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Ekinci v Civil Aviation Safety Authority [2014] FCA 905 (15 August 2014)

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FEDERAL COURT OF AUSTRALIA

Ekinci v Civil Aviation Safety Authority [\[2014\] FCA 905](#)

Citation: Ekinci v Civil Aviation Safety Authority [\[2014\] FCA 905](#)

Appeal from: Ekinci v Civil Aviation Safety Authority [\[2014\] AATA 424](#)

Parties: **REHA EKINCI v CIVIL AVIATION SAFETY
AUTHORITY**

File number(s): NSD 722 of 2014

Judge(s): **GRIFFITHS J**

Date of judgment: 15 August 2014

Catchwords: **PRACTICE & PROCEDURE** – application for stay of
order made by AAT

Legislation: [Administrative Appeals Tribunal Act 1975](#) (Cth)
[Civil Aviation Act 1988](#) (Cth) [ss 9A, 28](#)(1)(a)

Date of hearing: 15 August 2014

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 24

Counsel for the Appellant: Mr J A Ribbands

Solicitor for the Appellant: Maitland Lawyers

Counsel for the Respondent: Mr B J A Shields

Solicitor for the Respondent: Civil Aviation Safety Authority

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 722 of 2014

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

**BETWEEN: REHA EKINCI
Appellant**

**AND: CIVIL AVIATION SAFETY AUTHORITY
Respondent**

JUDGE: GRIFFITHS J
DATE OF ORDER: 15 AUGUST 2014
WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The interlocutory application filed on 7 August 2014 be dismissed.
2. The appellant is to pay the respondent's costs of and incidental to the interlocutory application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 722 of 2014

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: REHA EKINCI
Appellant
AND: CIVIL AVIATION SAFETY AUTHORITY
Respondent

JUDGE: GRIFFITHS J
DATE: 15 AUGUST 2014
PLACE: SYDNEY

REASONS FOR JUDGMENT

1. The Court has before it an interlocutory application filed on 7 August 2014 by the appellant in proceedings which have been commenced in the Court pursuant to [s 44](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) (**AAT Act**). The application seeks to stay the operation of one of the orders made by the Administrative Appeals Tribunal (**AAT**) below. Before describing that order, it is appropriate if I set out in general terms some background matters.
2. The appellant, Mr Reha Ekinci, has been involved for many years in the civil aviation business. He is the sole shareholder in two companies who hold Air Operator Certificates (**AOCs**). Those two companies are Air Combat Australia Pty Limited and Cloud Nine Helicopters Pty Limited (**the AOC**

Companies). I understand that, until recently, he was also the sole director of both those companies. The AOC Companies conduct their business from Camden Airport. The respondent, the Civil Aviation Safety Authority (← CASA →), made series of decisions which had a severe adverse impact on the operation of those two businesses.

3. On 24 January 2014, ← CASA → cancelled or suspended a series of licences, certificates, approvals and permits which were held by Mr Ekinci and the AOC Companies. Those primary decisions included: cancelling Mr Ekinci's aircraft maintenance engineer licence (**LAME**), his chief pilot approval and his chief flying instructor approval. ← CASA → also cancelled the AOCs of the AOC Companies. There were various other regulatory decisions that were made by ← CASA → on that day which are not relevant for present purposes.
4. Mr Ekinci, together with the AOC Companies, appealed ← CASA →'s decisions to the AAT. On 27 June 2014, the AAT gave reasons for its decision. It set aside the primary decisions made by ← CASA →, some of which I have described above and in substitution therefore made the following decisions.
5. First, that LAME L187910 (held by Mr Ekinci) be suspended for one year.
6. Secondly, it determined that it be a condition of the certificate of approval that the company, as defined, employ a suitably qualified LAME other than Mr Ekinci who is acceptable to ← CASA → to be responsible for the supervision and certification of all maintenance activities undertaken by Air Combat Australia Pty Limited.
7. Thirdly, and it is this particular condition which is the subject of Mr Ekinci's present stay application, the AAT determined that it be a condition of the AOCs held by the AOC Companies, that those companies employ a person or persons to hold the position of chief executive officer other than Mr Ekinci and who is acceptable to ← CASA → for the purposes of satisfying the requirements of [s 28\(1\)\(a\)](#) of the [Civil Aviation Act 1988](#) (Cth) ([Civil Aviation Act](#)) (**Order 2(c)**).
8. The AAT also determined to cancel the chief pilot approvals and chief flying instructor appointments held by Mr Ekinci.
9. The appeal which has been filed in the Court has only been brought by Mr Ekinci. Currently, neither of the two AOC Companies is a party to the appeal.
10. The grounds of the notice of appeal as originally filed are as follows:
 1. The Tribunal erred in law in that it suspended the applicant's engineer licence L187910 for a period of one year and in so doing imposed a punishment which was beyond the power conferred upon it under the provisions of [section 269](#) of the [Civil Aviation Regulations 1988](#).
 2. The Tribunal misconstrued the entitlements of the applicant to sign for maintenance carried out on VFR aircraft equipped with a single generator in respect of work carried out on the categories of electricals, instruments and radio.
 3. The Tribunal misconstrued the extent of the privileges afforded by [Part 66](#) of the MOS transitional provisions relating to the limited maintenance that can be carried out on VFR aircraft equipped with a single generator.
 4. The Tribunal erred in preventing the applicant from being responsible for the supervision and certification of all maintenance activities undertaken at Air Combat Australia Pty Ltd in circumstances where:
 - a. It purported to suspend his aircraft engineer licence for a period of one year and made no corresponding order which would otherwise entitle him to be responsible for the supervision and certification of all maintenance activities undertaken at Air Combat Australia Pty Ltd at the expiration of that suspension;
 - b. Alternatively the conclusion reached by the Tribunal at [60] was based upon its findings of two discreet errors in relation to the failure of the applicant to obtain the second signatory to maintenance records notwithstanding that the maintenance had in fact been carried out;
 - c. The exercise of the Tribunal's discretion to make such an order was one that no reasonable decision maker could have come to on the evidence before it.

5. The Tribunal erred in ordering that both Air Combat Australia Pty Ltd and Cloud Nine Helicopters Pty Ltd not employ the applicant in the position of Chief Executive Officer (however described) for the purposes of satisfying the requirements of [Section 28\(1\)\(a\)](#) of the [Civil Aviation Act 1988](#):
 - a. when there was no evidence before the Tribunal which would permit a finding that were the applicant otherwise employed in that position, he would interfere with or otherwise override the chain of command of those corporate entities; and/or
 - b. The exercise of the Tribunal's discretion to make such an order was one that no reasonable decision maker could have come to on the evidence before it.
6. The Tribunal erred in cancelling the applicant's chief pilot approvals and chief flying instructor appointments in that:
 - a. It conflated in its reasons for decision a series of allegations raised against the applicant which were nonetheless dismissed or otherwise stated as not being of any weight to the Tribunal in its determination with those issues which were relevant to the exercise of their discretion;
 - b. No reasonable Tribunal could exercise its discretion in such a way when based upon the relevant findings that it made.
7. The Tribunal denied the applicant procedural fairness in that it used the evidence before it as to issues of alleged breaches of rules and procedures in an entirely unexpected way, namely to support the conclusion described in [122] and [130] of the Tribunal's decision that the applicant was or would be unable to liaise and cooperate with officers of the respondent.
8. The Tribunal applied the wrong test in determining to:
 - a. Suspend the applicant's aircraft maintenance engineer's licence;
 - b. Cancel the applicant's chief pilot approvals;
 - c. Cancel the applicant's chief flying instructor appointments

as described in [129] of the Tribunal's decision.

9. Alternatively, insofar as the decision to cancel those was based upon "a series of significant and important failures to perform those functions and comply with the regulations designed to ensure safety of air operations", as described in [129], the findings of the Tribunal which were relied upon by it to support that conclusion were such that no reasonable decision maker could conclude that suspension and/ or cancellation of the relevant authorisations was the correct or preferable decision and/or within the scope of their discretion.

10. The Tribunal erred in that it had no power to cancel ATO Delegation  CASA  64/06 as it was not a reviewable decision that was before the Tribunal for determination.

11. It should also be noted that, during the course of the hearing, Mr Ribbands, who appeared for Mr Ekinci, sought and was granted leave to amend the notice of appeal in respect of ground 7 so as more squarely to raise a complaint of denial of procedural unfairness by the AAT in the making of Order 2(c). The amended ground 7 now reads as follows:

7. The Tribunal denied the applicant procedural fairness in that it used the evidence before it as to issues of alleged breaches of rules and procedures in an entirely unexpected way, namely:
 - a. to support the conclusion described in [122] and [130] of the Tribunal's decision that the applicant was or would be unable to liaise and cooperate with officers of the respondent; and
 - b. to make the order contained in paragraph 2(c) of the Tribunal's decision.

12. The Court's power to grant a stay of an order such as Order 2(c) is to be found in s 44A(2) of the AAT Act, which is as follows:

(2) Where an appeal is instituted in the Federal Court of Australia from a decision of the Tribunal, that Court or a Judge of that Court may make such order or orders staying or otherwise affecting the operation or implementation of either or both of the following:

(a) the decision of the Tribunal or a part of that decision; and

(b) the decision to which the proceeding before the Tribunal related or a part of that decision;

as that Court or Judge considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the appeal.

13. The effect of that provision is to confirm that merely because an appeal has been lodged against a decision of the AAT, does not mean that the operation of the decision or its implementation is affected. However, there is a discretion in the Court to make an order staying or otherwise affecting the operation or implementation of either part or all of the AAT's decision if the Court considers that it is appropriate for the purpose of securing the effectiveness of the hearing and the determination of the appeal.
14. In relation to the nature of the Court's discretion to grant a stay, Mr Ribbands referred to the familiar tests applicable to interlocutory injunctive relief. Those tests are, of course, to ask whether or not there is a serious question to be tried and also to determine where the balance of convenience lies. I am content to approach the application in that fashion.
15. I am satisfied for the purposes of this interlocutory application that there is a serious question raised by the amended ground 7 of the amended notice of appeal. Mr Shields, who appeared for  CASA , frankly acknowledged that there is nothing in the AAT's reasons for decision which addresses Order 2(c) as it relates to the position of chief executive officer. Mr Shields also informed the Court that the issue was not one which was directly raised during the course of the proceedings below.
16. In indicating there is a serious question to be tried as to whether Mr Ekinci was denied procedural fairness in this respect. I am not suggesting that there is no scope for arguments to be put as to the materiality of any such error – if there be such an error. Nor am I suggesting that there are no implications which may arise from the fact that neither of the AOC Companies is a party to the appeal and neither of them complains of any procedural unfairness vis-à-vis themselves, notwithstanding that they are the holders of the AOCs which are directly affected by the relevant condition.
17. I am more troubled about the balance of convenience. The AAT made some serious adverse findings in respect of Mr Ekinci. Those findings are summarised in [124]-[127] of the AAT's reasons for decision and are as follows:

124. With respect to Mr Ekinci's abilities and performance as a commercial charter pilot and flight instructor there has been no question raised as to his competence. However those charged with the higher responsibility of supervision and oversight of other pilots and instructors must ensure they satisfactorily undertake their duties, responsibilities and obligations that arise under relevant legislation to provide for the safety of air navigation. The role and responsibilities of such supernumerary positions as Chief Pilot and Chief Flying Instructor are necessarily of a much higher order than other persons in the aviation industry.

125. In *Quadrio and Civil Aviation Safety Authority* [\[2011\] AATA 709](#) the Tribunal [at 73] found:

Mr Quadrio's inability or unwillingness to acknowledge his demonstrated shortcomings only reinforces our view that he is not a fit and proper person to have the responsibilities and to exercise and perform the functions and duties of a commercial pilot. [74] It is undoubtedly the case that pilots will from time to time, fall into error. In our view a pilot who does so and who has a proper

appreciation of the importance of air safety will acknowledge the error and reflect upon it in order to prevent a recurrence. Mr Quadrio had done none of that. On the contrary he sees himself as the persecuted victim of an “overly protected bureaucracy”.

126. The standard of fitness and propriety must be measured against the duties, responsibilities and obligations entrusted to operators by the Authority and it is incumbent upon those to whom these privileges are entrusted that they behave in such a manner that the safety of the air navigation system is not jeopardised and indeed is enhanced.
127. Having regard to the above considerations the Tribunal considers that Mr Ekinci does not satisfy us that he is presently a fit and proper person to perform his duties and responsibilities as a LAME, Chief Engineer, Chief Pilot and Chief Flying Instructor in relation to the operations being conducted by the Applicants.
18. It can be seen that in those paragraphs the AAT was not directly addressing the question of Mr Ekinci’s suitability to either hold the position of CEO or perform the duties of CEO for either of the AOC Companies. Nevertheless, it concluded that he was not a fit and proper person to perform the duties and responsibilities of LAME, chief engineer, chief pilot and chief flying instructor in relation to the AOC Companies’ operations.
19. I also draw attention to the AAT’s observations in [124] and [126] about the higher responsibility of supervision and oversight of other pilots and instructors of those who occupy the supernumerary positions of chief pilot and chief flying instructor. One of the matters which is of particular concern is that, putting to one side the procedural unfairness complaint, the scheme of the legislation is that the person who either occupies or carries out the duties of chief executive officer is explicitly identified in [s 28](#) of the [Civil Aviation Act](#) as one of a number of people who are described as key personnel and who are charged with the responsibility for conducting and carrying out AOC operations safely.
20. I refer in this respect to [s 28\(1\)\(b\)\(iv\)](#) and the definition of key personnel in [s 28\(3\)](#) of the [Civil Aviation Act](#). The legislation contemplates that it is not only the person who is the head of the flying operations of an AOC operation, i.e. the chief pilot or the person who is the head of aircraft airworthiness and maintenance control, who have responsibility under the legislation for ensuring that air operations are conducted and carried out safely. The legislation provides that the chief executive officer also has these critical responsibilities.
21. In those circumstances, I am unable to accept Mr Ribbands’ submission, that the Court can be comforted by the fact that whoever is ultimately approved by  CASA  to be the chief pilot will be in a position to discharge the relevant duties relating to operational safety, as set out in [s 28\(1\)](#) of the Act. Related to that concern is the fact that – as Mr Ribbands also frankly acknowledged in oral argument– the person who is the chief executive officer or who fulfils the duties of chief executive officer of the two AOC Companies, would have some involvement in nominating who would be the chief pilot, as well as the person responsible for certifying maintenance activities for  CASA ’s approval in accordance with the terms of the conditions which have been imposed by the AAT.
22. I reiterate that serious adverse findings have been made by the Tribunal in relation to Mr Ekinci personally. In particular, there are findings that he is not a fit and proper person in his own right to occupy the positions of chief pilot, chief engineer, LAME or chief flying instructor. Although those findings in their terms do not relate to his involvement in the position of chief executive officer, it seems to me that the underlying considerations which led to those conclusions also raise a serious question as to his fitness and propriety to be the chief executive officer. I understand that it is those concerns which caused the AAT to make Order 2(c).
23. It was evident from the way in which the interlocutory application was conducted that the appellant hoped that if the condition were stayed, he would again become the sole director of the two AOC Companies and, either in form or in substance, perform the role of chief executive officer. Having regard to the findings on fitness and propriety that were made by the AAT, coupled with the important fact that [s 9A](#) of the [Civil Aviation Act](#) makes safety the most important criterion in making regulatory decisions under that legislation, I am not persuaded that the balance of convenience favours a

stay. On the contrary, I consider that the balance of convenience and the public safety considerations that are implicit in the making of the orders and in the findings that are made by the AAT strongly favour the condition imposed in Order 2(c) remaining in place.

24. That is not to say, however, that the Court is unsympathetic to the implications of those orders for the businesses being conducted by the AOC Companies and for the people who are associated with the conduct of those businesses. I am referring there not just to Mr Ekinci, but to other persons who are employed in various capacities with those companies. It is very much in their interests, as it is in the broader public interest, that the appeal be heard as soon as is practicable. The case is one in which, in my view, the hearing ought to be expedited.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths.

Associate:

Dated: 22 August 2014

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