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Rachelle v Air New Zealand Limited (Christchurch) [2017] NZERA 1140; [2017] NZERA Christchurch 140 (15 August 2017)

Last Updated: 28 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 140
3001575

BETWEEN GEORGINA RACHELLE Applicant

AND AIR NEW ZEALAND LIMITED Respondent

Member of Authority: Andrew Dallas

Representatives: Applicant in person

Andrew Caisley, Counsel for the Respondent

Investigation Meeting: 19 April 2017 at Queenstown

Submissions received: During the investigation meeting with further information received up to, and including, 15 May 2017

Determination: 15 August 2017

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Georgina Rachelle lodged a statement of problem in the Authority alleging various matters in relation to a customer services agent (CSA) role at Queenstown Airport with Air New Zealand Limited (Air NZ), which the company said she never performed.

[2] Some of the matters raised by Ms Rachelle related to earlier periods of casual and fixed term employment as a CSA at Queenstown Airport with Mt Cook Airline Limited (Mt Cook).

[3] As remedies for her employment relationship problem, Ms Rachelle sought

\$20,000 compensation for hurt, humiliation and injury to feelings and two years lost wages.

[4] Air NZ denied all of Ms Rachelle's allegations and said it never employed her. Air NZ further said that even if she was an employee and one capable of bringing an action or actions under the Act, which it denied, she did not do so within 90 days¹ and

the company did not consent to any such grievances being raised out of time.²

The Authority's investigation

[5] By agreement between the parties, the matter proceeded on a preliminary basis to allow the Authority to investigate the parameters of Ms Rachelle's employment relationship problem.

[6] During an investigation meeting convened for that purpose, I heard evidence from Ms Rachelle and Air NZ employees, Jeremy Holman, Head of Regional Airports and Christine Guthrie, Airport Manager – Queenstown (formerly an employee of Mt Cook in a similar position). The parties provided various documents during the investigation. Written submissions were

also provided.

Factual background

[7] Mt Cook is an operator of regional air services. It is a wholly owned subsidiary of Air NZ. From an air services standpoint, Mt Cook is fully integrated into Air NZ's domestic and, so it follows, international network. Historically, airport ground services were undertaken at regional airports by three Air NZ subsidiaries including Mt Cook.

[8] Mt Cook provided ground-handling services at Queenstown Airport. Such services included "back of house" operations – for example, baggage handling and aircraft loading – and "front of house" operations – for example, customer check-in, customer boarding, baggage and flight disruption management.

[9] To provide "front of house" services, Mt Cook employed around 35 permanent CSAs. The terms and conditions of employment for CSAs were determined by a collective agreement negotiated between Mt Cook and E tū (formerly, in respect of the

airline industry, EPMU).

¹ Employment Relations Act, s 114(1)

² Employment Relations Act, s 114(3)

[10] To manage its labour deployment requirements, Mt Cook supplemented the CSA roles with a pool of casual employees. In addition, in response to seasonal fluctuations in passenger numbers through Queenstown Airport, Mt Cook also engaged seasonal temporary employees. However, such seasonal fluctuations have diminished in recent years as Queenstown has become a winter and summer destination for travellers.

[11] Ms Rachelle was employed by Mt Cook under a fixed-term agreement from 19

May 2014 to 25 September 2014 as a temporary, part-time CSA to "cover peak seasonal work". At the conclusion of the period of employment, Ms Rachelle was offered inclusion on, what was in effect, a casual employment list. A review of a letter issued by Mt Cook to Ms Rachelle dated 26 September 2014 relevantly disclosed it was headed "Casual Engagement" and relevantly provided any engagement was on an "as and when required basis", each time Ms Rachelle was engaged was a "separate employment agreement" and "there [was] no employment relationship between engagements".

[12] While there was some confusion in the evidence about how this arrangement ended, Mt Cook believed Ms Rachelle made herself unavailable for further engagements in April 2015 because she was assisting her husband with a new business venture.

[13] Ms Rachelle sought to make herself available again for casual engagements in

June 2016, however she was advised there was no work available at that time.

[14] In July 2016, Ms Rachelle requested consideration for any future work opportunities at the airport. During a subsequent employee vetting process, a problem was identified with Ms Rachelle's application. Ms Guthrie said Ms Rachelle became "quite rude and demanding", including making threats of litigation and questioning the professionalism of some staff, while Mt Cook was trying to resolve the issue.

[15] In the end, Ms Guthrie intervened to ensure that Ms Rachelle was offered casual employment at Queenstown Airport and to counsel her about the inappropriateness of her behaviour and the negative effect it was having on Mt Cook's view of her. Ms Guthrie said she hoped Ms Rachelle would take her feedback "on board" and make appropriate changes.

[16] By letter dated 18 September 2015, Mt Cook offered Ms Rachelle further casual employment. This letter was headed "Casual Engagement" and stated that any engagement was on an "as and when required basis", each engagement was a "separate employment agreement" and "there [was] no employment relationship between engagements".

