

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 29/10
5158824**

BETWEEN EMMA HAMILTON
 Applicant

AND ZEAL 320 LIMITED (FORMERLY
 FREEDOM AIR LIMITED)
 Respondent

Member of Authority: Leon Robinson

Representatives: Richard McCabe, Counsel for Applicant
 Kevin Thompson, Counsel for Respondent

Investigation Meeting: 4 & 5 September 2008

Submissions Received: 15 September 2008 & 22 September 2008

Determination: 25 January 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Emma Hamilton (“Ms Hamilton”) claims she has a personal grievance for unjustifiable disadvantage. The respondent Zeal 320 Limited (formerly Freedom Air Limited) (“the Company”) denies the claim.

[2] The essence of the claim is that the Company's appointment of another pilot (who need only be referred to here as “Mr M”) to a captain position before she was, constitutes an unjustifiable action by the Company.

[3] Ms Hamilton also claims that she was not provided training that the Company promised her. She says that this failure to provide her training caused her disadvantage in that she was prevented from qualifying for advancement.

[4] The parties were unable to resolve the differences between them by the use of mediation.

[5] The Authority apologises to the parties for the delay in issuing this Determination and any inconvenience caused to them.

The facts

[6] The Company is a duly incorporated company operating an air transport service using a fleet of Airbus A320 aircraft providing passenger and cargo services to and from destinations within New Zealand and to and from Australia and the Pacific islands. It was formerly known as Freedom Air Limited but changed its name to Zeal 320 Limited in June 2006. As Freedom Air Limited, it operated Boeing 737-300 aircraft but subsequently introduced its fleet of Airbus A320 aircraft.

[7] Ms Hamilton was first employed as a First Officer by the Company when it was South Pacific Air Charters Limited (trading as Freedom Air International) from 26 February 2001. The terms of that employment were recorded in a written individual (temporary) employment agreement.

[8] In July 2001, Ms Hamilton was promoted to Senior First Officer.

[9] On 21 August 2001 Ms Hamilton accepted terms and conditions of employment as a Senior First Officer as set out in an individual employment agreement called the *Freedom Air Pilots Individual Employment Agreement* which took effect from 30 July 2001.

[10] In terms of her flying career, Ms Hamilton desired a "Command" - advancement to a Captain's position.

[11] By virtue of clause 7 of the *Air New Zealand Limited Pilots' Collective Employment Agreement* Ms Hamilton enjoyed the seniority of rank conferred by the Group Opportunity List ("GOP List") therein as from her signing on to that GOP List

in January 2003. Ms Hamilton was ranked senior to Mr M by virtue of her longer service than his.

[12] In or about August 2003, Ms Hamilton expressed her interest for a Boeing 737-300 Captain's position (a Command) by entering a "standing bid".

[13] In September 2003, Ms Hamilton performed a simulator assessment, and in October 2003 and November 2003 performed Line Assessment Flights. These exercises formed a Command Assessment Programme ("CAP") a prerequisite for eligibility to fill a Captain's position. Ms Hamilton was not successful in this assessment because she says she had only recently returned to work following a car accident in which she sustained a serious injury. She took leave in November and December.

[14] By a letter dated 13 January 2004, and following discussion between Ms Hamilton and Mr Barry Miles (Flight Crew Training Manager) ("Mr Miles"), the Company devised a personalised training program said to prepare Ms Hamilton for Command training.

[15] By email of 20 April 2004 Ms Hamilton submitted a bid for a Captain's position. She wrote:-

Hope you had a nice little Easter break? I have just returned from a schedule and now replying to your notice of up-coming promotions. I here-by would like to place my bid for a Captains position and would like to bid for Hamilton at this stage but more than happy to fill an Auckland position if that is all that will be available.

[16] That bid for a Boeing 737-300 Captain position was acknowledged by the Company in an email of 27 April 2004:-

I acknowledge your Bid for a B737 Command with Freedom. This will be passed to Air NZ.

