

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** New Zealand Air Line Pilots Association Inc (Applicant)

**AND** Air New Zealand Limited (Respondent)

**REPRESENTATIVES** Richard McCabe, for applicant  
Kevin Thompson, for respondent

**MEMBER OF AUTHORITY** Marija Urlich

**SUBMISSIONS RECEIVED** 29 July, 11 and 18 August 2005

**DATE OF DETERMINATION** 6 October 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

**Employment relationship problem**

[1] In a statement of problem received by the Authority on 30 May 2005 the applicant, the New Zealand Air Line Pilots' Association, lodged a dispute over the "interpretation, application and operation of a Collective Employment Agreement". This dispute concerns the definition of salary for the purposes of calculating the amount the respondent, Air New Zealand Limited, deducts from pilots' salaries and contributes itself to the Air New Zealand Superannuation Scheme ("the scheme").

[2] Whether the Authority has jurisdiction to interpret the terms of the scheme is at issue. This determination deals with that preliminary issue. The investigation into this preliminary issue was conducted on the papers with the agreement of the parties.

**Submissions**

[3] Mr McCabe, on behalf of NZALPA, submits that the interpretation of the terms of the scheme fall squarely within the jurisdiction of the Authority because the scheme and the CEA are inextricably linked and the issue to be determined arises solely out of the employment relationship. He relies on section 161 of the Employment Relations Act.

[4] Mr Thompson, for Air NZ, submits that the central question is the definition of salary contained in the scheme. He submits the effect of this definition does not touch on the employment agreement and is outside the jurisdiction of the Authority. He relies on *BDM Grange Limited v Parker and Ors*<sup>1</sup>. Mr Thompson has also referred me to other cases which he cites as authority for

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<sup>1</sup> (unreported) CIV 2005-404-993, Baragwananth and Courtney JJ 19 July 2005, paras [18] – [33]

the proposition that the Authority does not have jurisdiction to interpret instruments of this kind<sup>2</sup>.

### **The relevant clauses**

[5] Clause 3.3 of the CEA provides:

“The incentive portion of pay ... [is] included in the definition of “salary” for Superannuation purposes.”

[6] Clause 2 of the scheme provides the relevant definitions of “incentive pay” and “salary” for the purposes of clause 3.3 of the CEA.

### **Determination**

[7] To interpret clause 3.3 of the CEA it is necessary to use the relevant definitions of the scheme. These definitions have been expressly referred into the CEA.

[8] Section 161 of the Act confers on the Authority exclusive jurisdiction to determine employment relationship problems including disputes about the interpretation, application, or operation of an employment agreement<sup>3</sup>. The judgment of the High Court in *BDM Grange* limits the application of section 161 of the Act to issues “*found[ed] entirely within the employment relationship itself*”<sup>4</sup>. Is that the case here?

[9] The terms of the CEA require Air NZ to maintain a superannuation scheme and to give pilots access to membership of that scheme. An employee pilot becomes a member of the scheme when they agree to be bound by the terms of the trust deed. There is no dispute that the terms of the trust deed are separate to the employment agreement. However, some definitions contained in the trust deed (eg, the definition of “salary”) have been expressly referenced into the CEA. This must be for the purpose of interpreting the terms of the CEA.

[10] This situation is not analogous to *Hulse* where there was no claim that the express provisions of the employment agreement had been breached or where the issue needed to be decided by the administrators of the scheme once the dispute resolution mechanism contained therein had been triggered. This situation concerns a dispute over the manner in which deductions and payments into the scheme are made by Air NZ. Those deductions and payments are governed by the terms of deed. The relevant definitions of the governing deed have been expressly imported into the CEA and it follows that enforcement of the terms of the employment agreement must be possible including those imported terms.

[11] For these reasons I am satisfied this dispute is based entirely on an employment relationship and that the Authority has jurisdiction to determine this employment relationship problem.

### **Mediation**

[12] The parties are directed to attend mediation within 28 days of the date of this determination. If they are unable to resolve this dispute at mediation then they may apply to the Authority to timetable an investigation into the substantive issue.

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<sup>2</sup> *Hulse v Ministry of Justice* (unreported) AEC 37A/97, Travis J 28 November 1997, *Air New Zealand v Kippenburger* [1999] 1 ERNZ 390.

<sup>3</sup> Section 161(1)(a) of the Act

<sup>4</sup> para [66]

**Costs**

[13] The issue of costs is reserved. I am of the view that costs should lie where they fall. However, application may be made to the Authority to determine the issue.

Marija Urlich  
Member of Employment Relations Authority