IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 125
ARC 41/13

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority
BETWEEN	FLIGHT ATTENDANTS AND RELATED SERVICES (NZ) ASSOCIATION INC First Applicant
AND	KAREN ABERNETHY AND OTHERS Second Applicants
AND	AIR NEW ZEALAND LIMITED First Respondent
AND	AIR NEW ZEALAND TASMAN PACIFIC LIMITED Second Respondent

Hearing:	5 July 2013
Appearances:	Simon Mitchell and Lisa Keys, counsel for applicants Andrew Caisley, counsel for first respondent Rob Towner, counsel for second respondent
Judgment:	5 July 2013
Reasons:	9 July 2013

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

---

[1] The question now for decision is whether the applicants should have special leave to have removed to this Court, proceedings that are currently before the Employment Relations Authority. The Authority declined to direct their removal. At the conclusion of the hearing on 5 July 2013 I granted the applicants' application for

leave and made a number of directions consequent upon that.[1] These are my reasons for doing so.

[2] The case concerns the lawfulness of significant proposed changes to the terms and conditions of employment of flight attendants on several fleets of Air New Zealand aircraft. In addition to the proceedings in the Authority, the applicants have now issued proceedings in this Court at first instance, alleging that the respondents' proposed restructuring of their flight attendants' terms and conditions of employment amounts to an unlawful lockout of the affected employees which should be stopped by injunction.

[3] The application is brought under s 178(3) of the Employment Relations Act 2000 (the Act) which provides:

> 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] The criteria, one or more of which the Court must apply, in paras (a)-(c) of subs (2) are:

> 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;

[5] Until the hearing of this application on 5 July 2013, the parties and the Court have proceeded on the basis that the applicants' amended statement of problem in the Authority would be the basis for considering the application for special leave. However, at the start of the hearing Mr Mitchell handed up a draft statement of claim which he said will set the parameters of the applicants' claims in this Court if special leave is granted to remove them. Mr Caisley for the first respondent took issue not with the contents of the draft statement of claim or with his preparedness to

[1] [2013] NZEmpC 122.

address new issues raised but, rather, sought to argue that the applicants should be confined to their pleadings in the Authority. I declined to constrain the applicants' case for the following reasons.

[6] First, rather than adding new grounds, the applicants now propose to refine, and in one case abandon, some of the arguments advanced to the Authority supporting removal. The abandonment relates to the question of the first applicant's entitlement in law to represent its members in the proceedings.

[7] Next, I conclude that the reference in s 178(3) to "the matter or [a] part [of it] …" should not be interpreted narrowly to apply only to the arguments precisely as put before the Authority. The "matter" is the broad issue which the applicants challenge, that is the lawfulness of the respondents' proposed restructuring. That broad definition of the same word is consistent with court judgments[2] dealing with the phrase in s 179 ("a matter before the Authority") which have consistently interpreted broadly the same word in a materially similar context. Finally, employment relations litigation is a dynamic exercise, no less in this case, and it would be wrong to freeze an issue as it was identified previously in the same litigation attempting to resolve an employment relationship problem.

[8] For these reasons I allowed the applicants to rely, for their grounds for special leave to remove, on the contents of the draft statement of claim.

[9] Although the Court must reach its own decision on the application for special leave, it is nevertheless instructive to consider the Employment Relations Authority's refusal to remove which has brought about this application for special leave. The Authority delivered its determination refusing removal on 20 May 2013,[3] having considered written materials placed before it but without an investigation meeting or other hearing. In the Authority at that stage, Air New Zealand Limited (ANZL) was the only respondent. The applicants relied solely on the grounds for removal set out in s 178(2) of the Act that an important question of law is likely to arise in the matter other than incidentally, that the case was of such urgency that it is in the public

[2] *Sibly v Christchurch City Council* [2002] 1 ERNZ 476 and *Abernethy v Dynea New Zealand Ltd* [2007] 1 ERNZ 271
[3] [2013] NZERA Auckland 199.

interest that it be removed immediately to the Court and that in all the circumstances the Court should determine the matter. Only the first two of these three grounds relied on in the Authority are applicable to this application for special leave, although another third ground is now being be relied on, that under s 178(2)(c).

[10] It is notable that as the sole respondent in the Authority, ANZL did not either support or oppose the application there for removal, but expressed some doubts that the statutory requirements for removal had been met. That stance has now developed into opposition in this Court.

[11] Cabin crew on Air New Zealand aircraft are employed by two different legal entities, the respondents. One of those, the second respondent (ANZTPL) is, through a series of holding and subsidiary companies, effectively a wholly owned subsidiary of ANZL. ANZL also employs cabin crew on its aircraft, principally its long haul international fleets. Each of the respondents has current collective agreements with the first applicant (FARSA) and with another union (the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc), covering the employment of those cabin crew who are members of those unions.

[12] ANZL is making changes to its fleet types and wishes to have its cabin crews for these new aircraft (A320 and B787 type aircraft) together with its existing B767 aircraft, provided exclusively by ANZTPL rather than as, in many cases at present on its current aircraft types, directly by itself. In general, the union claims that the ANZTPL collective (and individual employment agreements) are less favourable to employees than are ANZL's so that increasing numbers of its flight attendant members will be affected disadvantageously by the proposed restructuring.

[13] In mid-April 2013 the respondents advised the applicants that ANZTPL intended to create a number of new positions for cabin crew on these aircraft with effect from September 2013. This exercise is known to the parties as "Project Choice". The respondents advised the union and existing cabin crew that they could apply for these new positions if they wished to do so and that new employees to be engaged for these aircraft types by ANZTPL would be offered its form of individual employment agreement. The respondents have offered to engage in bargaining for a

new collective agreements or agreements, but cannot initiate this because there is no existing collective agreement with coverage of the work. The unions have not, so far at least, taken up the employers on their offer to bargain collectively. I assume that is because FARSA says that the strategy which underpins any new collective bargaining, is unlawful. The respondents say that the implementation of Project Choice will not result in any redundancies of cabin crew. Substantial numbers of cabin crew (about 420) have already signed up to new individual employment agreements with ANZTPL in fulfilment of its strategy.

[14] ANZL's overall objective is to move employment terms and conditions of cabin crew on all B767, B787 and A320 type aircraft to ANZTPL so that ANZL, with some minor exceptions, is not the employer of any cabin crew on these aircraft types which will, in future, constitute the majority by number of aircraft in its fleets. At present, B767 cabin crews are employed by ANZL, many of them on a collective agreement between FARSA and ANZL. Current A320 cabin crews are employed by both ANZL (in respect of short haul operations) and an ANZTPL collective agreement. There are, as yet, no B787 designated cabin crew because the first aircraft of this type is not due in service until next year.

[15] ANZL says that its domestic and long haul cabin crews are being given a choice to remain on their existing employment arrangements (including on current collective agreements) but it emphasises what it says are the longer term advantages to them of agreeing to be employed by ANZTPL. These include not only opportunities for career advancement but offers to existing (or new) ANZTPL employed cabin crew to operate on B767 and B787 aircraft, which opportunities will not be offered to cabin crew not employed by NZTPL.

[16] ANZL also wishes to eliminate the current two separate A320 cabin crewing sets of terms and conditions, replacing them with a single set of terms and conditions with ANZTPL.

[17] The Project Choice proposals also include reducing the number of cabin crew members on B767 aircraft from a current eight to a proposed seven (one above the regulatory minimum of six) except on services to and from Shanghai.

[18] ANZL says that it is not intended that there will be any recruitment of cabin crews for domestic (B737 and some A320 aircraft) or long haul (ANZL type B777-200, B777-300 and B747) fleets although there will be recruitment of new cabin crew by ANZTPL for the airline's A320 and B787 (new aircraft) and B767 fleets.

[19] Finally, the Project Choice proposal is that ANZTPL will have separate A320 and B767/787 cabin crew groups.

[20] The Authority accepted that a question or questions of law arose in the case before it but was not persuaded that any such question was "an important question of law". It said this was so because it could be assisted in its investigation and determination "by established legal precedents which can be applied to the particular factual matrix" of the case. The Authority considered that the questions raised in support of the application were mixed ones of fact and law "in respect of which the investigative nature of the Authority is well designed to address".

[21] As to urgency, the Authority observed that it could address the case in a timely manner. Dealing with the question of the public interest in a removal, the Authority, while accepting that large numbers of employees were involved, said that this did not of itself favour removal. Nor, too, did the fact that the aviation sector is an important one in the New Zealand economy, the Authority concluding that there was insufficient evidence that the proceedings would affect the national economy, the travelling public, or "the employers and employees engaged in the sector". The Authority concluded, therefore, that there was no particular public interest in favour of removing the case.

[22] Against removal also, the Authority found that the need to resolve disputed questions of fact, its ability to provide a prompt investigation meeting and determination and the preservation of a statutory right of challenge to this Court all militated against removal.

[23] An important preliminary issue in the case will be whether the respondents are either one and the same entity in effect, or whether they may be joint employers

of cabin crew. This is known by the legal shorthand as the "piercing or lifting the corporate veil" question.

[24] Although there is New Zealand employment case law (albeit now more than 20 years old) about piercing or lifting a corporate veil, this was decided in the context of the re-flagging of ships to avoid the application of local employment law to their crews. In this case, the applicants' attempts to pierce or lift the corporate veil will be in respect of a subsidiary company that has both traded for many years (albeit differently named and performing different functions in the aviation field) and which is currently the employer of cabin crew for Air New Zealand aircraft. It will be an important question of law arising other than incidentally (indeed, it will arise both at the start of and centrally in the applicants' case) whether the Court may and should pierce the corporate veil behind the second respondent so that the applicants may establish that those of its members who are employed as cabin crew by the second respondent are, in reality and in law, either employed by the first respondent or by both respondents jointly.

[25] Another important legal question which I am satisfied will arise in the case other than peripherally is whether conduct undertaken with the intention or predominant intention other than of undermining a collective agreement but which nevertheless has that effect, is conduct in breach of the legislation's obligations to act in good faith. Mr Towner for the second respondent accepted that there is no case law guidance on this issue and I do not accept his submission that it will be able to be determined without difficulty by the Employment Relations Authority on a case by case basis and by reference to the particular facts of the case. The question will turn on whether it can be said that undermining a collective agreement amounts to a failure to comply with the duty of good faith in s 4(1) of the Act. Although there is reference to undermining a collective agreement in s 4A, this is to the intention of a person who is a party to an employment relationship who fails to comply with the duty of good faith in s 4(1). Further, the reference in s 4A is a prerequisite to liability for a penalty for a breach of good faith. There is no express reference in s 4 to the undermining of a collective agreement. That is in contrast to the express reference in s 32(1)(d)(iii) to the prohibition upon a union or an employer bargaining for a collective agreement undermining that bargaining or the authority of the other

in the bargaining. In this case, however, there is no bargaining at issue, at least as yet. Important considerations in answering this question of law will include the references in the partial definition of good faith dealing in s 4(1), to the doing of anything "directly or indirectly" to mislead or deceive another, and to the doing or not doing of anything "that is likely" to mislead or deceive the other.

[26] The important questions of law that I accept will arise in the proceeding other than incidentally, include:

- whether and if so with what effect, the Court may pierce or lift the corporate veil behind ANZTPL to fix ANZL as employer of all cabin crew and/or whether the two respondents are joint employers of the employees

- whether undermining a collective agreement is a breach of statutory good faith;

- whether the respondents, by the implementation of Project Choice, will undermine a current collective agreement or agreements;

- whether undermining a collective agreement, albeit having other intentions than to so undermine, is a breach of statutory good faith obligations;

- whether the acts or omissions of the respondents have been, and whether the implementation of Project Choice will be, an inducement to the second applicants not to be covered by a collective agreement and so in breach of s 4(6) of the Act;

- whether the implementation of Project Choice will be a breach of the statutory obligations of good faith and, in particular, will be with the intention of undermining the employment relationship between the first applicant and its second applicant members;

- whether the implementation of Project Choice will be in breach of s 4A(b) of the Act and contrary to those statutory obligations to be active, constructive, productive, responsive and communicative in the employers' employment relationships with the applicants; and

- whether the implementation to date of Project Choice has amounted to a breach by the respondents of obligations under s 4(1A)(c) of the Act to give the second applicants access to information and an opportunity to comment thereon.

[27] The Employment Relations Authority accepted that the majority of these (and indeed some other) questions of law will arise in the proceedings. It refused to remove them, however. As already noted, the Authority decided that it was "… not persuaded that an important question of law arises which cannot be assisted by established legal precedents which can be applied to the particular factual matrix of this particular case".[4]

[28] That, however, misstates the statutory test and led the Authority astray. Section 178(2)(a) does not refer to whether important questions of law can be determined by established legal precedents. Rather, the test is that an important question of law likely to arise in the matter (first limb of the test) will do so "other than incidentally" (second limb). That second limb is not whether there is precedential guidance for the determination of those legal questions. The latter test applied by the Authority addresses the significance of the important question or questions of law in the case. Indeed, to determine the application for removal under s 178(2)(a) as the Authority did, even if it was correct, would run the risk of ossifying the law to be applied by it because it would not allow, at least until during a further stage of the proceedings (in a challenge), for a review by the Court of previous legal decisions.

[29] Applying the second limb of the statutory test, I am satisfied that the important legal questions identified will arise other than incidentally. They, or at least some of them, will be at the heart of the case. The case as now pleaded will not

[4] At [36].

be able to be decided without determining some or all of those important legal questions. Despite what is asserted to be the different facts relied on by each party and contradictions between their witnesses, it seems likely that the well documented Project Choice will largely speak for itself, at least so far as the future is concerned. Although there may be some contentious evidence about the manner in which Project Choice has been implemented to date, s 178 is not restricted to cases in which none of the relevant facts is in dispute. Section 178(2)(a) focuses on important questions of law.

[30] Again with respect, the Authority was in error when it stated:[5]

> I consider that the issues that arise in this case are a mixture of both law, which as observed can be assisted by the legal precedents, and fact, in respect of which the investigative nature of the Authority is well designed to address.

[31] Without disagreeing about the latter statement, the Authority's conclusion misstates the s 178(2)(a) test. It is not to consider whether there are "legal precedents" determining the important issues of law that will arise other than incidentally.

[32] Nor am I as confident as was the Authority that the various questions of law have already been determined authoritatively. Authoritative determination of questions of law in this field begins with the Supreme Court, albeit rarely, but extends down through the Court of Appeal to the Employment Court with increasing frequency although decreasing authoritativeness. Such restructurings and their strategies are relatively rare and have generated even less litigation, certainly which has been examined and ruled on at higher appellate level. There are some cases at Employment Court and Court of Appeal levels, but not all of these are on the points raised by this case.

[33] Again with respect to the Authority, it concluded erroneously that the legal questions at issue are well settled by determinations of the Employment Relations Authority of which it set out four examples[6] in its determination. The Authority is,

---

[5] At [38].
[6] At [24].

however, not bound by its previous determinations. The scheme of the legislation is not that it determines authoritatively questions of law. It is a pragmatic, problem-solving and investigative body. That is illustrated, as much as anything, by s 143(f), (fa) and (g) which states that the Act is to be construed in relation to the institutions established so as to:

> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
> (fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and
> (g) recognise that difficult issues of law will need to be determined by higher courts

[34] The judgments of the Employment Court relied on by the Authority in its determination declining to remove these proceedings included *National Distribution Union Inc v General Distributors Ltd*[7] dealing with the question of proof of an "intention to undermine". The Authority also referred to the cases decided early in the current legislative regime, *Association of University Staff Inc v Vice-Chancellor of the University of Auckland*[8] and *Christchurch City Council v Southern Local Government Officers Union Inc*.[9] As to questions of law concerning a union's entitlement to represent its members, the Authority relied on three cases brought to its attention by Mr Caisley for ANZL, *Health Care Hawke's Bay Ltd v Bickerstaff*,[10] *Service and Food Workers Union Nga Ringa Tota v OCS Ltd*[11] and *Marshment v Sheppard Industries Ltd*.[12] *Marshment* did not, however, deal with representation of employees by a union as is the issue in this case.

[35] The *General Distributors* case, whilst addressing "undermining", did so in the context of collective bargaining and what is known as "passing on". Neither of those issues arises in this case and, indeed, the important issues of law relate not only to the intention required to undermine but, more fundamentally, to whether

---

[7] [2007] ERNZ 120.
[8] [2005] ERNZ 224.
[9] [2007] ERNZ 37 (CA).
[10] [1996] 2 ERNZ 419.
[11] [2007] ERNZ 169.
[12] [2012] NZEmpC 93.

undermining a collective agreement may be categorised as conduct in breach of the statutory good faith requirement.

[36] The judgment of the Court of Appeal in the *Christchurch City Council* case dealt with communications between an employer and its employees who are union members during bargaining, again not an issue or at least a central one, in this case.

[37] As already noted, the issues posed by the applicants do not now include ones of its entitlement to represent its members who are employees of the respondents, so that the *Bickerstaff* and *OCS* cases will not be instructive.

[38] Even if, therefore, the statutory test for removal had addressed whether there are authoritative and relevant precedents that might guide and bind the Authority, such a test would not have been met in this case in any event.

[39] I deal now with the applicants' case under s 178(2)(c). This allows the Authority (or now the Court) to order the removal of a matter, or any part of it, if "the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues …". That was not the position when these matters were before the Authority and so there can be no criticism of it in relation to s 178(2)(c).

[40] However, in the meantime, the applicants have commenced proceedings under file number ARC 42/13, filed on 14 June 2013 at the same time as was this application for special leave, seeking injunctive relief against unlawful lockout action of the second applicants by the respondents in reliance on the same events that are the subject of this proceeding. Although, very technically, it may not have been able to have been said that when the application for special leave was filed, there was already before the Court a proceeding that otherwise met the terms of s 178(2)(c), now when the Court has come to consider the application for special leave, there is "already … before it …" such a proceeding.

[41] The respondents' strongest argument for the applicants' failure to meet the s 178(2)(c) test is that the proceedings already before the Court (the lockout

proceedings under ARC 42/13) are not "between the same parties". Mr Caisley conceded that his argument in support of the applicants' failure to meet the second test (that is that the proceedings already before the Court do not involve the same or similar or related issues) is not really sustainable. I agree. Although the issues in the two sets of proceedings may not be the same, in my view they are "similar" and certainly involve "related issues". That is in the sense that they involve different legal grounds for challenging the validity of the respondents' Project Choice. Given Mr Caisley's concession (in which Mr Towner concurred) and my agreement with that, nothing further needs to be said on that second limb of s 178(2)(c).

[42] The respondents' contention that the lockout proceedings filed in this Court are not "between the same parties" as in the Authority must be addressed however. I discern the statutory purpose to be that issues affecting the same parties, and which are the same or similar or related, should be dealt with expeditiously in one venue and at one time. To use the example of this case, it would be undesirable to have this Court hearing and deciding the lockout issues (which only it can do at first instance) either at the same time as, or even before or after, the Authority deals with the good faith elements of the same dispute. The requirement in s 178(2)(c) for "same parties" is to ensure that the parties to the proceedings in the Court include those who are before the Authority so that the latter preserve their litigation opportunities.

[43] Here, the parties to the lockout proceeding are FARSA and ANZL. Those are "the same parties" that are before the Authority and it is unnecessary that, for s 178(2)(c) to apply, the additional parties in the Authority (the employees and ANZTPL) must also be parties before the Court.

[44] I do not interpret s 178(2)(c) as requiring a precise identity of respondent parties in both forums. There are many examples in the Act of disputes (to use that term non-technically) that can be brought by different forms of litigation depending on the identity of the persons bringing them or against whom they are brought. Frequent examples involve unions and their members who are employees of an employer. Some sorts of proceedings must be brought by an employee or employees themselves, others can be brought by employees and a union, and yet others are able

to be brought by a union alone. Such proceedings may, however, address the same essential dispute.

[45] Although not suggested by the respondents, the filing of the proceedings alleging unlawful lockout may have been a tactic by the applicants to bolster their chances of removal of the other proceedings in the Authority. If that were the only thread by which the success of their application for special leave hung, I might have examined the merits of that subsequent proceeding more rigorously. Here, however, I have already concluded that the ground under s 178(2)(a) is made out. The applicants' case does not depend on the existence of a s 178(2)(c) ground, although it reinforces the decision to remove and the consideration of all of these matters affecting the same situation in the one hearing.

[46] In this case, also, one of the arguments for the applicants is that the two respondents are, in reality, the single entity ANZL despite being separate companies. It is not disputed that the second respondent is a wholly owned subsidiary (indirectly but at all intermediate stages wholly owned) of ANZL. If the Court is to lift or pierce the corporate veil behind the second respondent as the applicants have as a major plank of their case, then there would be a precise identity of respondents in both sets of proceedings. I accept, also, the applicants' fall-back position that both the affected individual employees and ANZTPL could be added lawfully as parties to the lockout proceedings.

[47] Moving to the respondents' fall-back positions that, even if one or more of the statutory grounds exist the Court should exercise its discretion against removal, these are said to be as follows.

[48] First, it is claimed that the case will involve a number of disputed questions of fact which "Parliament has intended … be resolved at first instance by the Authority". That may be so but, equally, Parliament has enacted a unique hierarchical regime which includes what is known as a challenge by hearing de novo in which all matters before the Authority (including disputed questions of fact) are considered afresh by the Court without regard to the Authority's determination of them. So, to remove a proceeding still allows for a resolution of all disputed facts,

although by adversarial as opposed to investigative means. Even then, the extent to which these methodologies differ in practice is possibly more theoretical than real.

[49] Next, the respondents say that the discretion not to remove should be exercised because to remove will deprive the parties of a right of appeal by hearing de novo. That is said to be, more particularly, in circumstances where the only right of appeal from a judgment of the Employment Court is restricted by the statutory requirements that it be on a question of law and that, by reason of its general public importance for any other reason, the matter ought to be submitted to the Court of Appeal: s 214(3). There is the further restriction, although arguably not applicable in this case, that an appeal from the Employment Court to the Court of Appeal cannot concern the construction of an individual employment agreement or a collective agreement.

[50] That submission is both correct and respectable, although as the court has noted in other cases,[13] Parliament intended some cases and their parties to lose such rights by operation of the removal regime.

[51] Next, the respondents say that the Authority will be able to investigate and determine these proceedings more expeditiously than will be possible in the Court. Again, whether or not that is so, it is now complicated by the existence of the separate but related proceedings alleging an unlawful lockout, which must be heard at first instance in the Employment Court. If there is no removal, the pace of the proceedings in the Authority will, therefore, be governed by the pace of the related proceedings in this Court. As it transpires, there now appears to be time to do so in this Court starting in mid-August 2013, although this will require prompt intense preparation and a limitation to the hearing time of not more than five days. The Authority has scheduled its investigation meeting for the following month.

[52] I concluded that there were no discretionary factors against removal even although the s 178 grounds had been made out.

---

[13] See, for example, *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [51].

[53] For the foregoing reasons I granted special leave under s 178(3) of the Employment Relations Act 2000 to remove the whole of the proceeding to the Employment Court for hearing and decision. It is to be consolidated with the lockout proceeding in file ARC 42/13. Once the pleadings directed to be filed are in order, the Registrar should arrange a prompt directions conference with the trial Judge to timetable the proceedings to an early hearing.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Tuesday 9 July 2013