[17] Ms Rachelle signed this agreement on 24 September 2015. Between 28

September 2015 and 10 April 2016, she was engaged for a total of 341.7 hours by Mt

Cook.

Air NZ restructures ground services at regional airports

[18] In early 2015, Air NZ, after concluding it could achieve operational efficiencies and consistencies at regional airports by taking direct responsibility for ground services, embarked on an "interest based problem solving" project with E tū to deliver this. The outcomes of the project included a migratory process for permanent employees of the subsidiary companies at regional airports to Air NZ and a new collective agreement to standardise terms and conditions of employment.

[19] The effective date for Air NZ's new regional airports operation was 4 April

2016.

[20] Mt Cook advised its employees, including Ms Rachelle, of the proposed changes at Queenstown Airport and permanent employees were advised their employment with Mt Cook would terminate on 3 April 2016 and they would be engaged by Air NZ on and from 4 April 2016.

[21] As part of its assessment of its requirements at Queenstown Airport, Air NZ decided to move away from Mt Cook's model of "up sourcing" labour for seasonal peaks and employ more permanent CSAs.

[22] Air NZ commenced a recruitment process, which was led by Ms Guthrie, for these positions in late 2015. Ms Rachelle applied but was not successful. This was communicated to her on two occasions in December 2015, the latest being during a meeting on 22 December. Ms Guthrie said she gave Ms Rachelle a number of reasons for her non-appointment including concerns about Ms Rachelle's professionalism, behaviour and teamwork.

[23] While the evidence was slightly confusing here, Ms Rachelle alleged during the meeting, or around this time, Ms Guthrie made a disparaging remark about the state of her marriage. Ms Guthrie denied this. She also said Ms Rachelle had regularly engaged other Mt Cook employees in discussions about her personal life. Ms Rachelle, in turn, denied this.

[24] Ms Rachelle maintained she was not offered a position with Air NZ for a variety of reasons including because she swore at a pilot. However, this was denied by Ms Guthrie who said that while she was aware of the incident, it had not led to a disciplinary investigation – primarily, because Ms Guthrie accepted Ms Rachelle was correct in her application of the civil aviation rule giving rise to the incident.

[25] Ms Rachelle continued to be engaged by Mt Cook until 20 February 2016 but seemingly made herself unavailable for further work from that time until 11 April 2016 (a date after Mt Cook had ceased undertaking ground services at the airport).

Air NZ commences ground services at Queenstown Airport

[26] In March 2016, in anticipation of taking over Mt Cook's ground services at Queenstown Airport, and as cover for special events such as the Queenstown marathon and winter festival, Air NZ contacted five or six people including Ms Rachelle to ask if they would be prepared to be engaged as casual CSAs.

[27] On 31 March 2016, Ms Rachelle was issued with a letter by Mr Holman which set out the proposed casual employment arrangement. The casual agreement was in similar terms to the earlier casual agreements issued by Mt Cook. Specifically, the agreement stated:

You are being offered casual employment, so the nature of the relationship is a casual "as an when required" employment relationship. It recognises that from time to time you work for [Air NZ] on a casual basis, for a limited period

Because you are a casual employee, there is no guarantee [Air NZ] will offer you work and should have no expectation of regular or continuing employment with [Air NZ].

[Air NZ] will endeavour to provide reasonable notice to you regarding when you be offered casual work. The nature of the casual relationship means that you do not have to accept any work offered to you by [Air NZ]

....

[28] Ms Rachelle signed the casual agreement on 4 April 2016.

[29] On 27 April 2016, Ms Rachelle sent Ms Guthrie an email detailing her (and her lawyer's) concerns about not being offered a permanent CSA position including that Air NZ had not "taken into account [her] work ethic and performance on the job, and you have decided your employment discussions based on my personal life".

[30] On 11 June 2016, Mr Holman emailed Ms Rachelle and advised he had reviewed the recruitment process for permanent CSAs at Queenstown Airport and advised Air NZ stood by its decision not to appoint her. Mr Holman stated in the email: "[f]or completeness, while you were considered to be a hard worker, there was concern about your ability to work collaboratively in a team environment".

[31] Ms Rachelle was never engaged by Air NZ under the casual agreement and it was terminated by Mr Holman in a letter dated 12 June 2016.

[32] As stated above, on 15 August 2016 through her (then) lawyer, Ms Rachelle raised personal grievances with Air NZ for unjustifiable dismissal and unjustified disadvantage for unilateral reduction in hours.

Issues

[33] The issues for investigation and determination are:

(i) What are the parameters of Ms Rachelle's employment relationship

problem?;

(ii) Are the various allegations made by Ms Rachelle personal grievances as that term is understood and if so, have they been raised within 90 days?;

(iii) Is Air New Zealand the correct respondent?;

(iv) If not, is the correct respondent Mt Cook Airline Limited and if so, should that company be joined to the proceedings?; and

(v) Should, if applicable, either party contribute to the costs of the other?

Ms Rachelle's employment relationship problem

[34] One of the central preliminary issues before the Authority was to determine what the parameters of Ms Rachelle's employment relationship problem were, assuming one was found to exist with either or both Air NZ and Mt Cook. This was because Ms Rachelle's employment relationship problem evolved over time. In her statement of problem, Ms Rachelle alleged "12 counts of misconduct against [Air NZ] for breaching its own code of conduct towards her and unlawful practices carried out towards her in a recruitment process". Whereas, Mr Rachelle's (then) lawyer had raised personal grievances with Air NZ for unjustifiable dismissal and unjustified disadvantage.

[35] During the investigation meeting, Ms Rachelle stated she was not pursuing these personal grievances because her lawyer did not understand her matter. Ms Rachelle's final position, also adopted at the investigation meeting, was that Air NZ (and/or Mt Cook) had discriminated against her. When asked by the Authority about what prohibited ground of discrimination she was alleging, Ms Rachelle said "marital status".³

[36] In fairness to Ms Rachelle, as a self-represented litigant, the Authority has proceeded on the basis of investigating the entire circumstances of her involvement with Air NZ and Mt Cook.

Claims against Air NZ

Unjustifiable dismissal – termination of casual employment

[37] Air NZ said no valid claim could be made against it because the company never employed Ms Rachelle. Air NZ said the offer of casual employment was "conditional" and she was, in fact, never engaged by the company under the casual agreement, which it said created no employment relationship. In support of this proposition, Counsel for Air NZ referred to several determinations of the Authority.⁴

[38] I do not completely accept this submission. In my view, there was an employment relationship between Air NZ and Ms Rachelle because she was a person intending to work, albeit as a casual employee.⁵ Section 6 of Act does not contain a definition of, reference to, or create sub-categories of "employee" – for example "permanent", "temporary" or "casual". However, this does not assist Ms Rachelle in the present circumstances because she never actually performed any work under the

casual agreement for Air NZ. Therefore, Ms Rachelle is unable to, for example, point to the kind of extensive and consistent performance of work that might bring her claim

within the ambit of s 103(1)(a) of the Act.⁶

³ Employment Relations Act, s 105(b)

⁴ *Gwilliam v KPMG and Westpac Banking Corporation*, ERA Auckland, AA 354/03, 26 November

2003, *Rogers v UNITEC Institute of Technology*, ERA Auckland, AA370/03, 5 December 2003 and

Barnes v Telecom New Zealand Limited, ERA Christchurch, CA20/06, 14 February 2006.

⁵ Employment Relations Act, s 6(1)(b)(ii) and, as further defined in, s 5.

⁶ See, *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 225

Unjustified action – unilateral variation of hours

[39] Ms Rachelle never worked for Air NZ under the casual agreement. There was no evidence of her being offered any hours of work under that agreement, let alone having those hours unilaterally varied or withdrawn. Even if properly raised, I find

there is no basis to this personal grievance.

Non-appointment to CSA role

[40] Air NZ said even if it was found that Ms Rachelle could bring a claim arising out of her non-appointment to a permanent CSA role, which it denied, she did not raise a personal grievance within 90 days.

[41] I find, on the evidence before the Authority, Ms Rachelle did not raise a personal grievance about this matter within 90 days. Also on the evidence, I find there are no grounds for granting leave to allow the grievance to be raised out of time under s 114(a) of the Act.

Discrimination – marital status

[42] Ms Rachelle’s claim of discrimination on the basis of marital status appeared to be both a claim arising out of non-appointment to a permanent CSA role and a stand-alone claim. Air NZ said even if it was found that Ms Rachelle could bring the claim, which it denied, she did not raise a personal grievance within 90 days.

[43] I find, on the evidence before the Authority, Ms Rachelle did not raise a personal grievance about this matter within 90 days and no grounds exist for granting leave to allow it to be raised out of time.

Summary

[44] I find Ms Rachelle does not have any personal grievance claims against Air

NZ.

Does Ms Rachelle have any claims against Mt Cook and if so, should Mt Cook be joined to the proceedings?

[45] All of Ms Rachelle’s claims in her statement of problem were directed at Air

NZ and Mt Cook was not named by her as a party to proceedings.

[46] However, Ms Rachelle would invite the Authority to, in effect, “lift the corporate veil” between Air NZ and Mt Cook because she believed she had been employed by Air NZ the whole time. Ms Rachelle said the evidence for this included her Air NZ uniform, of which she provided a picture, and her interactions with Air NZ’s human resources and payroll, which included email and bank records. Even if the basis for such an inquiry existed, and I find it does not in this case, it would not assist Ms Rachelle because, based on the forgoing, there was no evidence of valid personal grievance claims being raised against Air NZ.

[47] Having reviewed the evidence and considered the submissions, I am satisfied Ms Rachelle does not have any personal grievance claims against Mt Cook. Consequently, there is no basis upon which to join Mt Cook to these proceedings under s 221(a) of the Act.

Costs

[48] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.⁷

Andrew Dallas

Member of the Employment Relations Authority

7 PBO Ltd v Da Cruz [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106]-[108].