

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 231/08  
5120034

BETWEEN	ANA-MARIE VELTMANS First Applicant
AND	RALPH WARD Second Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Helen White for Applicants Kevin Thompson for Respondent
Consideration on Papers	2 July 2008
Determination:	4 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**The application**

[1] The applicants, Ms Veltmans and Mr Ward, seek removal of their employment relationship problem to the Employment Court on the grounds that an important question of law is likely to arise in the matter other than incidentally.

[2] The respondent opposes the application on the basis that the application as currently framed does not raise justiciable questions of law and, even if framed differently, any questions of law would be incidental to the primary inquiry which is essentially a factual one.

[3] By the consent of the parties I have determined the application on the papers lodged in the Authority.

**Employment relationship problem**

[4] Ms Veltmans and Mr Ward are both employees of the respondent and are married to each other. Mr Ward had, until recently, been employed as a Flight

Services Manager ("FSM") pursuant to an individual employment agreement. As a result of disciplinary action Mr Ward was demoted and his salary reduced from \$85,367.12 to \$34,790. Ms Veltmans is employed as a Flight Attendant Pacific Class pursuant to the Pegasus Collective Agreement.

[5] Both applicants had access to a staff privilege which allows employees discounted travel. The policy on discounted travel prohibits its use if the employee or their nominee is on sick leave or ACC, unless it is approved by the Group General Manager, HR.

[6] In early 2007 Ms Veltmans was on leave due to a wrist injury. Mr Ward used his staff travel privilege to purchase discounted flights for Ms Veltmans so that she could accompany him as his nominee on a tour of duty on which he was working.

[7] During the disciplinary investigation the respondent also investigated several other breaches of the respondents policies, specifically:

- that Mr Ward facilitated a seat upgrade for Ms Veltmans when an upgrade had not been purchased; and
- that Mr Ward facilitated the improper use of crew transport in contravention of the company code of conduct.

[8] The respondent found that the actions of both Mr Ward and Ms Veltmans constituted serious misconduct. Ms Veltmans was issued with a final written warning, and Mr Ward was issued with a final written warning and demoted to the position of flight attendant. Both applicants have had their staff travel privileges withdrawn permanently.

[9] The applicants claim their employment has been disadvantaged by the unjustified actions of the respondent. The applicants also claim the Respondent's Travel Policy is unreasonable as it inappropriately discriminates against the sick and injured and acts punitively and/or breaches the prohibition on discrimination on the grounds of disability and employment status.

[10] The respondent denies the claims.

## The application for removal

[11] The grounds for removal are prescribed by section 178 of the Employment Relations Act 2000. In *Hanlon v International Educational Foundation Inc* [1995] 1 ERNZ the Employment Court set out the following propositions to apply to an assessment of section 178(2)(a):

- It is necessary to identify a question of law arising in the case other than incidentally;
- It is necessary to decide the importance of the question;
- It is not necessary that the question should be difficult or novel;
- The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some importance aspect of it or strongly influential in brining about a decision of the case or material part of it.

[12] Ms White submits that the employment relationship problems between the applicants and the respondent raise a number of important questions of law:

- Whether the employer's applied interpretation of its sick leave and staff travel policies breach the Human Rights Act 1993 s21(1)(k) and s21(1)(h) by discriminating unlawfully;
- Whether the employer's applied interpretation of its sick leave and staff travel policies breach s104 and s105 of the Employment Relations Act with regard to the prohibition on discrimination on the grounds of disability and employment status.
- Whether the policies are unreasonable;
- Whether it is fair or reasonable to refuse to allow recording of disciplinary meetings;
- Whether an employer can discipline an employee for breach of a policy which relates to a benefit and which the employer claims to be beyond the jurisdiction of the Court;
- Whether the contractual right to demote Mr Ward entitled the employer to reduce Mr Wards pay rate and place him on a different Employment Agreement;
- Whether the reduction in salary and demotion to the lowest rank of flight attendant is justifiable; and
- Whether the wording of the policies is ambiguous.

[13] Mr Thompson submits that the applicant has not raised any justiciable questions of law and any questions of law would be incidental to the primary inquiry which is essentially a factual one. Further:

- There will be a number of factual disputes to be resolved which ought to be addressed by the Authority in the first instance;
- The legal and factual issues are interwoven;
- There exists a right to challenge in the event of a party being unhappy with the outcome in the Authority;
- Removing the entire proceeding now could deprive one party of a general right of appeal;
- Further mediation opportunities may be lost in the event that the entire matter proceeds to the Employment Court.

### **Determination**

[14] The statute provides that the Authority is to determine matters at first instance and should generally do so unless it is satisfied that one of the removal criteria is met and that it is appropriate, given the Authority's residual discretion, for it to remove the matter.

[15] It is not always easy to discern the distinction between a question of law and a question of fact. It is generally true that while questions of fact are concerned with the factual basis on which law is applied, whether a set of facts satisfies a certain legal definition or requirement is a question of law. Similarly, the application of the law to a set of facts is a question of law. A mixed question of fact and law arises where both questions of fact and law are in dispute.

[16] I am satisfied that the resolution of the issues raised by the applicant involves mixed questions of fact and law. The nature of the questions of law concern the ability of the respondent to implement and apply its sick leave and travel policies which exclude some employees while including others and whether the employer in applying its policies is in breach of the prohibited grounds of discrimination.

[17] There are a number of questions posed by the applicant which relate to enquiries posed by the Authority daily and there is nothing complicated about those enquiries. For example, the questions concerning the application and operation of Mr Ward's employment agreement are quite properly the domain of the Authority by investigation at first instance, consistent with the objects and intent of the Act.

[18] I am persuaded that the enquiry relating to the operation and interpretation of the Sick Leave and Travel Policies against the background of the prohibited grounds for discrimination set out in s105 of the Act is an important question of law for the purposes of s178(2)(a) of the Act. That question is important because it will be decisive of matters now in dispute between the parties in a material way.

[19] It is also my opinion that in all the circumstances the Court should determine those matters. There is a residual discretion reserved to the Authority on that basis at s178(2)(d) of the Act.

[20] Relevant too in my assessment is the likelihood of challenge. As far as I am able to assess from what is apparent on the papers at this point in time, it seems to me there is certain inevitability about the prospect of either or both parties ultimately seeking a *de novo* challenge in the Court given the stakes involved for both parties.

[21] It is appropriate that I should exercise my discretion and remove this matter to the Employment Court to hear and determine without the Authority investigating the matter.

**Pursuant to s178 of the Employment Relations Act 2000 the application for the removal of the whole matter to the Court is granted.**

### **Costs**

[22] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms White is to lodge and serve a memorandum as to costs within 14 days of the date of this determination. Mr Thompson is to lodge and serve a memorandum in reply thereafter but 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