

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 412
3022633

BETWEEN DAVID NEWALL
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Kevin Thompson for the Respondent

Submissions received: 2 July and 5, 6 and 26 September 2018 from the
Applicant
24 September 2018 for the Respondent

Date of determination: 21 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Newall was employed by Air New Zealand (Air NZ or the company) as a flight simulator engineer. His employment finished in 2013.

[2] Mr Newall filed a claim in the Authority alleging that he was unjustifiably dismissed by Air NZ. In the extensive addenda, filed with what is described as his amended application, other issues are also identified regarding a disciplinary process involving Mr Newall and his being off work on medical grounds.

[3] Air NZ's response to the claim in its statement in reply says that there is no live issues between the parties and the proper course is to strike out the statement of problem. The company says that all issues between Mr Newall and it have been fully and finally settled as is recorded in a settlement agreement signed by them and then certified by a mediator from the Mediation Service pursuant to s 149 of the Employment Relations Act 2000 (the Act). Other issues such as the limitation period are also raised.

[4] Air NZ filed an application to strike out the claim. This was subsequently objected to on Mr Newall's behalf.

[5] A case management conference was held with Mr Newall's then representative and Air New Zealand's representative. The Authority identified that Mr Newall's claim faced a hurdle in the form of the settlement agreement document which is said to be in full and final settlement of all of Mr Newall's claims or complaints against Air NZ.

[6] During the conference call Mr Newall's representative indicated that Mr Newall did not accept that the signatures on the settlement agreement document were his. Alternatively, it was suggested that Mr Newall did not have the necessary mental capacity to enter into the settlement agreement as he was off work on sick leave and had an operation around that time.

[7] Mr Newall's representative mentioned the prospect of going to the police regarding what was in effect a forgery allegation. Air NZ's representative expressed concern about proceeding with Mr Newall's claims in the Authority while there was still a possible police complaint pending. The Authority directed Mr Newall's representative to seek instructions on that issue. No final answer was received on whether the police were pursuing an investigation, although discussions between Mr Newall or his representative and the police were indicated to be occurring.

[8] Mr Newall's representative then pursued a complaint about administrative matters which was dealt with by the Authority's Support Manager. On Mr Newall's behalf a request was made not to progress his claim until the administrative complaint was dealt with. An attempt to organise another case management conference resulted in Mr Newall's representative informing the Authority that he was instructed not to speak at a telephone conference until other matters were dealt with.

[9] Mr Newall subsequently took over his own representation and filed a number of submissions regarding various issues including one seeking that the Member recuses herself from this matter.

[10] Mr Newall has not filed a formal application form seeking recusal. However, the Authority decided it was appropriate to deal with the recusal question before dealing with other issues.

[11] The Authority decided to deal with the recusal question on the papers, giving the parties the opportunity to provide submissions on that issue.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the recusal matter.

Mr Newall's position

[13] Mr Newall filed submissions, without affidavit evidence. He describes his grounds for seeking recusal as that the Authority:

- (i) accepted an un-prescribed application into proceedings;
- (ii) received it into the proceedings without due process for filing;
- (iii) refused to reject the unrecognised document;
- (iv) inappropriately shared his claim against them¹ with the respondent;
- (v) attempted to set up a proceeding whereby Air NZ's lawyers can make a defence for the Authority and then the Authority can simply rule in their favour thus ruling they did nothing wrong; and
- (vi) now trying to order Mr Newall to disrespect his own privilege and privacy and serve the respondent in his claim against them².

[14] The fourth and sixth items appear to relate to Mr Newall not serving his recusal complaint on Air NZ and the Authority then copying it to the company.

[15] Mr Newall describes the application to strike out as unlawful. He also submits that the Authority should of its own motion seek a ruling from the Employment Court. This appears to relate to the recusal issue.

¹ "them" appears to refer to the Authority.

² Ditto.

[16] Mr Newall says that he understands that his former representative was an informed observer of proceedings and expressed his concerns about the allowing of an “unlawful document”, namely the application to strike out, into the proceeding.

[17] Mr Newall also says that the recusal is a matter which is outside the scope of his original application regarding his dismissal and associated matters and “must be treated separately”. And thus the recusal matter should be given a new file number.

Air NZ’s position

[18] The company filed submissions, without affidavit evidence. Air NZ’s position is that it will abide by the decision of the Authority in relation to this matter. It goes on to say that there is nothing which has been put forward by Mr Newall which would constitute a ground, or grounds, to support a successful recusal application.

The recusal question

[19] Mr Newall suggests that the recusal issue should be dealt with separately as it was not related to his original dismissal claim and should be allocated its own file number. However, his dismissal file (3022633) is allocated to me as Authority Member. Mr Newall’s claim that I should recuse myself therefore relates to the dismissal file as I am the Member who is dealing with that matter. The recusal question is thus being dealt with under that same file number.

[20] I do not consider that I should of my own motion seek a ruling from the Court on this matter. I should deal with the recusal application at first instance.

[21] I now turn to consider the law. In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*³ the Supreme Court described the test for judicial bias as whether a fair minded and well informed lay observer would have a reasonable apprehension that the decision maker might not bring an impartial mind to the issues which she or he is required to determine.

[22] The lay observer is presumed to be objective and intelligent as well as reasonably informed about the Authority’s workings and the facts of this particular case.

³ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72.

[23] Disqualification is not appropriate just because one of the parties believe that that the decision maker may decide the case adversely to them.⁴ Rather a reasonable basis for concluding that the case would not be decided impartially must be established. There must be firmly established evidence of pre-judgment.⁵

[24] Mr Newall's concerns are largely focused on the strike out application. He correctly identifies that there is no strike out application form as part of the Employment Relations Authority Regulations 2000.

[25] Due to the Authority's role being to provide determinations according to the substantial merits of the case without regard to technicalities⁶, those regulations provide a limited number of forms compared to, for example, the District Court Rules 2014. However, many practitioners in the Authority use forms similar to those used in courts to make applications. The Authority must then decide how to deal with the subject matter of the application. In the present case that has not occurred as yet. There have been intervening issues regarding the police, the administrative complaint, difficulties with arranging another case management conference, the complaint on the subject of the form itself and the recusal request.

[26] I do not agree that the application to strike out can be regarded as unlawful. Mr Newall's request that the Member recuse herself is not on any particular form. There is no form for a recusal application in the Regulations.

[27] In terms of evidence of possible need for recusal Mr Newall makes reference to his former representative's views. However, those are not the views of an uninvolved observer to the proceeding. Mr Newall's representative was obviously representing one of the parties, and also recorded that he was Mr Newall's "long-time Personal Representative".

[28] Aside from the striking out application, the Authority considered that there was an issue of whether what, on the face of it, appears to be a settlement agreement signed by Mr Newall, presents a hurdle or barrier to his unjustified dismissal claim. Mr Newall is entitled to argue that he did not sign the agreement or that there is some reason to set aside the settlement agreement. Those are things which the Authority will need to consider.

⁴ *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] ERNZ 162 at [34].

⁵ *Supra*.

⁶ S 157(1) of the Act.

[29] I do not accept that raising the issue of the settlement agreement amounting to a hurdle, or not rejecting the strike out application, at an early stage amount to evidence of bias.

[30] I consider that a reasonable and well informed lay observer would conclude that recusal was not necessary. I therefore do not recuse myself.

[31] The Authority officer will be in contact with the parties in the New Year to progress the case.

Costs

[32] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority