

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 90
5319822**

BETWEEN JOHAN HEYNEKE &
 BRENNAN PEREIRA
 Applicants

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Eska Hartdegen, Counsel for Applicant
 Kevin Thompson, Counsel for Respondent

Investigation Meeting: 16 February 2011 at Auckland

Submissions received: 16 February 2011

Determination: 10 March 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Issue

[1] This determination addresses the preliminary issue whether the Applicants, Mr Johan Heyneke and Mr Brennan Pereira, raised their personal grievances with the Respondent, Air New Zealand Limited (“ANZL”), within the 90 day period specified in s 114 (1) of the Employment Relations Act 2000 (“the Act”), such that they are entitled to pursue their grievances before the Authority.

[2] Specifically the issue for the Authority to address is whether or not Mr Heyneke and Mr Pereira each raised, within the 90 day period, their personal grievances concerning an alleged misrepresentation, such misrepresentation being the availability of discounted staff travel between South Africa and New Zealand, allegedly made by ANZL during a recruitment campaign undertaken in South Africa

in 2007; and which Mr Heyneke and Mr Pereira claim was a key component in their decision to accept employment with ANZL.

[3] ANZL claim that Mr Heyneke and Mr Pereira raised their personal grievances outside the 90 day time period specified in the Act and do not consent to the personal grievances being raised after the expiration of that period.

Background Facts

[4] In 2007 ANZL, requiring aircraft engineers to resource business growth, undertook a recruitment campaign in South Africa with the objective of recruiting qualified engineers to take up employment in New Zealand. Potential candidates were interviewed both individually and in group sessions.

[5] Mr Heyneke and Mr Pereira said that during this recruitment process in South Africa they were promised by representatives of ANZL that, once employed in New Zealand, ANZL would provide discounted staff travel to and from South Africa for them and their families. As ANZL did not operate direct flights to South Africa, Mr Heyneke and Mr Pereira understood that the discounted staff travel would be provided via a Star Alliance partner, in this case South African Airlines (“SAA”).

[6] Both Mr Heyneke and Mr Pereira accepted offers of employment from ANZL as Aircraft Engineers and commenced employment in New Zealand, Mr Heyneke on 29 January 2008, and Mr Pereira on 28 April 2008.

[7] Whilst still in South Africa Mr Heyneke and Mr Pereira were provided with copies of their Individual Employment Agreements (“the Agreements”). Mr Heyneke and Mr Pereira said that they had read and understood the Agreements and had sufficient time to obtain legal advice on the contents.

[8] The Agreements state under the section headed ‘**General Conditions**’:

Your employment is on the basis of this individual employment agreement entered into between yourself and the Company. Although you are employed on an individual employment agreement, your terms and conditions comprise the applicable terms and conditions contained in ...

*i. Air New Zealand Human Resources Policy & Procedures
as may be amended from time to time*

[9] Appendix 2 of the Agreements in accordance with the requirement as set out in s 65(2)(a)(vi) of the Act provided an explanation of the services available for the resolution of employment relationship problems and stated: “- *to raise a personal grievance, you should make us aware of your problem (verbally or in writing) within 90 days of the personal grievance arising...*” Mr Heyneke and Mr Pereira confirmed that they had read and understood Appendix 2.

Mr Heyneke

[10] [9] The detail of the ANZL Staff Travel Policy was available on the Air New Zealand intranet (“the Intranet”). Mr Heyneke said that as soon as he commenced employment, he had access to the Intranet, and as discounted staff travel was extremely important to him, he had at that time accessed the Intranet to obtain details of the discounted staff travel to South Africa.

[11] Mr Heyneke said he had also become aware upon commencing employment that it was common knowledge among other ANZL employees that discounted staff travel was not available on flights made with Star Alliance partners. In particular he became aware that discounted staff travel was not available with SAA which meant that there could be no discounted staff travel available to the South African aircraft engineers and their families who wished to travel between New Zealand and South Africa.

[12] Mr Heyneke stated that after he became aware there was no discounted staff travel between New Zealand and South Africa, he initially discussed the discounted staff travel issue with Mr John Hugo, Union Delegate. Mr Heyneke said Mr Hugo had told him he would investigate the issue and report back to him. However despite regular discussions with Mr Hugo, Mr Heyneke became dissatisfied with the Mr Hugo’s response.

[13] Consequently, on 3 October 2008 Mr Heyneke went to discuss the issue with Mr Mark Nicholson, General Manager Human Resources for ANZL’s Technical Operations. Mr Heyneke said that although discussion at the meeting was focused on

New Zealand residency issues, he also raised the discounted staff travel issue. Mr Heyneke stated that he had made his grievance on the unavailability of discounted staff travel clear to Mr Nicholson at the meeting.

[14] Mr Nicholson said his recollection of the meeting on 3 October 2008 was that immigration issues had been discussed but he did not recall the discounted staff travel issue being raised and denied that Mr Heyneke had raised a personal grievance in relation to discounted staff travel at that meeting.

Developments and Communications

[15] During April 2009 there were email exchanges between Mr Heyneke and Ms Vanessa Stoddart, ANZL Group General Manager People, concerning the status of approaches ANZL had made to SAA with a view to accessing discounted staff travel for Mr Heyneke and his colleagues.

[16] On 29 April 2009 Mr Hugo sent an email to the South African employees at ANZL. In that email Mr Hugo provided the information that the discussions between ANZL and SAA were still in progress: “– *at present we are still working on SAA ...*” and provided information on various flight options to South Africa using other airlines.

[17] On or around June 2009, or possibly earlier, Mr Heyneke said that he had raised the issue with Ms Christine Whittle, ANZL Staff Travel Supervisor, who confirmed to him that ANZL could not provide him or his colleagues with discounted staff travel on flights with Star Alliance partners. However Ms Whittle had informed Mr Heyneke that ANZL was in discussions with SAA with regard to the issue.

[18] On 2 June 2009 Mr Heyneke emailed Mr Rob Fyfe, CEO of ANZL, requesting that Mr Fyfe investigate the progress being made on the discussions with SAA. Mr Fyfe responded that same day reassuring Mr Heyneke that he personally, in addition to other ANZL personnel working with other airlines overseas, were trying to assist the South African engineers obtain discounted staff travel. Mr Heyneke’s email in response was appreciative of Mr Fyfe’s involvement.

[19] Mr Heyneke stated that he was the person who liaised with ANZL in respect of the discounted staff travel issue, and that he kept his colleagues updated on developments.

[20] On 22 June 2009 Mr Heyneke emailed all the South African aircraft engineers confirming that he had had meetings with ANZL Staff Travel and HR representatives and commenting that: “...*it is looking promising for ID 75 through Perth on SAA.*”

[21] During September 2009 emails were exchanged between Ms Whittle and Mr Heyneke mainly updating Ms Whittle (who had been absent on annual leave), with information about the meeting due to take place between Mr Fyfe and the CEO of SAA the following week.

[22] On 28 October 2009 Mr Nicholson emailed all the South African employees with details of the outcome of discussions which had taken place at a meeting between Mr Norm Thompson, Deputy CEO of ANZL, and the CEO of SAA. In the email Mr Nicholson explained that staff travel was only available on ANZL services and that discounted staff travel could not apply on services operated to and from South Africa by SAA.

[23] On 10 November 2009 Ms Whittle confirmed this information in an email sent to Mr Heyneke and to all the South African employees, stating: “*South African Airways have at this stage declined to conclude a Star Alliance Duty or Personal travel arrangements with Air New Zealand.*” The email concluded by requesting that the recipients did not respond to the email but raised any queries at forthcoming seminars.

[24] Between 23 November and 7 December 2009, ANZL held a series of seminars and presentations for the engineers who had been recruited from South Africa and Canada. Mr Nicholson explained that the seminars had been arranged in order to address queries which had been raised around immigration issues and the availability of discounted staff travel to and from South Africa. Mr Heyneke attended the seminar on 30 November 2009 and Mr Pereira attended the seminar held on 4 December 2009.