[17] Ms Hamilton did not successfully complete a second CAP provided in July 2004.

[18] On 14 October 2004 Mr M successfully passed a CAP and thereby became eligible for Command appointment.

[19] The Authority finds that on 28 October 2004 the Company advertised a vacant position for a Boeing 737-300 captain with a course start date of 1 January 2005.

[20] By email dated 17 November 2004, Ms Hamilton wrote to the Company withdrawing her existing standing bid for a Command vacancy. The existing bid was in respect of a Boeing 737-300 Command. She wrote:-

*Due to some unforeseen circumstances that have only just recently arisen **I would like to remove my standing bid** that I believe is still in place for the current command positions. As one of the companies last remaining 'protected' pilots I would here by like to re-enstate my application/bid for a command on the next earliest intake that may occur early in the new year? Please don't take this as a lack of interest on my behalf as I am very keen to pursue my career here at Freedom ... just need to clear a little matter up that may take a month at the most.*

(emphasis added)

[21] On 22 November 2004 Mr M was appointed to the advertised Captain vacancy on a provisional basis being subject to his passing the standard Company command course.

[22] From January through to March 2005 Mr M commenced Command training. On 8 March 2005 he failed a sector route check.

[23] From March 2005, the Company introduced its fleet of Airbus A320 aircraft to replace the existing Boeing 737-300 aircraft. The Company instituted a policy that there would be no command upgrades during the introduction of the new fleet.

[24] Ms Hamilton says that at the same time she asked Captain Tony Millen (Flight Operations Manager) ("Captain Millen") what was happening with her future

concerning promotion to Captain. She says he told her to wait for Mr M to finish his training first and "not to worry".

[25] Ms Hamilton says or about 24 May 2005, Captain Millen repeated what he had told her earlier that she once she had performed 500 hours on the A320 she would receive captain training and she and Mr M would probably be trained up around the same time.

[26] Between March and May 2005, the Company and Mr M agreed that Mr M would transfer to new Airbus A320 aircraft, consolidate his hours and then proceed to complete his Command training. Ms Hamilton learned of this arrangement from Mr M directly.

[27] In May 2005 the Company and the New Zealand Airline Pilots Association entered into a collective employment agreement ("the CEA"). Ms Hamilton benefited from the GOP List provision of that agreement being ranked 624 and Mr M at 650. That ranking entitled her to rights to promotion ahead of Mr M.

[28] In September 2005 Ms Hamilton was type rated for the Airbus A320 by the Air New Zealand Limited training department.

[29] In late December 2005 Ms Hamilton entered a standing bid for an A320 Captain Position.

[30] The Company says that by email dated 11 May 2006 Ms Hamilton informed it that she did not wish to be assessed for Command.

[31] In May 2006 Ms Hamilton became employed under the terms of the CEA.

[32] In July 2006 Ms Hamilton attended a three day command course.

[33] Ms Hamilton, Mr John Mathewson Manager Airline Operations (Mr Mathewson") and others met on 18 December 2006 to discuss concerns held by Ms Hamilton as to her circumstances and Mr M's continuing training.

[34] In January 2007 Mr M successfully completed his command training and became a fully qualified Captain.

[35] By letter dated 28 February 2007 Ms Hamilton formally raised an employment relationship problem with the Company. She wrote materially:-

I have been employed by Freedom for about 7 years, and made written application for an A320 Command vacancy during the 2005 Airbus A320 fleet introduction, and prior to that made written application for a Captain's position on the Boeing 737-300.

Colleagues have achieved command, but I have still not yet been provided with a similar opportunity. In particular, a much less senior First Officer is now undergoing Command Training and listed on Roster 2/2007 as a Captain. I believe I have not been provided with equal employment opportunities and have been materially disadvantaged in both remuneration and career aspirations as a result.

The "FREEDOM AIR NZALPA PILOTS' COLLECTIVE AGREEMENT 2005-2008" clause 16.1.4.1 provides:

"Subject to the provisions of 16.1.2 and 16.1.3, vacancies for Captains will be filled in the first instance by the most senior First Officer applicant employed by the Company at 12.7.02 and still so employed, and in the second instance by the second most senior First Officer applicant employed by the Company at 12.7.02 and still so employed"

I seek the following remedies that demonstrate commitment by the Company to right the wrongs of the past:

- a) Remedial and on-going salary adjustment in that my salary be immediately adjusted as if the Company had, in the past, provided a promotion to Command in the normal, requisite, and agreed seniority order.*
- b) I seek real and material commitment from the Company that the agreed order of promotion (most senior first, then least senior), will be adhered to.*
- c) I seek, in seniority order, to be given proper opportunity to undergo Command Training and to assume the position and role as Captain at Freedom.*
- d) I seek that an apology letter, with agreed wording, be circulated to all Freedom pilots by the General Manager of the Company.*

[36] Ms Hamilton accepted an offer of employment with Air New Zealand on 20 October 2007.

[37] Mr M also accepted employment with Air New Zealand Limited and lost the Command he held with the Company.

The merits

[38] Ms Hamilton pleads a disadvantage grievance. But that grievance is argued as having two constituent components:-

(i) that she was not provided training the Company promised to her that would have allowed her to achieve her CAP. She refers to this aspect as "the training personal grievance"; &

(ii) that the Company has not applied strict and well settled contractual seniority provisions to promote her to an Airbus A320 Captain's position, and as a consequence, that position was given to a pilot less senior to her, Mr M. She refers to this aspect as "the seniority personal grievance".

The "training personal grievance"

[39] Ms Hamilton says that Zeal 320 did not provide the training it promised to her in a letter dated 13 January 2004 from Mr Miles materially as follows:-

This letter is to outline the beginning of an informal training program designed to prepare you for Command Training.

The approach is five pronged:

- 1. Increasing your exposure to non-normal and emergency operation of the aircraft by rostering you whenever possible for support duties in the simulator*
- 2. Improving your indepth knowledge of day to day operations by rostering you intermittently*
- 3. Improving your theoretical knowledge base by making you as a Temporary Ground Instructor for our Pilot Induction Courses*
- 4. Assigning you a mentor to assist and guide you when you require*
- 5. Guiding you to study material that will assist you to increase your operational skills*

As you will have noticed, we have commenced the process in the current roster with you being assigned simulator support duties commencing at the end of this month. In addition you are rostered to attend the next Pilot Induction course as a trainee Ground Instructor. This will be commencing about the 15th February.

[40] The Authority is not persuaded that Ms Hamilton raised a personal grievance with the Company within the time required for her to do so. The Authority finds that

the only personal grievance raised by Ms Hamilton was that specified in her letter to the Company dated 28 February 2007.

[41] Nor is the Authority persuaded that the Company consented to the personal grievance being raised out of time.

[42] The personal grievance is not pleaded in the statement of problem.

[43] The Authority concentrates on resolving the seniority personal grievance which it considers to be the real problem.

The seniority personal grievance

[44] In late 2007, and after Ms Hamilton had raised her employment relationship problem, the Company offered its Captains an option of “Salary/income grandfathering”. In essence, this offer provided for, among other things, the option of joining Air New Zealand Limited in a lesser rank but at the Company's A320 captain pay. Ms Hamilton says that as a result of the Company's unlawful action, she has been disadvantaged in terms of her not being offered the option of joining Air New Zealand in a lesser rank at the Company's A320 Captain pay. She has transferred to Air New Zealand Limited on the A320 Airbus aircraft as a First Officer. It will be some years before she will be eligible for a Captain's position at Air New Zealand Limited.

[45] Ms Hamilton argues that appointing Mr M to a Captain position on the A320 before her was an unjustifiable action by the Company. She says the position taken by Mr M was not advertised and he did not have a standing bid - all in breach of the prevailing collective. As a result of this breach, she says she has been disadvantaged in terms of her salary and career aspirations.

[46] The argued contractual provisions are those set out in the Collective at Part 16:-

PART 16 PROMOTION IN RANK

16.1 COMMAND

16.1.1 *All vacancies for Command shall be advertised to all Company pilots and to all pilots on the GOP List not less than two weeks before the closing date for applications for the advertised position.*

16.1.2 *Any appointment to Captain is a provisional appointment and final confirmation of appointment is subject to the applicant holding an ATPL, having at least 500 flight hours on a multi-engine jet aircraft, and passing the standard Company Command Course, (and/or a type-rating course where the appointment involves a change of equipment category).*

16.1.3 *An applicant may be refused appointment to a Captain vacancy where the Company has determined on reasonable and objective grounds, and has previously so advised the pilot, that the pilot is unsuitable for Command.*

16.1.4 *Vacancies for Captain on the current four aircraft, or on aircraft which replace those aircraft, shall be filled from applicants in the following order:*

16.1.4.1 *Subject to the provisions of 16.1.2 and 16.1.3, vacancies for Captains will be filled in the first instance by the most senior First Officer applicant employed by the Company at 12.7.02 and still so employed, and in the second instance by the second most senior First Officer applicant employed by the Company at 12.7.02 and still so employed. This protection provided to these two pilots shall cease, in relation to each such pilot, on the pilot's taking up a position at Air New Zealand Limited.*

16.1.4.2 *If no such protected pilot applies (or if all such pilots have achieved a Captain's position) the vacancy shall be filled by the applicant holding the highest position (lowest number) on the GOP List.*

16.1.5 *If no such pilot applies then the Company may appoint a direct entry Captain.*

16.1.6 *Where an aircraft is transferred into Company service from Air New Zealand Limited in the manner described in 7.3.4 of the Air New Zealand Limited NZALPA Pilots' Collective Employment Agreement that aircraft may be crewed, in the first instance, by pilots employed by Air New Zealand Limited and where this is the case no vacancy arises for Company pilots to apply for.*

16.1.7 *Where, in relation to vacancies on aircraft additional to the current four aircraft or their replacements and not covered by 16.1.4 or 16.1.5, there are more than one applicant then the appointments shall be made on the following basis: the applicant with the highest position (lowest number) on the GOP list shall be appointed to the vacancy. Should no pilot on the GOP List apply the vacancy may be filled as the operator determines.*

[47] When Mr M was appointed provisional Captain in November 2004, there was no collective in force. The Authority finds that appointments were usually based on seniority but at that time were not based on contract. Ms Hamilton's objections that the appointment was not advertised must fail as being both wrong in fact and also because there was no such contractual provision at the time.

[48] But the Collective was operative from May 2005. Ms Hamilton also argues there was a breach of the terms of clause 16.1.4 that "*vacancies for Captains will be*

filled in the first instance by the most senior First Officer applicant employed by the Company at 12.7.02 and still so employed, and in the second instance by the second most senior First Officer applicant employed by the Company at 12.7.02 and still so employed".

[49] By her email of 17 November 2004, Ms Hamilton expressly withdrew her then existing standing bid for a Boeing 737-300 Command. She wrote:-

*Due to some unforeseen circumstances that have only just recently arisen **I would like to remove my standing bid** that I believe is still in place for the current command positions. As one of the companies last remaining 'protected' pilots I would here by like to re-enstate my application/bid for a command on the next earliest intake that may occur early in the new year? Please don't take this as a lack of interest on my behalf as I am very keen to pursue my career here at Freedom ... just need to clear a little matter up that may take a month at the most.*

[50] As a direct consequence of her explicit withdrawal, Mr M succeeded and was appointed to a Command vacancy. That appointment was deemed provisional by virtue of the express terms of clause 16.1.2 and final confirmation was subject to Mr M holding an ATPL, having 500 flight hours on a multi-engine jet aircraft and passing the standard Company Command Course.

[51] The Company Command Course was set out in the Company's Training and Standards Manual.

[52] If it is accepted that Mr M successfully completed his Command course training in January 2007 and his appointment as Captain was complete, I now examine whether there was a breach of the clause at point. It is correct that by January 2007 that clause 16.1.4 was operative at that time as between all parties.

[53] If Ms Hamilton argues that as at January 2007 Mr M's full qualification as Captain at that point in time was contrary to clause 16.1.4 I do not agree. I do not agree because I consider that the reference to vacancies in the clause refers not to the point in time when a pilot fully qualifies or completes command course training, but rather, it refers to the time of appointment as provisional Captain once advertised

applications close and an appointment at that time is made. The distinction is clear from clause 16.1.2 which says that *"Any appointment to Captain is a provisional appointment and final confirmation of appointment is subject ..."*. I conclude that "vacancies for Captains will be filled" refers to the initial provisional appointment and not the final qualification as Captain once command course training is complete.

[54] On this analysis then, Mr M was provisionally appointed Captain on 22 November 2004. There was no collective provision in operation at that time on which Ms Hamilton can sustain any objection.

[55] It is significant that Ms Hamilton takes no objection with Mr M's provisional appointment. She acknowledges the legitimacy of that fact and I do not understand her to criticise it. She must acknowledge that her undoubted withdrawal of her standing bid as at 17 November 2004 puts matters beyond doubt and Mr M's appointment, provisional as it was, was inevitable and unobjectionable.

[56] Once Mr M was provisionally appointed as Captain, there were no contractual provisions governing his succession to final appointment. In this regard I refer to Ms Hamilton's objection that Mr M failed his command course training. I understand that argument to proceed on the basis that if he had failed that command course training he would revert to First Officer. That in turn would have meant that the subsequent bid tendered by Ms Hamilton in December 2005 for an A320 Captain position, meant that she was at that time, the most senior candidate for Command appointment.

[57] Ms Hamilton relies on Mr Rob Torenvlied's evidence to the Authority. Mr Torenvlied was the Company's former crew training manager from September 2005 to March 2006 ("Mr Torenvlied"). Mr Torenvlied says that he performed a command route check on Mr M on 8 March 2005 "which he (Mr M) failed". Mr Torenvlied puts the point starkly. He says *"[Mr M] failed his Command Route check. I believe that the 'further training' line is a fudge"*. Ms Hamilton relies on that evidence to argue that Mr M failed his command course training and consequently, was out of the running for final appointment as captain.

[58] The Company disagrees and rejects the argument entirely. Firstly it says that as a matter of fact, failing a sector route check is not a pass or fail of command course training. The Company says that Mr M's training commenced in March 2005 but was put on hold while additional training and support was put in place, stretched out further by the introduction of the Airbus A320 fleet. Mr Millen wrote this email to Mr M dated 3 May 2005 materially as follows:-

Hi [Mr M]

Thank you for attending yesterday's meeting.

As we discussed, we are not starting any new Captain's (that is new to command) on the B737 fleet, as it is programmed to leave us earlier than anticipated.

This will avoid a combination of a new Captain on a new type, which we(sic) would be unacceptable to the NZCAA.

If it is O.K. by you, we would like you to finish a little bit of flying rostered with Dave Palmer, on the B737.

I think that takes you up to half way through this new roster.

Then take some leave, as you have plenty owed to you.

After the leave, a fresh start on the A320 and after say 500 hours on the A320 we will put you up for a command.

[59] This evidence establishes how Mr M progressed from provisional appointment as Captain Boeing 737-300 to Captain Airbus A320. The authority accepts that the introduction of the new fleet of Airbus A320 aircraft was a supervening event that required amended and appropriate arrangements for obvious practical considerations and regulatory NZCAA purposes as well. The Authority accepts that the Company's actions in progressing Mr M's advancement on this basis, cannot objectively be regarded as unreasonably or in any way objectionable. This answers the criticism that Mr M did not have a standing bid for Captain of Airbus A320.

[60] It also answers the objection that Mr M was appointed to a Command for which there was no vacancy. It is correct that at the time of his final qualification and completion of command course training there was no vacancy. The Authority finds that the vacancy he filled was that to which he was appointed back in November 2004. As has already been noted, at the material time of appointment, there was no applicable contractual provision.

[61] Returning to the argument that Mr M failed his command course training and consequently voiding his provisional appointment as Captain, the Authority accepts the Company's evidence that Mr M's training was continuing and his provisional status continued on "his swap to the A320". It says that the failure of the route sector check was not a failure of the training. The Authority is persuaded by that point. Mr M's Command training was put on hold for it would make no sense for him to be trained for Command of Boeing 737-300 aircraft when the Company would introduce a fleet of Airbus A320 aircraft.

[62] At the time he commenced his command course training, there was no applicable contractual provision which governed the limits or rules around such training. Even subsequently, the contractual provision in the CEA does not place any constraints or limits around the training for Command either.

[63] By virtue of a work sharing agreement between Air New Zealand Limited and the Company, there was a cap on the number of Captains the Company could employ. That cap at the material time was set at 27. The Authority accepts that there was no vacancy or requirement for an additional captain as at the end of 2006. The Authority accepts that there was no new position specifically created for Mr M. The Company was obliged to conclude Mr M's command course training to eventually succeed to final appointment.

[64] Mr Miles' evidence was that he told Ms Hamilton that once she had completed 500 hours on the Airbus A320 then she would be considered for a vacancy if one arose. The Authority accepts that evidence and also accepts that Ms Hamilton was told she would follow on after Mr M.

[65] The Authority finds that unfortunately for Ms Hamilton, there were no further vacancies for Captain arising subsequently for which she was eligible for appointment after Mr M's provisional appointment.

[66] It is entirely understandable that Ms Hamilton should feel aggrieved that a colleague who was less senior than her should advance to Command before her. It is

accepted that upon the integration of Freedom Air's operations with that of Air New Zealand Limited's, Ms Hamilton's privilege of rank was significantly reduced. But the advancement of Mr M over her was entirely a result of her express withdrawal of bid in November 2004 and not having successfully completed a command assessment programme. It was because of her personal circumstances then prevailing that Ms Hamilton stood aside. That permitted Mr M to then advance ahead of her. Ms Hamilton raises no objection with that fact and quite properly so. But nor did Mr M subsequently "fail" the training course he and the Company had committed themselves to. That training was both indefinite as to its content, limits and duration. Mr M did not revert to first officer status when he failed a route sector check and he did not fail his command course training. He was engaged in a continuing course of training. It was also reasonable and unobjectionable that Mr M continued his training for command on an Airbus A320 aircraft. Unfortunately, there were no further vacancies for which Ms Hamilton could have succeeded before the Company's operations were integrated with Air New Zealand Limited's.

[67] That is the Authority's assessment of the situation. The Authority finds that Ms Hamilton was not disadvantaged resulting from any action of the Company towards her. Even if the advancement of Mr M is considered an "action" towards Ms Hamilton, the Authority does not accept that there is a disadvantage caused to Ms Hamilton as a result. And if there were a disadvantage, the Authority accepts that such a disadvantage was justifiable in all the circumstances.

The determination

[68] The Authority determines that Ms Hamilton does not have a personal grievance for unjustifiable disadvantage. There will be no formal orders as sought.

The costs

[69] In the event that costs are sought, the parties are invited to resolve the matter between them, but failing agreement, Mr Thompson is to lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr McCabe is to lodge and serve a memorandum in reply within 14 days thereafter.

Leon Robinson
Member of Employment Relations Authority