**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2014] NZERA Auckland 11
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| | BETWEEN | NEW ZEALAND AIR LINE PILOTS ASSOCIATION INC (NZALPA)<br>Applicant |
| | A N D | AIR NEW ZEALAND LIMITED<br>Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Dr Rodney Harrison QC and Claire Abaffy, Counsel for Applicant<br>Rob Towner and Susannah Maxfield, Counsel for Respondent |
| Investigation Meeting: | 8 October 2013 at Auckland |
| Date of Determination: | 15 January 2014 |

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## DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] The applicant association (NZALPA) alleges that the respondent airline (Air New Zealand) has breached the collective employment agreement between the parties and makes a claim for arrears of wages together with interest in respect of the affected ALPA members.

[2] The operative collective employment agreement (the NZALPA agreement) between the parties came into force on 5 November 2012 and continues until its expiry on 4 November 2015.

[3] A provision of that agreement at clause 24.2 contains the kernel of the dispute between the parties. That provision is in the following terms:

> 24.2 *During the term of this Agreement any agreement entered into by the company with any other pilot employee group which is more favourable than provided for in this Agreement will be passed on to pilots covered by this Agreement on the written request of the Association.*

[4] Another registered union represents some commercial pilots employed by Air New Zealand who are not members of NZALPA. That other union is Federation of Air New Zealand Pilots (FANZP).

[5] Air New Zealand and FANZP signed terms of settlement for a fresh agreement between the airline and FANZP on 15 March 2013. The collective agreement incorporating those terms of settlement was subsequently executed on 14 April 2013 and is referred to in this determination as the FANZP agreement.

[6] NZALPA says that the FANZP agreement provides better rates of remuneration than are provided for in the NZALPA agreement for some of its members.

[7] On 24 April 2013 NZALPA wrote to Air New Zealand purporting to invoke clause 24.2 of the agreement. On 3 May 2013, Air New Zealand wrote to NZALPA rejecting the suggestion that clause 24.2 of the agreement applied.

**Issues**

[8] The only issue for determination in the instant case is what clause 24.2 means and whether a proper construction of that clause gives rise to the relief sought by NZALPA.

**What does clause 24.2 of the agreement mean?**

[9] It is helpful to encapsulate the difference between the parties by briefly sketching their respective positions. For Air New Zealand, its position is simply that the clause in question, properly interpreted, gives rise to an option for NZALPA to pick up the totality of the alternative agreement (the FANZP agreement) but not to select particular parts of the FANZP agreement and to superimpose them on the NZALPA agreement.

[10] Conversely, NZALPA says that a proper interpretation of the subject clause allows the passing on of particular terms and conditions of employment to affected

members of NZALPA of terms and conditions agreed between air New Zealand and FANZP and reduced to agreement in the FANZP agreement.

[11] It seems to be common ground that the relevant provision was inserted in the NZALPA agreement precisely because of the existence of FANZP. In effect, the practical reality is that Air New Zealand as employer is negotiating with two separate bodies which represent pilot employees and NZALPA's concern was simply that FANZP's members were effectively getting negotiating leverage from the base formed by the negotiations between Air New Zealand and NZALPA. Because NZALPA is the dominant union covering pilots employed by Air New Zealand, it is perhaps understandable that it might take a jaundiced view of the smaller FANZP union and see FANZP as benefiting from NZALPA's negotiating position as well as potentially undermining NZALPA's membership base.

[12] The Authority supposes that underpinning NZALPA's convictions in this matter is the belief that, whether right or wrong, there is not a level playing field in terms of the negotiations between Air New Zealand and the two unions. This is because the negotiations between the airline and the two unions are never simultaneously undertaken and because they are sequential in time, it may be inevitable that one bargaining entity would benefit from the efforts of its predecessor at the bargaining table.

[13] Certainly, the evidence of Captain Garth McGearty, a former Industrial Director of NZALPA, is that the present dispute:

> *... is an important industrial issue. I understand it has resulted in a reduction in entry level pilots joining NZALPA and that a number of pilots have left NZALPA to gain significantly better pay rates. It has the potential to result in a significant reduction in pilots choosing to join or remain members of NZALPA.*

[14] Captain McGearty also told the Authority that the two unions were *"philosophically different"* in that FANZP focuses on maximising the individual income of pilots whereas NZALPA concentrates rather on a more collective approach and in particular seeks to achieve a better work/life balance for its members than would be possible with the FANZP approach of simply maximising earnings. The contention that the two unions have a different philosophy is accepted by Air New Zealand's witnesses so that view is also common ground between the parties.

[15] What is not common ground is how clause 24.2 of the NZALPA agreement is to be interpreted. At its core, the dispute is about what the word "agreement" means. While Air New Zealand maintained that a proper construction of the word meant the whole collective agreement between the parties, NZALPA contended that agreement meant just that, that is, individual agreements reached by the parties in respect of particular matters within the total document.

[16] It will be helpful now to consider the law relating to contractual interpretation to see how that bears on the particular problem in the present case. As Dr Harrison QC indicated in his closing submissions, *"contractual interpretation involves the attribution of meaning to the words which the parties have used in their written contract"*.

[17] There are a number of judicial statements about the appropriate principles to apply in contract interpretation. The Authority has helpfully been referred to a number of the cases wherein some of the judicial statements are to be found. The leading case is *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (*Vector*). In that Supreme Court decision, Wilson J expressed the matter in this way:

> *The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.*

[18] In a subsequent decision, the Court of Appeal decided that *Vector* applied to the interpretation of the provisions of collective employment agreements: *Silver Fern Farms Ltd v. New Zealand Meatworkers' Union* [2010] ERNZ 317 (*Silver Fern*).

[19] What Mazengarb's Employment Law at para.[ERA129.23.3] described as a *"valuable summary of those principles"* is set out in the judgment of Ford J in *New Zealand Professional Firefighters Union v. New Zealand Fire Service Commission* [2011] NZEmpC 149 at para.[17] *( Firefighters Union ):*

> *In summary it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise of a Court to "cross check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language is, on its*

> *face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subsequently intended or understood their words to mean, or what their negotiating stance was at any particular time.*

[20] In the earlier decision of *New Zealand Tramways and Public Transport Union Inc v. Transportation Auckland Corporation Ltd* [2006] 1 ERNZ 1005 (*Tramways Union*) the Full Court stated:

> *The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against the factual background having regard also to the genesis and, objectively, the aim of the transaction …*

[21] The Authority's first task then is to look at the words in the subject clause, see whether they are *"clear and unambiguous"* and then see if they can be given their *"ordinary meaning"*.

[22] Using Judge Ford's expression of *"cross checking"*, the Authority might then seek to review whether the words are *"in accord with business commonsense"*.

[23] First it is necessary to observe that in the first line of the subject clause, the word "agreement" appears twice. The first time it appears, is in the phrase *"this Agreement"*. Then immediately after is the next phrase *"any agreement"*.

[24] The expression *"this Agreement"* causes little difficulty. Plainly this is a reference to the collective employment agreement in which the clause sits; that is, the phrase is a reference to the collective employment agreement between Air New Zealand and NZALPA.

[25] It is the next reference to the word *"agreement"* which is more challenging. As the Authority has already noted, that is the very next phrase. In essence, Air New Zealand says that the word "agreement" in the context in which it is used, namely in a clause in a collective employment agreement immediately following another use of

the same word but with upper case to identify a particular collective employment agreement, must be said to mean a complete alternative collective employment agreement rather than particular provisions in a collective employment agreement.

[26] Air New Zealand says that the context in which the word in dispute is used is strongly suggestive of reference to a concluded and complete written bargain between the parties rather than some individual element or elements of such a bargain. Put another way, the salary increases for first and second officers in the FANZP agreement is simply not an agreement but is a part of an agreement or a provision in an agreement.

[27] To emphasise that point, Air New Zealand says that it does violence to common sense to suggest an alternative meaning because surely, if the parties had intended an individual term, condition or provision, then they would have used such an expression or expressions.

[28] Instead, they used the word "agreement" which is a term of art, that is the word in the context of employment relationships has a particular meaning; here the word in question is used within just such a collective employment agreement, juxtaposed against another use of the same word relating to the particular document in which the subject provision sits and it simply makes no sense to try to force a different meaning on to the word in dispute.

[29] Furthermore, Air New Zealand draws the Authority's attention to the fact that immediately after the word in dispute, the next phrase is *"entered into"*. It is suggested it does violence to our normal use of language to refer to parties *"entering into a term or a provision of an agreement. What we say plainly is that parties have entered into an agreement meaning the totality of the agreement, not bits of it"*.

[30] Conversely, NZALPA says that the expression *"any agreement"* refers to the content of the other agreement rather than the whole package. NZALPA then goes on to identify what it says are a series of practical difficulties with the implementation of the clause using the interpretation favoured by Air New Zealand.

[31] In particular, NZALPA argues that the practical effect of Air New Zealand's considered view would be extremely difficult to implement because, in effect, parties would need to assess the total value of a particular package of terms and conditions within an agreement against a like package of provisions in an alternative agreement.

[32] Further, it is suggested for NZALPA that clause 24.2 is inserted primarily for the benefit of individual pilot employees who are members of NZALPA and that it makes more practical sense for those individual members to make an election, based on their own circumstances.

[33] Moreover, NZALPA says that its interpretation of the relevant provision is in keeping with s.59B through to s.59C of the Employment Relations Act 2000 (the Act). In addition, NZALPA says that Part 5 of the Act is inconsistent with the interpretation proposed by Air New Zealand but is consistent with the interpretation it advances.

[34] Looking at the matter from a business common sense point of view, Air New Zealand says that it would be completely inappropriate of it as a commercial organisation to contemplate the meaning ascribed to the subject provision that NZALPA advances because it would effectively not enable it to cost the bargain that it had negotiated with a particular employee group. In effect, the airline would be negotiating to best advantage with its cost envelope but then opening itself up to having NZALPA encourage some of its members to pick up better terms and conditions of employment from the alternative document, thereby arbitrarily adding to the cost envelope in circumstances where Air New Zealand would be unable to ascribe a value to that potential situation. It would amount to an unidentifiable contingent liability which would make no business sense.

[35] Conversely, if NZALPA was to pick up the FANZP collective employment agreement in its totality, that would materially assist the airline because it would reduce the number and extent of disparate terms of employment. Greater uniformity makes good sense from the employer's perspective.

[36] Nor does Air New Zealand accept NZALPA's argument that the clause is meaningless as it stands. Indeed, Air New Zealand says that, far from being meaningless, the clause does no more than give NZALPA another option which would not otherwise be available to it.

[37] Last but by no means least, Air New Zealand points out that the increases paid to certain pilot officers under the FANZP agreement are part of a total package, a total package which involved making concessions in one direction in order to get benefits

in another, by both sides. The terms of settlement specifically record that it is a total package, as most collective employment agreements do.

**Determination**

[38] The Authority has not been persuaded by NZALPA's argument. The Authority's considered view is that NZALPA's definition does violence to the plain words of the relevant clause. The Authority prefers Air New Zealand's conclusions about what the clause means.

[39] In essence, the Authority is satisfied that the use of the word "agreement" for the second time in clause 24.2 is a reference to a collective employment agreement and not to parts of a collective employment agreement, and that that view is supported by the juxtaposition between the two uses of the word "agreement" in the clause, by the context in which the second use of the word "agreement" is found within the body of a collective employment agreement, and by the subsequent words *"entered into"* which again tend to support the conclusion that what is in contemplation is the totality of a bargain between negotiating parties rather than a particular provision in a bargain.

[40] Put another way, the word "agreement" in the context of an employment relationship is a term of art, that is to say, it has a particular meaning ascribed to it when the word is used in an employment relations context. In giving effect to the parties' intentions when they drafted the subject clause, it is difficult to see why they would have used the word "agreement" in the context of an employment negotiation, knowing the usual, ordinary meaning of that word in that context, if rather than a whole collective agreement the parties were actually referring just to an as yet unspecified part or parts of such an agreement.

[41] Put shortly, the Authority is not persuaded that NZALPA's argument applies *"the natural and ordinary meaning of the language used by the parties"*. Indeed, in order for NZALPA's conclusion to be accepted, the Authority's conviction is that violence would need to be done to the *"natural and ordinary meaning"* of the words in dispute.

[42] That conclusion is, in the Authority's view, supported by NZALPA's reliance on trying to draw out what it saw as the consequences of Air New Zealand's interpretation rather than focusing on giving effect to the words the parties used.

[43] The Authority was not attracted by NZALPA's characterisation of the Air New Zealand position as out of step with the requirements of the Act or as creating practical difficulties if implemented in the way the airline sought to do. The dispute is about the interpretation of the words in a clause of a collective employment agreement. Each party calls in aid such arguments as they can to support their position. The Authority's task is to focus on the words in dispute and to give them the life and meaning that it considers the parties must have intended. In the Authority's judgement the natural and ordinary meaning of the words marries better to the airline's view than to the view advanced by NZALPA.

[44] The Authority also thought that *"cross checking"* its conclusions by reference to business common sense supported the conclusion that Air New Zealand's interpretation of the provision was to be preferred. As Air New Zealand said, it entered into complete bargains with FANZP and with NZALPA and each of them was a bargain which resulted from each party making concessions in order to gain benefits and it was simply not sensible, in a business sense, to contemplate a situation where an employer would willingly agree to increasing its costs in the unquantifiable way that would result if NZALPA's interpretation were to be preferred.

[45] As the Authority has already opined, a consequence of NZALPA's interpretation would be that the airline would, on a continuing basis, have an unquantifiable contingent liability. This is because no matter how well the airline planned and budgeted, it could never accurately estimate what numbers of staff would seek to exercise their option of picking up some of the provisions in the alternative collective employment contract. Not only is it impossible to predict the number of staff who would make the election but it is also impossible to predict how much the cost would be because staff making the election to pick up some provisions from the alternative document might decide to take some but not all of the alternative provisions, thus further complicating the position. The Authority is clear that business common sense militates against the interpretation favoured by NZALPA.

[46] Accordingly, the Authority is not persuaded that Air New Zealand is in breach of clause 24.2 of the collective employment agreement. That being the position, NZALPA's application to the Authority fails in its entirety.

**Costs**

[47] The parties are urged to resolve costs between themselves. If that proves to be impossible, Air New Zealand is to file submissions to have costs fixed by the Authority and NZALPA is to have 14 days thereafter to file its response.

James Crichton
Member of the Employment Relations Authority