[25] It was reported at the seminars that ANZL had been unable to negotiate beneficial travel concessions on SAA.

Mr Pereira

[26] On 21 January 2010 Mr Pereira emailed Mr Fyfe expressing his concern as to the lack of discounted staff travel to and from South Africa and offering suggestions relating to alternative options for discounted staff travel other than through SAA.

[27] Mr Pereira explained that in June 2010 when his father-in-law had died, he had accompanied Mr Hugo to the HR department in order to request assistance with organising flights to and from South Africa. However he had been disappointed when he was informed that the travel cost which the HR department was able to arrange for him and his wife was only marginally less than the full fare cost which could be purchased at a travel agent, and moreover that it would be on a ‘stand-by’ basis.

22 September 2010 Letter

[28] In September 2010 Ms Hartdegen wrote to Mr Nicholson. The letter was headed: “*Johan Heyneke & 9 Others v Air New Zealand Limited – Personal Grievance*”, and stated clearly that the letter was raising a personal grievance pursuant to s 114 of the Act, specifying in detail the basis of the personal grievance and outlined the remedies sought.

Determination

[29] Section 114 of the Act is the section governing the raising a personal grievance. Section 114 of the Act states:

114 Raising personal grievance

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*

- (2) *For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[30] As observed by Judge Travis in reference to s 114 (2) in *Melville v Air New Zealand Ltd*¹: “This means that the grievance must be specified sufficiently to enable the employer to address it, presumably at that time”. The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.² In this case, Chief Judge Colgan stated:

[36] *It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy’s behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[31] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer³.

[32] I find that Ms Hartdegen’s letter dated 22 September 2010 addressed to Mr Nicholson provided the constituent elements required to raise a personal grievance. However the preliminary issue is when did Mr Heyneke and Mr Pereira each have the requisite knowledge for the purposes of s 144(1). A secondary issue is whether or not Mr Heyneke and Mr Pereira raised their personal grievances in accordance with the requirements of s 114(2) of the Act.

¹ [2010] NZEmpC 87 at para [16]

² *Creedy v Commissioner of Police*[2006] ERNZ 517

³ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

[33] Pursuant to s 114(1) there is the requirement that the personal grievance be raised within a period of 90 days beginning either from the date on which the action alleged to amount to a personal grievance occurred, or when it came to the notice of the employee. In accordance with s 114 (2) the personal grievance must be raised with sufficient specificity to enable the employer to address it.

Mr Heyneke

[34] Mr Heyneke gave evidence that he became aware that the representations he believed had been made at the time of his recruitment in South Africa as to the availability of discounted staff travel to and from South Africa, were not correct. This was as a result of the information he had obtained from the ANZL Staff Travel Policy on the Intranet and from conversations with other ANZL employees.

[35] Mr Heyneke's evidence was that he had accessed the ANZL Staff Travel Policy and had conversations relating to these issues with the other ANZL employees shortly after commencing employment with ANZL in New Zealand on 28 January 2008. On this basis it is reasonable to conclude that Mr Heyneke had become aware of the action alleged to amount to a personal grievance, i.e. the unavailability of discounted staff travel to South Africa, by the end of February 2008, or at the latest, the end of March 2008.

[36] Mr Heyneke said that he had discussed the discounted staff travel issue with Mr Hugo, but could not identify the exact date, although the meetings with Mr Hugo may have occurred within the 90 day period specified in s114(1) i.e. within the 90 day period following Mr Heyneke acquiring the requisite knowledge of the action amounting a personal grievance.

[37] However, even if Mr Heyneke had instructed Mr Hugo to raise a personal grievance on his behalf with ANZL, there is no evidence that such an instruction was issued, or that Mr Hugo had acted upon such an instruction by raising a personal grievance on Mr Heyneke's behalf in accordance with s 114.

[38] On 3 October 2008 Mr Heyneke met with Mr Nicholson. Mr Heynecke said that he had raised a personal grievance on the subject of discounted staff travel at that

meeting. There is no written documentation to support Mr Heyneke's claim, but that in itself is not conclusive since a personal grievance may be raised orally⁴.

[39] However the email documentation which followed this meeting lends support to Mr Nicholson's statement that no personal grievance was raised at this meeting in accordance with s 114(2). The later documentation consists of emails sent between Mr Heyneke and members of ANZL management team in the period between April 2009 and October 2010.

[40] The content of these emails contain no reference to the raising, nor the specific details, of a personal grievance alleged to have been raised with Mr Nicholson during the previous October meeting. There is no aggrieved tone, rather there is a tone of partisanship and collaboration which belies the contention that Mr Heyneke had raised a personal grievance.

[41] More fundamentally, even had Mr Heyneke raised a personal grievance at the time of his meeting with Mr Nicholson on 3 October 2008, which I do not accept he did, I find that Mr Heyneke had possessed the requisite knowledge sometime between February and March 2008 for the purposes of s 114(1), which is significantly earlier than 90 days prior to 3 October 2008. Consequently I find that Mr Heyneke did not raise a personal grievance within the 90 day period in accordance with s114 (1) of the Act.

Mr Pereira

[42] Mr Pereira said that, as he was aware that he was not entitled to discounted staff travel until he had been employed with ANZL for 12 months, he did not access the ANZL Staff Travel Policy at the commencement of his employment. Mr Pereira also said that he worked in a side area apart from his South African and other colleagues work area and consequently he was not aware from the conversation of other employees on the main work floor during the early stage of his employment of the fact that discounted staff travel was not available to and from South Africa.

[43] However Mr Pereira appears to have been made aware of the action amounting to a personal grievance during 2009:

⁴ *Creedy v Commissioner of Police*[2006] ERNZ 517 at para [36]

[44] On 29 April 2009 Mr Hugo sent an email to all the South African employees containing information on the situation with SAA. It is possible that Mr Pereira did not receive this, or any of the other emails addressed to the South African employees, although I find this unlikely. However I find it difficult to accept that Mr Pereira was so isolated from his South African colleagues that he had not become aware by this stage, or shortly thereafter, of what was clearly an issue of significant importance to all the South African employees, and one which he said was a key component in his decision to accept employment with ANZL.

[45] There is the evidence from both Mr Heyneke and Mr Pereira himself. Mr Heyneke gave evidence that, following his meeting with Ms Whittle in June 2009, he had become “...*the person who dealt with the company on the matter and I then gave feedback to my co-workers on the progress*”. In his evidence, Mr Pereira agreed that Mr Heyneke was the person who: “*dealt with HR and other staff on the issue of discounted staff travel and he gave us regular updates of what was going on and how things were progressing*”.

[46] Further Mr Pereira had agreed at the Investigation Meeting that he was aware of the information provided by Ms Whittle in June 2009 that ANZL could not provide discounted staff travel on SAA.

[47] Mr Pereira stated that although by the end of 2009 he had become aware that discounted staff travel to South Africa was not available, he had not raised a personal grievance at that point as he relied on the assurances from ANZL that it was trying to obtain an agreement which would provide him and his South African colleagues with discounted staff travel.

[48] Mr Pereira said that he had not formally raised a personal grievance until the letter dated 22 September 2010 was sent to ANZL.

[49] I find that Mr Pereira was aware of the action alleged to amount to a personal grievance by the latter part of June 2009. From that point, the onus was on Mr Pereira to make ANZL aware that he had a personal grievance, specified in sufficient detail to enable ANZL to address it, within the 90 day period. He did not do so. I find that Mr

Pereira did not raise a personal grievance in accordance with ss114 (1) and (2) of the Act.

[50] Mr Heyneke and Mr Pereira confirmed that they had read and understood the terms and conditions of their employment agreements, including Appendix 2 and the requirement to raise a personal grievance within the 90 day time period. I find that they were in possession of the necessary information that they were required to make ANZL aware of a personal grievance within the 90 day period following the date when they had acquired the requisite knowledge for the purposes of s 114.

[51] I determine that Mr Heyneke and Mr Pereira did not raise personal grievances within the statutory timeframe mandated under s 114 of the Act. I am unable to assist them further.

Costs

[52] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority