

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 242  
5331918

BETWEEN

AIR NATIONAL  
CORPORATE LIMITED  
Applicant

AND

ANDREW FLETCHER  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Sherridan Cook and Louise Holden, counsel for Applicant  
Respondent in person

Investigation Meeting: 31 May 2011

Determination: 8 June 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Air National Corporate Ltd employed Mr Andrew Fletcher from March 2009 until he resigned at the beginning of October 2010. Under an individual employment agreement Mr Fletcher worked as the pilot of a Westwind aircraft flown by Air National in medivac or air ambulance charter operations.

[2] After Air National had received Mr Fletcher's resignation it wrote to him advising that under the employment agreement he was obliged to repay part of a bond entered into by him to cover the expense of the training necessary for him to become type-rated as a Westwind pilot. He did not repay \$18,433 as requested and was written to by Air National's solicitors in November 2010 with a formal demand for that sum. Subsequently the company lodged a claim with the Authority seeking an order requiring Mr Fletcher to repay the outstanding amount of his bond.

[3] In his response to the claim Mr Fletcher disputed that the bond was repayable and disputed the amount claimed. His opposition was expressed as follows;

*Contractual obligations apply to both parties, Air National have been in breach of theirs in relation to health and safety and legal compliance on numerous occasions resulting in CAA [Civil Aviation Authority] investigations where I have been implicated.*

[4] Mr Fletcher in his response also referred to options Air National had presented to him after he had advised of his intention to finish his employment:

- *I could reconsider my position and not leave Air National.*
- *I could work the three months notice period but would have to be part of the line training of the new captain which was in contravention to CAA law.*
- *I could leave effective immediately.*

*Given the options, to leave immediately was the only viable choice. Due to previously being implicated in CAA investigations into Air National's operations my career had already been damaged this could not be tolerated a second time.*

*... I was informed that if I chose to leave with immediate effect the bond would be due without delay, at no stage did I agree to repay the remaining bond.*

[5] To try and resolve the employment relationship problem Air National and Mr Fletcher undertook mediation but were unsuccessful.

[6] Mr Fletcher does not dispute that as a term of his employment he agreed that in consideration for the type-rating training received at the expense of Air National he would work for the company for three years. He also agreed that if he left before that time he would reimburse the bond of \$36,000, less \$1,000 for each month worked by him.

[7] Under an express term of the employment agreement Air National was able to deduct the amount of any outstanding bond from Mr Fletcher's final pay, which it subsequently did in the sum of \$2,839.25, leaving a balance of \$15,593.75. During the course of the investigation meeting Air National accepted that Mr Fletcher was also owed a further amount of \$948 in allowances and it took this off the total outstanding amount of the bond, leaving \$14,645.15 owed. The company sought a compliance order under s 137 of the Employment Relations Act 2000 requiring Mr Fletcher to pay that sum together with interest from the effective date of his resignation, 6 October 2010.

[8] Mr Fletcher put his arguments against Air National's claim forward very clearly in submissions and in evidence, including evidence given in response to his questioning of company representatives, Mr Derek Burgess and Mr Andrew Cliff.

[9] As I have understood it, Mr Fletcher's case is that he had intended remaining with Air National for at least the three year bond period but his employer breached or threatened to breach rules and regulations enforced by the CAA for safety in commercial flying, leaving Mr Fletcher no choice but to leave. His case is that through its actions or expressed intentions, Air National made it unreasonable for him to continue working in an unsafe workplace and risk breaching aviation law or becoming a party to a breach.

[10] In this case the issue, largely a factual one, is whether Air National had operated unsafely or had shown a clear intention to do so before Mr Fletcher resigned. There is also an associated issue as to whether by the time he resigned Mr Fletcher believed Air National was unsafe and to such a degree that left him no choice but to leave immediately.

[11] In determining this claim the Authority has had to consider the likely reasons why Mr Fletcher resigned when he did, about halfway through the three year bond period. He gave evidence of a number of problems he had experienced from the very beginning of his employment, some of which persisted up to at least September 2010. Many of them had actual or potential safety implications. It is a fact that from the time he started in March 2009 through to September 2010, however serious any of those problems were he did not resign or refuse performance of his pilot duties at any time. Mr Fletcher claims that what happened in late September just before he resigned became "the last straw" for him.

[12] One of the problems experienced and which recurred several times over a year or more had been with the Westwind's autopilot equipment. Mr Fletcher described to the Authority the faults he found with the autopilot as having been "downright dangerous," but despite the risk he continued to fly the plane when required.

[13] For its part Air National told the Authority that whenever problems occurred and were reported with the autopilot it had the equipment checked and fixed. Eventually it had the equipment's computer replaced to correct the problems.

[14] At the Authority meeting Mr Fletcher presented his view of Air National, and his reasons for having it, as being an unsafe operator to the point of making him decide to leave the employment. The strength of view Mr Fletcher put forward during the Authority's investigation was however not apparent at the time he resigned. Air National contends that Mr Fletcher changed his view because once he had resigned the company demanded from him repayment of the bond and had to bring a legal claim against him to enforce that. It is therefore relevant to consider events that occurred in September 2010, immediately before Mr Fletcher resigned.

[15] To expand his career opportunities Mr Fletcher secured a place on a training course for flying Convair aircraft being held by another operator, Air Freight New Zealand. Because of his employment with Air National he needed to attend this course in his own time and so he sought approval to take annual leave for that purpose. The leave application was rejected by Air National, for the reason that the company had a shortage of pilots to operate the Westwind and Mr Fletcher was urgently needed to assist in the training of a new pilot, Mr Richard Wright, and also to complete a further formal checking of his own competence.

[16] The start date for the Convair training course was 11 October 2010. On Wednesday 29 September Mr Cliff emailed Mr Fletcher advising that his request for leave had not been granted and that he was required to attend simulator training on 19 October. That date cut into the second of the two weeks leave Mr Fletcher had been seeking. He responded to Mr Cliff with the following:

*I really can't see why a compromise can't be reached. I am only asking for two weeks leave at this stage, I am not trying to resign or be unreasonable in any way.*

...

*I have been totally compliant with Air National's requirements and I think that asking for some time to further my career is not unreasonable in any way.*

*I am quite sure that we can both gain from this situation and it is not my intention to cause Air National inconvenience or problems with the future operation of the Westwind.*

[17] On 30 September, Mr Cliff by email repeated to Mr Fletcher that his leave had not been approved and that he was required to present himself for work on Monday 4 October 2010 to start training and undergo assessment.

[18] Sensing what was about to happen Mr Cliff also sent an email to Air National's CEO with the following advice:

*Here is where we are at the moment with Andrew Fletcher. I am anticipating that he will resign shortly as he is confirmed on the next Convair ground course with Air Freight starting on 11 October.*

[19] The next day, 1 October, Mr Fletcher wrote his resignation and on 3 October emailed it to Mr Cliff. In it he referred to the three options that had been offered to him by Mr Cliff and Mr Burgess during a discussion a short time earlier; i) that he continue to work for Air National indefinitely, as the company had wanted, or ii) that he resign on three months' notice as required under the employment agreement and work out that notice, or iii) that he resign with immediate effect.

[20] Mr Fletcher chose the last option, to be effective from 6 October. He attended the two week Convair training course beginning on 11 October. Recently he commenced employment as a pilot with Air New Zealand.

[21] Mr Fletcher denied that his real motive for resigning was to leave him free to undertake the Air Freight training course. He said that he had resigned because the last straw was the way Air National had wanted to train the new pilot Mr Wright and wanted him to assist in that. He said he believed that the training proposed would be unsafe and not legal. Air National had made arrangements for Mr Wright to be trained, with Mr Fletcher's assistance, in a simulator in the United States in October. There had also been discussion with Mr Fletcher by Mr Cliff about training while flying the Westwind aircraft, with Mr Fletcher performing the role of training captain. Mr Fletcher said he had immediately rejected the idea as he was not qualified to perform that role and did not have sufficient experience.

[22] Mr Fletcher does not dispute that in whatever way Air National decided to train Mr Wright, whether in the simulator or during flight in the Westwind aircraft, the approval of the CAA would have been required. Mr Fletcher confirmed that he had known it was highly unlikely the CAA would have given approval if the proposed training was unsafe or unlawful for any reason. As a qualified and experienced commercial pilot Mr Fletcher was well aware of the role and function of the CAA and could expect it would not approve unsafe or illegal operations.

[23] Mr Fletcher also confirmed that in relation to the idea of conducting training flying the Westwind aircraft, what was said by Mr Cliff about this had not been an

instruction or direction or command for him to follow. Mr Cliff described it merely as an idea that he had floated in circumstances where Air National urgently required its new pilot to be trained up to the standard necessary for flying the Westwind.

[24] The Authority finds that the reason given during the course of this investigation by Mr Fletcher for resigning was not the reason he had at the time he decided to leave Air National. I reject his evidence that he resigned because of the way Mr Wright's line training was being considered or planned by Air National. I reject the suggestion that he resigned because, as he said, the situation at Air National had become so bad that he could not go on. His real thoughts about continuing the employment were clearly indicated in the email he wrote to Mr Cliff on 29 September, when trying to get the company to reconsider his application for two weeks leave. He said, "I am not trying to resign or be unreasonable in any way." When the company continued to decline his application for leave, Mr Fletcher immediately wrote his resignation on 1 October.

[25] He accepted in his evidence that on 29 September when he sent his email he had not been going to resign from Air National. He accepted that he had resigned because of the way the training for Mr Wright was being planned, in what he believed was contrary to safety requirements and in breach of law.

[26] I reject Mr Fletcher's evidence that his decision to resign was made purely because he could not safely be involved in line training for Mr Wright. I find that his concern about that training was not to do with the content of it but the timing of it, which would have prevented him from attending the Convair course. He said he had been so concerned about the training that he had told Air National he would call the CAA to pass on his concerns. His notes of a meeting with Mr Cliff show that on 4 October he had been invited to contact the CAA and speak to an officer of that agency, Peter Underwood. Although the record he made of that meeting concludes with his advice "I will call CAA with my concerns," Mr Fletcher confirmed in his evidence that he had not called the CAA, suggesting that his concerns, if any, about safety had not been so great that he had been compelled to take immediate action.

[27] Some of the issues he said he had had with safety and other workplace concerns that he maintained were part of his reasons for leaving, he has confirmed were "resolved" before he resigned.

[28] I agree with the view given by Mr Burgess that there was no nexus between any safety concerns Mr Fletcher held and his resignation. I conclude from the evidence that the motive Mr Fletcher had for resigning at the time he did was the future advancement of his career as a pilot and not the present protection of himself or others from unsafe practices or conduct in the workplace. I do not consider that Mr Fletcher believed that such conduct or practices were present to an extent that jeopardised his safety, otherwise it is likely he would not have continued working for Air National for so long once he knew about matters such as the faulty autopilot, the incorrect rigging of the Westwind's ailerons on one occasion, and a number of other matters referred to and about which evidence was given.

[29] The proposed training of Mr Wright did not present any breach of safety or potential for a breach, because the training required the oversight and approval of the CAA, as Mr Fletcher knew. I therefore find that he chose to resign and chose not work out the three month period of notice in circumstances where he had the reasonable alternative open to him of continuing his employment. Having chosen to resign he became legally obliged, I must find, to repay the amount of bond outstanding.

### **Determination**

[30] I find that Mr Fletcher breached clause 35 of his employment agreement which required him to repay the bond. I am satisfied that \$14,645.15 is the correct amount due under the terms of the employment agreement. Pursuant to s 137 of the Act, I therefore order the repayment by Mr Fletcher of that sum. It is to be paid to Air National within 21 days of the date of this determination.

[31] Interest on the amount is awarded at 8.4% per annum, the current rate prescribed at clause 11 of Schedule 2 of the Employment Relations Act. Interest will be calculated from the date of the formal demand made for payment of the bond, 18 November 2010, until the principal sum has been paid in full.

### **Costs**

[32] There is no reason in this in case not to apply the usual rule that costs should follow the event. An award is sought on behalf of Air National at the rate of the daily tariff for Authority investigations, notionally \$3,000 per meeting day. I am satisfied

that sum will be considerably less than the actual costs incurred by the company in the exercise of enforcing the employment agreement.

[33] For the single day investigation meeting Mr Fletcher is therefore ordered to pay Air National \$3,000 as a reasonable contribution to its actual legal costs.

A Dumbleton  
**Member of the Employment Relations Authority**