Security Policies. So while the Authority can not investigate any claims based upon a breach of the Privacy Act, Mr Urquhart's claims that Aviation Security breached the terms of his employment agreement and its owns policies should be subject to an investigation and determination by the Authority.
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> [20] However, before arrangements are made for an investigation meeting, Mr Urquhart and Aviation Security are to meet in mediation and attempt in good faith to resolve the outstanding issues between them. A direction to that effect will be made.

Costs

> [21] Costs relating to this determination are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell

Member of Employment Relations Authority
