IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 34
5301814

	BETWEEN	NEW ZEALAND AIRLINE PILOTS ASSOCIATION INCORPORATED Applicant
	A N D	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Richard McCabe, Counsel for Applicant Andrew Caisley, Counsel for Respondent
Investigation Meeting:	30 September 2015 at Auckland
Date of Determination:	3 February 2016

FIRST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed in the Authority on 7 April 2010, the applicant (ALPA) raised an issue about the proper interpretation of the operative collective employment agreement between the parties as that agreement impacts on the employment of six employees of Air New Zealand who are members of ALPA. Associated with that preliminary issue, which is the subject of this determination, is an underlying personal grievance in respect of each of the six employees affected by the issues before the Authority.

[2] For the avoidance of doubt, the parties have helpfully agreed that the only issue for determination in the present case is the preliminary question of what the relevant sections of the operative collective employment agreement mean and that is the subject of this determination.

[3] The dispute arises because of the personal circumstances of six employees of Air New Zealand who, prior to September of 2009, were flying Boeing 767 (B767) aircraft as captains for Air New Zealand.

[4] Then as a consequence of the global financial crisis, those six captains were transferred from the B767 fleet to fly as captains on the Airbus 320 (A320) fleet. The first six months or so of this arrangement (when the affected staff flew as captains of the A320 fleet) was a voluntary transfer, but thereafter the affected staff continued to fly as A320 captains although their continued engagement with the A320 fleet was in terms of the compulsory provisions contained in clause 12.1.11 of the operative collective employment agreement (the agreement). It is common ground that the dispute between the parties centres on the compulsory aspect of the affected staff's engagement with the A320 fleet.

[5] For the sake of completeness, I note that the six affected staff have now all been returned to the B767 fleet as captains.

The issues

[6] It will be useful if the Authority considers the following questions:

(a) What are the terms of the relevant contractual provisions; and

(b) How do those provisions relate to each other?

What are the relevant contractual provisions?

[7] There are effectively only two provisions which the Authority needs to consider. The first is the so-called *"downtraining"* provision which is found in clause 12.1.11 of the agreement and the second is clause 11.5.2 of the agreement which is part of the redundancy provision in the agreement.

[8] The effect of clause 12.1.11 is to provide an ability for Air New Zealand to direct a pilot to any position *"appropriate to his seniority that the company considers suitable"*.

[9] Those words are contained within a wider clause which deals generally with the seniority system by which pilots are employed in their professional capacity by the airline. Clause 12.1.11 is, according to the evidence of Mr Gerard Gilmore, a senior

manager with Air New Zealand, a *"qualification to the seniority system"* and in order to explain better that observation, I refer next to the way that the seniority system generally operates.

[10] Pilots are paid more for higher ranks (a captain for example is paid more than a first officer) and more as the pilot moves up the aircraft fleets from the smaller aircraft to the larger aircraft.

[11] But, as Mr Gilmore is at pains to emphasise, a pilot is a pilot and is not employed for a specific fleet although the ability of pilots to influence their own work conditions is enshrined in the agreement by the perpetuation of the seniority system.

[12] Put simply, the company maintains a list which ranks all pilots according to the date on which they started with Air New Zealand. The earlier the date the higher the pilot is on the seniority list.

[13] When there is a vacancy in the fleet, pilots are able to express interest in that vacancy and generally speaking, Air New Zealand will appoint to the vacancy the most senior applicant.

[14] By this device, the airline is ensuring that promotion is principally a function of seniority. Typically, this is a *"willing buyer/willing seller"* situation where the airline has a vacancy it wishes to fill and there are pilots who wish to offer themselves for that vacancy on the footing that it gives them an upward movement in their careers and more money.

[15] However, the evidence before the Authority is that there has long been in place the principle enshrined in clause 12.1.11 which enables Air New Zealand to direct a pilot to a position suitable to his or her seniority but which involves the pilot "trading down" either in terms of rank or aircraft size.

[16] Mr Gilmore told me that this happened where there were too many pilots in one fleet and not enough in another or when a particular aircraft type was being phased out. In each of those circumstances, Air New Zealand maintains that it can direct a pilot to either a lower rank or a smaller aircraft.

[17] Mr Gilmore explained in his evidence to the Authority that because any change in fleet or rank inevitably involved training and because the effect of this

provision (clause 12.1.11) was invariably to direct a pilot either down in rank or down in fleet, the provision became known in the airline as *"downtraining"*.

[18] Because of the global financial crisis, there was a reduction in demand for air travel which had the effect of reducing the number of seats required to be provided on flights, thus reducing aircraft sizes to smaller aircraft and, despite a number of other steps which the airline took to try to address the problem, according to the evidence I heard from Mr Gilmore, the problem was *"particularly acute in the captain rank on the 767 fleet"* and it was decided to downtrain some B767 captains to the rank of captain on the A320 fleet. This step enabled A320 captains to use up their annual leave and also enabled Air New Zealand to retain the B767 captains in the employment rather than contemplate disestablishing their positions by redundancy.

[19] Although I am not persuaded that it is germane to the present dispute, for the avoidance of doubt, I record that the initial six month period of downtraining for the subject pilots was not a compulsory exercise in terms of the relevant contractual provision but in effect a voluntary agreement with ALPA to meet the particular exigencies of the situation.

[20] Notwithstanding that, the documentation developed by the parties at the time makes plain that Air New Zealand reserved to itself the right to compulsorily downtrain should that be necessary subsequently, and indeed that provision was relied upon in the second tranche of downtraining that the subject pilots were involved in, where Air New Zealand, in reliance on the downtraining provision, directed the pilots to continue flying as captains on the A320 fleet.

[21] It is ALPA's position that notwithstanding the downtraining provision in the agreement, once a potential redundancy situation is identified and Air New Zealand starts to exercise the rights that it has in terms of clause 11.5.2 of the agreement, it is in effect locked into a code which does not allow the airline to contemplate downtraining as clause 12.1.11 provides.

[22] To put it in the words used in the ALPA submission:

> *… as Air New Zealand chose to take advantage of the benefits to it under clause 11.5.2, it was locked into the process prescribed by that clause. Clause 11.5.2 contains no reference to downtraining under clause 12.1.11. Downtraining under clause 12.1.11 of the (agreement) was simply not open to Air New Zealand once it invoked clause 11.5.2.*

[23] Clause 11.5.2 sets out in some detail the steps that the airline must take once a potential redundancy situation arises. In effect, there is a descending range of measures which the airline can take which are designed to avoid the ultimate measure of declaring staff redundant. The scheme of the clause requires a succession of actions by the airline to be taken in the order recorded and in effect, if all else fails, termination of positions for redundancy can be undertaken.

[24] Air New Zealand argues that neither of the provisions suggest that when that provision is relied upon, other provisions of the agreement cease to apply or are somehow suspended and that the two provisions are consistent the one with the other because both of them seek to emphasise the intention the parties had in trying to resist redundancy at all costs.

[25] Moreover, it is suggested for the airline that any interpretation of either of the subject provisions which had the effect of somehow suspending the operation of the other subject provision would not give effect to the intention of the parties which was to avoid redundancy if at all possible, given that both provisions were, by different mechanisms, seeking to retain the employment of staff rather than have redundancy declarations made.

[26] The principles of contractual interpretation are well settled. The leading case, which I have been referred to, is *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 where at para.[19] Tipping J said:

> *The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. … The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.*

[27] Based on that statement of the law, the first obligation I have is to look at the words of the clauses themselves in the context of the agreement as a whole and on that basis I am unable to find any support for the interpretation advanced by ALPA. Neither of the provisions in question contains words which suggest that the operation of the provision is subject to suspension if the other provision is in play.

[28] If the parties had intended that the redundancy provisions in clause 11.5.2 should be an exclusive code (because that is the effect of what ALPA is saying), then surely the parties would have said so, but they have not.

[29] Moreover, the same point can be made in respect of clause 12.1.11 where again, there is no suggestion whatever that the downtraining right which Air New Zealand has in terms of that provision is somehow subject to qualification in that it cannot be relied upon where a redundancy situation exists.

[30] I agree with Air New Zealand's submission that in order for ALPA's interpretation to be given effect to, I must effectively add words to one or other (or perhaps both) clauses of the agreement in order to give effect to what ALPA claims is the correct position.

[31] Not only does it not seem to me that the provisions in question mean what ALPA alleges they mean but it also seems to me that ALPA's contention does violence to what, on the face of it, are two complimentary provisions, both directed at the laudable principle of retaining staff in circumstances where the disestablishing of jobs might be in prospect.

[32] While it is true that the provisions in dispute offer different solutions, I think it fair to say that they each of them address the same problem and I am simply not persuaded that it is my remit to add to the words the parties have negotiated and which I am advised have been in place for a significant period of time, in order to give effect to ALPA's interpretation.

Determination

[33] I decide this preliminary issue in favour of Air New Zealand Limited. I am satisfied that Air New Zealand has a right to direct a pilot to any position appropriate to his seniority that the company considers suitable as clause 12.1.11 of the agreement provides and I am not persuaded that there are any fetters on Air New Zealand's discretion to engage that provision from a proper interpretation of clause 11.5.2 of the agreement.

[34] It follows that even where clause 11.5.2 is invoked, I am satisfied that Air New Zealand can continue to have access to and use the provisions of clause 12.1.11 contemporaneously.

[35] I reach these conclusions because it seems to me the plain words of the relevant provisions in the agreement and the context in which those plain words sit in the agreement, impel such a conclusion.

[36] It is unnecessary for me to address the estoppel argument as a consequence.

Costs

[37] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority