

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 79
ARC 95/09**

BETWEEN	MARK FRANCIS RAYMOND SIMICH First Plaintiff
AND	ALASTAIR MURRAY STEWART RUSSELL Second Plaintiff
AND	BRYAN TOURELL Third Plaintiff
AND	KENNETH CARRAN MACLEAN FINLAYSON Fourth Plaintiff
AND	CHRISTOPHER ROBERT JAMES PETERS Fifth Plaintiff
AND	WILLIAM MICHAEL BENGE Sixth Plaintiff
AND	PETER MATHEWS Seventh Plaintiff
AND	PHILIP ROWAN Eighth Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 6 July (in Auckland in Chambers by telephone conference call)

Counsel: Jim Roberts and Sarah Holderness, counsel for plaintiffs
Kevin Thompson, counsel for defendant

Judgment: 8 July 2011

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN

[1] Further interlocutory decisions need to be made on this file because there is trenchant disagreement between the parties even as to whether certain matters should be dealt with as interlocutory questions.

[2] I start by recording what has been agreed should be the subject of the next interlocutory hearing on 19 September 2011 and other directions that can be made on the file by consent.

[3] First, the defendant's application to strike out the plaintiff Mr Bengé's first cause of action (a statutory personal grievance) on limitation grounds will be heard on that date.

[4] Next, also by agreement, the Court will hear and determine, as a preliminary question before trial:

The extent and scope of the implied term or terms, if any, as pleaded in paragraphs 3.25 to 3.28 of the amended statement of claim and in the affirmative defences in the amended statement of defence [which should be described as the defendant's amended statement of defence to the plaintiffs' amended statement of claim]; ...

[5] Next, the parties agree that the trial will be on questions only of liability, preserving remedies for subsequent hearing and decision if necessary.

[6] Next, I deal with those applications the preliminary hearing of which are opposed. The first is by the plaintiffs that they be entitled to elect two of them as representative of the group based on which of the two relevant pilot union groups they belonged to and therefore which applicable collective agreements applied to them. The plaintiffs propose that the cases of these two nominated plaintiffs (as yet unnamed) will be those to go to trial with judgment thereon to apply to the other plaintiffs, at least to the extent that the issues are the same in their cases.

[7] This proposal was opposed by the defendant on the basis that the plaintiffs all have or had different levels of seniority within the company which may in turn produce different results for each individual plaintiff depending upon the "reasonable accommodation" that the Court may consider the defendant should have made to provide for the circumstances of each of the plaintiffs.

[8] I consider the defendant's argument is more persuasive and that time and expense saved by running the cases of only two of the plaintiffs may ultimately be illusory. So the trial, to the extent and when it occurs, should be of the cases of all plaintiffs.

[9] Next, the defendant has applied to strike out the third, fourth and fifth causes of action brought by each of the plaintiffs. This, too, is on limitation grounds. The plaintiffs say, however, that these causes of action should be permitted to go to trial. The gravamen of the plaintiffs' objection was, however, that this being a strike-out application, the defendant should be confined to making submissions on the pleadings and not be entitled to call evidence. Mr Roberts relied on the provisions of the High Court Rules, submitting that this Court should be bound by, and follow, these in the absence of express strike-out provisions governing this Court's procedure.

[10] As I explained at the hearing, this is not an application to strike out proceedings or causes of action in a proceeding based on an allegation that, even assuming the alleged facts are all proved, the law establishes clearly that there is no sustainable cause of action. The defendant's application in this case is, rather, in the nature of a strike-out on limitation grounds which will require some relevant evidence to decide.

[11] I agree with the defendant that it should be entitled to have this application heard as a preliminary question to enable it to go to trial knowing the cause or causes of action in which it is at risk of a finding of liability. Although there may be some overlap between the evidence relating to these impugned causes of action and those which are indisputably justiciable, there is the prospect of not insignificant saving of time and expense if the matter is able to be dealt with as a preliminary issue and the defendant is successful. In these circumstances, the hearing on 19 September 2011 will include the defendant's application to dismiss the third, fourth and fifth causes of action of each of the plaintiffs.

[12] Next, I deal with the second question that the defendant seeks to have determined as a preliminary issue of law and which, if it is successful, the defendant

says will reduce significantly the scope of evidence required to be heard at trial.

This question is as follows:

In relation to the Convention of International Civil Aviation, and the Standards promulgated pursuant to that Convention, and in particular the standard contained in Annex 1 – Personnel Licensing 2.1.10.1, whether the difference filed by New Zealand has any application beyond New Zealand territorial limits to the extent that the difference purports to apply a more liberal, or lesser, standard than 2.1.10.1.

[13] This relates to the extent to which the defendant may have been entitled in law to ‘accommodate’ (using this word in the human rights discrimination sense) the plaintiffs by continuing to use them as operational B747-type captains. The ‘difference’ filed by New Zealand in respect of that international convention will, as a matter of law, and on the defendant’s case, affect the geographical extent to which the defendant may have continued to deploy the plaintiffs as operational pilots. Determination of this issue will be essentially a question of law unaffected by the personal circumstances of the plaintiffs. Decision of this question will require the interpretation of the international convention and application of it to domestic law governing the employment of the plaintiffs.

[14] I have concluded that, as a question of law applicable to the cases of all of the plaintiffs irrespective of their individual circumstances, it will be appropriate to hear and determine this as a preliminary question on 19 September 2011.

[15] All applications presently filed will, therefore, be heard as preliminary issues in the Employment Court at Auckland at 9.30 am on 19 September 2011. The briefs of any relevant evidence to be adduced in support of these applications by the defendant must be filed and served no later than three weeks before that interlocutory hearing, with the plaintiffs doing likewise, in respect of evidence in opposition, no later than one week before the interlocutory hearing. Counsel should attempt to confer with a view to the defendant providing the Court with a common bundle of documents (relevant for the purposes of this interlocutory hearing) no later than three working days before the hearing.

[16] No later than five working days before the hearing, the defendant should file and serve a synopsis of its submissions to be made at the hearing with the plaintiffs doing likewise no later than one working day before the hearing.

[17] Leave is reserved for either party to apply for any further interlocutory orders or directions on reasonable notice.

[18] I reserve questions of costs on these applications.

GL Colgan
Chief Judge

Judgment signed at 8.45 am on Friday 8 July 2011