Determination Number: AA 298/06
File Number: AEA 979/05

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, Counsel for Applicant Kevin Thompson, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	8 June 2006
ADDITIONAL INFORMATION RECEIVED	19 June 2006 19 July and 4 August 2006
SUBMISSIONS RECEIVED	7, 14, 21 July 2006 16 August 2006
DATE OF DETERMINATION	19 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Air Line Pilots Association ("ALPA") and Air New Zealand Ltd ("Air New Zealand") are parties to a collective employment agreement ("the agreement") covering pilots who are members of the former and employees of the latter.

[2] Air New Zealand has leased a Boeing 747-400 aircraft (referred to as a 744) to operate an international cargo-only service. The lease is a 'wet lease', so named because a crew is provided as part of the lease arrangement. That means Air New Zealand's own pilots do not operate the leased aircraft.[1] They seek the opportunity to do so, and say the failure to allow them that opportunity is a breach of the collective employment agreement. Air New Zealand disagrees.

[3] The relevant provisions are:

> "7.1 It is the intention of this Section to ensure that the security of employment and job prospects of the company's pilots are in no way diminished by arrangements with other operators for the interchange of aircraft and/or crews considered beneficial by the company. In doing so the company recognises the prior right of pilots employed by Air New Zealand Limited to operate the company's aircraft.
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> 7.2 Notwithstanding the intent of this Section the company may dry lease, wet lease, or charter its own or other aircraft on a short term basis as required from time to time."

[1] In contrast, a dry lease involves the lease of an aircraft without crew.

[4] ALPA seeks declarations that the wet lease arrangement:

(a) has diminished job prospects for pilots, in breach of clause 7.1; and
(b) is outside the exception in cl 7.2 relating to short term leases.

[5] ALPA also seeks compliance orders and penalties.

The wet lease

[6] Air New Zealand does not operate its own dedicated cargo aircraft, although it offers a cargo service. Its own passenger aircraft offer some space for the transport of cargo internationally, but for many years the airline has chartered or leased dedicated cargo aircraft (or space in them) to provide much of the service.

[7] Under one such arrangement Air New Zealand had shared space with Lufthansa on the MD11 (McDonnell Douglas) aircraft in the Lufthansa fleet. Lufthansa provided the crew. The arrangement had been in place since March 2001, and was to expire in March 2005. During the preliminary phase of the renegotiation of the arrangement, Air New Zealand concluded Lufthansa's indicative terms would mean a loss rather than profit position for Air New Zealand's cargo operation. Accordingly it looked for alternatives. Paul Reid, then the general manager cargo, and his staff identified that a twice-weekly round the world service using a 744 freighter aircraft would be capable of generating a reasonable profit.

[8] The next step was to test the availability of a 744. Mr Reid and his staff found such aircraft were in high demand worldwide, and were able to identify only one available aircraft. It was owned by a specialist international freight airline, Atlas Air Incorporated ("Atlas"). Atlas was prepared to offer only a wet lease.

[9] Accordingly Atlas and Air New Zealand negotiated a wet lease agreement which included the following terms:

(a) Atlas was responsible for aircraft, crew, maintenance and insurance (referred to as an 'ACMI lease'), with Air New Zealand being responsible for matters such as overflight and landing approvals, ground handling, fees, fuel, and crew transport and accommodation;
(b) The term of the agreement was 27 March 2005 – 24 March 2007, with limited rights of early termination on 25 March or 30 September 2006;
(c) Air New Zealand purchased a minimum number of block hours per month;
(d) Atlas was entitled to use the leased aircraft for its own purposes while it was not required on the Air New Zealand cargo route;
(e) The leased aircraft was a specified 747 400F, or a substitute aircraft from the 747 400F or 747 200F fleet;
(f) The route (subsequently modified slightly) was Frankfurt – Chicago – Honolulu – Auckland – Melbourne – Pudong (China) – Baku (Azerbaijan) – Frankfurt.

[10] Air New Zealand says there are commercial reasons for not wishing to exit its freighter operations, but obviously it does not wish to commit itself to a loss-making operation either. I accept there are genuine commercial reasons for its conclusion that using a 744 aircraft on the route it identified would be suitable. I have no reason to doubt its evidence about the general availability of 744 aircraft at the time, and there is certainly no reason to suggest it should have given serious consideration to purchasing its own 774 for the cargo route.

[11] As for whether the 744 could or should have been sourced under an arrangement that at least meant Air New Zealand pilots would be likely to be offered the opportunity to fly it (probably a dry charter or lease), ALPA sought to cast doubt on the evidence that Air New Zealand was able to source only a wet lease from Atlas. It sought to do so by referring first to certain email exchanges in May and June 2006. The exchanges involved a query from one of its officers about the availability of dry leases for 744 aircraft, and the response. That kind of material would not usually be given any weight, but I refer to it because it tended to support Air New Zealand's position. Not only was it acknowledged that the organisations ALPA approached advertised themselves as specialising in wet leases, but one response – ostensibly from the director of another aircraft leasing company - said this:

> "We do get involved in both dry and wet leases, although our specialty is wet leasing.
> The dynamics of the 747-400 market are that very few are owned by the leasing companies. They tend to be purchased by the airlines themselves. As such there are relatively few available for lease, …
> The smaller airlines may find it difficult to raise financing to acquire used 747-400 aircraft themselves if this is the only option available to them, and may lack the cash to invest the equity …
> Wet leases are expensive and rarely extend for more that (sic) 12 months. … They are not a long term fleet option because of the relatively high price."

[12] Regarding the first of the above points, even if the leasing companies do in general enter into dry leases from time to time, this does not cast doubt on Air New Zealand's evidence that a wet lease was the kind available to it at the relevant time.

[13] Further to the last of the above points, Air New Zealand's direct evidence was that it sought a relatively shorter rather than longer lease and that was reflected in its negotiating stance. It succeeded to the extent that it was able to negotiate the limited rights of early termination summarised in [9] above.

[14] Finally, ALPA provided information purporting to indicate that, apparently as at September 2005, a third company had five 744 aircraft available for lease (although the kind of lease was not specified). Apparently as at 22 May 2006, the same company had three of those aircraft available for dry lease. That does not shed light on precisely what was available in late 2004 and early 2005, or the terms on which it was available.

[15] None of this, anyway, means Air New Zealand was obliged to enter into a commercially unfeasible arrangement in order to ensure its own pilots could fly the associated aircraft. Moreover, I accept that the company's decisions overall were made for genuine commercial reasons, and not in an attempt to bypass pilots' rights.

ALPA's concerns

1. Diminishing of job prospects

[16] At the relevant time Air New Zealand owned or operated eight 744 aircraft on international passenger routes. Positions on the company's 744 passenger aircraft are highly sought after, being highly paid and regarded as the pinnacle of an Air New Zealand pilot's career. ALPA believes that Air New Zealand is diminishing the job prospects of its pilots by not offering them vacancies on the 744 freight operation. It says the pilots particularly affected are those with standing bids for 744 captain and first officer positions.

[17] Kevin Henderson, an officer of ALPA and currently a Boeing 767 captain, gave evidence that he has a standing bid for a 744 captain's position. He believes that, by operation of the system of seniority under which pilots' positions are filled, he would by now have achieved a 744 captain's position if positions on the freighter aircraft had been available to Air New Zealand's pilots. Not

only that, his effective promotion would have a trickle-down effect in that his original relatively senior 767 captain's position would become available to a less senior pilot.

[18] That is the kind of reason why ALPA says the job prospects of its pilots are diminished by the failure to offer vacancies on the 744 freighter.

2. Not a short term lease

[19] ALPA also says the lease is not a 'short term' lease. In addition to viewing a period of two years as something more than short term, it also has a concern that the lease will be renewed or extended on its expiry date.

[20] Although the concern is understandable in light of the history of repeated charter arrangements, there was no evidence to indicate that at the relevant time Air New Zealand planned a longer-term commitment to a lease of the 744 freighter. On the contrary, its evidence was that at the relevant time shorter-term flexible arrangements were its preference.

Determination

1. Existing case law

[21] The interpretation and application of clauses 7.1 and 7.2 (as they appeared in earlier collective agreements) have already been the subject of judicial consideration.

[22] In **NZALPA v Air New Zealand Limited** [1988] NZILR 793 the Labour Court was asked to determine how predecessors to these clauses applied to a series of wet charter arrangements operating from January 1985 to January 1986.

[23] Clause 7.1.1.0 - the clause relied on at the time – contained some of the elements of clause 7.1 although with additional express protections. The court said of it:

> "We think it clear that section 7.1.1.0 is a statement of intent. It is not a statement of limitation, but a statement of a general purpose to be achieved. It is no more than that. … But section 7.1.2.0 … provides the specifics whereby that purpose is to be achieved or that intent made effective. Therefore it is with the specifics in section 7.1.2.0 that the parties should comply." (p 795)
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> "… we view clause 7.1.1.0 as a statement of purpose and clause 7.1.2.0 as the machinery designed to secure that purpose. It is immaterial, therefore, whether security of employment and job prospects, immediate or otherwise, are involved or not." (p 796)

[24] Clause 7.1.2.0 was similar to clause 7.2, although again with additional express protections. It declared the exclusive right of Air New Zealand pilots to fly aircraft operating company flights and services, with a proviso applying to 'short term, short notice' requirements. The court said:

> "What does 'short' mean? The term defies precision. It means 'not long'. But what does 'long mean'? Again, each instance stands on its own. … Certainly, we consider the use of extensive aircraft charters throughout 1985 was not short term. At least at some point the charter arrangements ceased to be short term. …" (p 795)

[25] The meaning of clause 7.1 and 7.2 was considered in **Fransham & ors v Air New Zealand Limited** (unreported, Finnigan J, 5 December 1995, AEC 127/95). This time, the clauses before the Employment Court were the same as the present clauses. Air New Zealand had entered into a series of wet charters for round trips between New Zealand and the USA, operating in weekends. The charters were reviewed and continued every eight weeks from October 1993 until about March

1995, when a 12 month contract was signed with one supplier. Thereafter, and for business reasons, Air New Zealand continued for the most part to review the service every eight weeks.

[26] It appears from the decision that the matter was very fully argued. In particular, the court addressed the removal from clauses 7.1.1.0 and 7.1.2.0 of several of the specifics which the Labour Court had identified as achieving the intent and purpose of the provisions. For associated reasons ALPA had submitted that clause 7.1 was now more than a statement of intent or purpose, and had binding effect. The court found:

> "There is no clear intention to make a change from the well-established function of clause 7.1.1.0. It was a statement of intent. In its new form it remains a statement of intent. Since practically all the specifics of the former s 7 have been shorn away then it is also the provision which carries out the intent. …
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> …
>
> What therefore is the intention of s 7? In my view it is:
>
> > . To ensure that the security of employment and job prospects of the employer's pilots remain at least as good as they are (i.e. not diminished)
> > . When interchange arrangements are made by the employer in its management discretion
> > . So far as Air New Zealand's aircraft are concerned, when the employer deems it beneficial to let them out to other operators, flying them is the prior right of Air New Zealand pilots.
>
> 'Interchange' seems on the evidence to have a clear meaning: it is the letting out by the employer to other operators of its own aircraft and/or crews, and the taking on by the employer from other operators of their aircraft and/or crews – reciprocity is not a concept imported into that work as used in s 7.1 by any of the evidence which I heard." (p 18)[2]

[27] Since the aircraft in **Fransham** was not one of Air New Zealand's in terms of the second sentence in cl 7.1, there was no prior right for the company's pilots to fly it. The same is true here. As the court also pointed out, the requirement that aircraft operating company flights and services be flown exclusively by company employees, unless the parties agreed otherwise in writing, no longer existed.[3] Similarly, the prior right to operate 'the company's aircraft and services' had become a prior right to operate 'the company's aircraft'.[4]

[28] ALPA has, nevertheless, provided extensive information and some submissions aimed at establishing that the 744 freight operation is an Air New Zealand operation. If the information was also intended to persuade me the 744 is one of 'the company's aircraft', I do not accept that.

[29] Otherwise, in the light of **Fransham**, it is not clear how the argument helps ALPA's position. The court in **Fransham** did say it was satisfied the freight operation in question was an Air New Zealand operation, albeit a temporary one. However the relevant passage was no more than a finding about the evidence – and the company's evidence at that. In its proper context, it was part of the court's commentary on the company's evidence about the commercial reasons for the operation, the temporary or experimental nature of the operation, and uncertainty about future demand. Similar points were made in the evidence here. Notably, despite finding the freight operation was an Air New Zealand operation, the court found there was no breach of cl 7.1.

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[2] The Employment Court also found in **Campbell-Cree & Ors v Air New Zealand Limited** (unreported, Colgan J, 13 December 1995, AEC 47C/95), that reciprocity was not a required element of an 'interchange' as the word is used in cl 7.1. Otherwise the decision concerned allegations of failure to observe Air New Zealand pilots' prior rights to fly what were acknowledged to be Air New Zealand aircraft. The court interpreted the provision with reference to the right to fly company aircraft, rather than services or operations.

[3] The requirement had been present in cl 7.1.2.0.

[4] Comparing the last sentence of cl 7.1.1.0 with the last sentence in cl 7.1.

[30] For those reasons, while there might be no doubt the 744 freight operation is an Air New Zealand operation, I do not accept the submission that means cl 7 applies to it.

[31] The court did, however, find that the operation in question was an 'interchange', and accordingly there was a question about whether the pilots' security of employment and job prospects were diminished. The same question arises here.

[32] The court said the evidence in **Fransham** did not disclose any diminution of job prospects and security. Moreover it seems one aspect of the evidence – which was also a focus here – concerned pilots' prospects of advancement. The court was unable to see that any prospect of advancement had been taken away or reduced. It said: "I cannot see how flying the freighter – advancement or not – is a prospect for either of these pilots when their employment contracts permit the employer to take that aircraft into service with its own crew if that is what the employer thinks is beneficial. (p 19)"

[33] As for the meaning of 'short term' the court commented that the parties had not heeded the earlier warning about lack of precision, and had failed to remove that imprecision. It found that, to the extent there was any precision, the phrase allowed the arrangement to be open-ended as long as it was subject to termination at short notice during or at the end of any one of a series of short terms.

2. Diminishing of job prospects

[34] If the doctrine of stare decisis applies to the institutional structure created under the Employment Relations Act 2000, then the Authority must be bound by the interpretation of cl 7.1 found in **Fransham**.

[35] In addition, or alternatively, Air New Zealand says the elements of an issue estoppel are present in this problem as it relates to the correct interpretation of cl 7.1 and 7.2. It is not open to ALPA to now assert a different interpretation. Counsel quoted the following summary of the necessary elements of the estoppel:

> "(1) The decision relied on was a judicial decision.
> (2) The decision was made and pronounced by a judicial tribunal.
> (3) The judicial tribunal had competent jurisdiction in that behalf.
> (4) The judicial decision was final.
> (5) The judicial decision was a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised, or the decision involved that same question.
> (6) (a) The parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies, or
> (b) The decision was conclusive in rem."[5]

[36] I accept those elements are present here, with the judicial decision in question being Fransham**.** Further to the identities of the respective parties, the applicants in **Fransham** were a number of named pilots whose individual employment agreements contained the same cls 7.1 and 7.2 as each other and the one here. The provisions were based by operation of law on an expired collective employment agreement to which the present applicant had been a party. Here the collective employment agreement has been renegotiated and the clauses re-incorporated into it. The union party to the collective agreement is acting as applicant, rather than affected individual members. This is sufficient to meet element (6)(a).

[37] I now turn to apply the interpretation of the provisions, as found by the court, to the present facts.

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[5] Laws of New Zealand, Estoppel, paragraph 3

[38] With reference to the court's comments on the intention of the clause, the starting point for assessing whether pilots' security and job prospects are diminished or not must be to identify the levels of security and job prospects at the time the arrangements in question were entered into. For present purposes, that is the period immediately prior to 27 March 2005. That is one reason why I had no hesitation in treating as irrelevant to this matter concerns ALPA raised in July 2006 about what Air New Zealand might now be planning to do with its 744 passenger fleet some time in 2007 or later.

[39] During the period of some 3 – 6 months while new arrangements for the international freight operation were being negotiated, there were not - and nor for many years had there been – any Air New Zealand pilots employed in dedicated roles in the international cargo operation. To that extent there was no-one whose job security, or prospects, was at risk or even affected by the introduction of a wet leased 744 freighter operation.

[40] During the same period the company's passenger operation had been experiencing a growth phase, with new aircraft types being purchased and more pilots being engaged. The introduction of the wet leased 744 cargo operation did not make any difference to existing opportunities for employment or advancement in the passenger operation, and certainly did not render less secure any pilot's employment.

[41] In short, pilots' security and job prospects remained at least as good as they were. They were not diminished.

[42] ALPA has taken a different approach. It sees the deployment of the 744 freighter as offering further prospects of advancement for pilots provided they are offered positions on the aircraft, and those prospects have been denied to pilots. The issue is one of a new set of opportunities, outside the existing range, being denied. In that sense ALPA says pilots' job prospects, although not their security of employment, have been diminished.

[43] I comment first that essentially the same argument was put to the court in **Fransham**. It was not accepted. Nor can I accept it here. I consider it clear the position ALPA now contends for is not the test. The test is whether existing security of employment and job prospects are diminished, rather than whether additional prospects or opportunities (not currently in existence) might become available.

[44] I therefore conclude there has not been any breach of cl 7.1.

3. Not a short term lease

[45] My conclusion about clause 7.1 means there is no need to address whether the wet lease has been entered into on a 'short term' basis. That may be fortunate, since the term is as imprecise as it ever was and there is no paradigm for the measure of it.

[46] For these reasons I decline to make the declarations sought, and decline the applications for compliance orders and penalties.

Costs

[47] Costs are reserved.

[48] The parties are invited to agree on the matter. If they seek a determination from the Authority they are to file and serve memoranda within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority