

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 278
3105932

BETWEEN	E TŪ INCORPORATED Applicant
AND	AIR NEW ZEALAND REGIONAL MAINTENANCE LIMITED First respondent
AND	AVIATION AND MARINE ENGINEERS ASSOCIATION INCORPORATED Second respondent

Member of Authority: Helen Doyle

Representatives: Peter Cranney, counsel for the Applicant
Andrew Caisley and Melissa Hu-Davidson, counsel for the
First Respondent
Jim Roberts and Eloise Callister-Baker, counsel for the
Second Respondent

Investigation Meeting: 25 and 26 June 2020 at Wellington

Submissions Received: 26 June 2020

Date of Determination: 13 July 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] E tū Incorporated (E tū) is a union with members who work at Air New Zealand Regional Maintenance Limited (RML). It is a party with RML to a collective agreement that covers employees who are or become its members.¹

¹ Air New Zealand Regional Maintenance Limited and E tū Aircraft Engineering Employees Collective Agreement 16 September 2019 to 11 September 2022.

[2] RML is a duly incorporated company carrying on the business as a provider of turboprop aircraft engineering and maintenance services. It is a wholly owned subsidiary of Air New Zealand Limited and provides its services to a number of customers including Air New Zealand.

[3] Aviation and Marine Engineers Association Incorporated (AMEA) is a union and was joined to the proceedings by consent. It is a party to a collective agreement that covers employees who are or become its members.²

[4] RML says that as a result of some pre-existing overcapacity on its overnight shift and the impact of COVID-19 it will only have work for 34 of its 112 aircraft engineering employees employed at its Nelson base. RML has decided heavy maintenance work is to be carried out in Christchurch. It has announced to its employees an intention to disestablish 78 roles and has been engaged in a consultation process since 22 April 2020.

[5] The parties reached an impasse during the consultation process about the selection of the 78 employees to be made redundant.

[6] E tū says that it has members who undertake the line maintenance work that will remain and they should be safe from redundancy. Further there is nothing in the collective agreement allowing RML to replace them with other workers whose positions are redundant “or, to separate them from their positions and place or throw them in a pool”.

[7] E tū asks the Authority to resolve a dispute about the meaning of the words “redundant” and “redundancy” in clause 32 of its collective agreement. It seeks a compliance order and injunction to restrain RML from dismissing its members.

[8] RML denies that there are 34 employees employed in positions in line maintenance. It denies the rest of the employees are employed in positions in heavy maintenance. It says that the roles that exist are those provided in the collective agreements and letters of appointment. They are Team Leaders, Certifying Engineers/Return to Service Engineers (Cert Eng/RTS), Aircraft Maintenance Engineers (AME) 1, 2 and 3, Trade Assistants and Trades People.

² Air New Zealand Regional Maintenance Limited and Aviation & Marine Engineers Association Inc Aircraft Engineering Employees Collective Agreement 16 September 2019 to 11 September 2022.

[9] It does not accept that line maintenance work is unaffected by the current proposal and that only heavy maintenance work is going. RML says that the collective agreements are silent about how the selection for redundancy should be undertaken and that in those circumstances it is for the employer to determine the approach to be adopted. Further, it says that the work in overnight line maintenance is reducing.

[10] AMEA did not lodge a statement in reply before it was formally joined by consent to the proceedings on the first day of the investigation meeting. A statement of evidence from the National Industrial Organiser for AMEA, Penelope Mahoni, had been lodged and served the day before the first day of investigation. AMEA in submissions say that there are no positions in the collective agreements of Line Maintenance AME/Cert Eng/RTS or Team Leader. Further there are no positions of Heavy Maintenance AME/ Cert Eng/RTS or Team Leader. Rather it says that positions are generic in nature and the same wherever the work is carried out.

[11] It is helpful to set out the nature of the aircraft engineering work at RML with a description of heavy and line maintenance.

[12] Heavy work (or Hangar work) is usually done during the day because the aircraft has been taken out of service and is not required for ordinary operational flying for a period of time. Maintenance carried out on aircraft removed from operation and towed away to a maintenance hangar consists of routine maintenance checks and replacement of components that require a longer time frame. This could include support from specialised areas such as non-destructive battery testing, painting and structural work on the aircraft.

[13] Line work at RML incorporates what would normally be called Ramp work which is done during the day and Light work. Ramp or line work is work on aircraft which have completed a flight and are in transit before another. Pre-flight checks are undertaken. Light work is done overnight between the end of one day's scheduled flying and before the commencement of the next days scheduled flying. It includes maintenance checks and replacement of components that can be completed within a shorter timeframe.

[14] There is urgency as the process has come to a standstill. A number of employees want to know what the outcome of the process is so they can make decisions about their future. The parties attended mediation but the matter remained unresolved.

The issues

[15] Counsel provided opening addresses to clarify the nature of the dispute and issues to be resolved. I consider that the issues for determination by the Authority are as follows:

- (a) What do the collective agreements provide for redundancy in clause 32?
- (b) What do the collective agreements/appointment letters provide about positions?
- (c) Should those working in line maintenance be kept safe from the downsizing process on the basis of work performed?

What do the collective agreements provide for redundancy in clause 32

[16] Both collective agreements mirror each other. E tū is bringing the dispute and I shall refer to its collective agreement with RML although what is set out will equally apply to the collective agreement AMEA has with RML.

[17] Clause 32 of E tū's collective agreement does not define redundancy. It sets out how the consequences of loss of permanent employment can be minimised. It refers to notice, redundancy compensation and voluntary redundancy.

[18] There is no dispute about what would constitute a redundancy.

[19] Mr Cranney in his opening submission puts it this way "that if the position filled by the worker is superfluous to the employer's needs, the worker is redundant."

[20] Mr Caisley and Mr Roberts in submissions refer to the Court of Appeal's statement in *G N Hale & Sons v Wellington Caretakers IUOW*:³

...
Termination being attributable, wholly and mainly, to the fact that the position filled by the worker, is or will become superfluous to the needs of the employer and...

[21] There was no disagreement with the statement from the Court of Appeal in *New Zealand Fasteners Stainless Limited v Thwaites* that the principles are clear enough and redundancy is determined in relation to the position not the incumbent.⁴

³ *Hale v Wellington Caretakers IUOW* [1992] NZIL1079.

⁴ *New Zealand Fasteners Stainless Limited v Thwaites* [2001] ERNZ 379 at 22.

What do the collective agreements provide about positions?

Coverage

[22] Coverage of the collective agreement is in clause 2. The collective agreement covers all employees of the company, who are or become members in positions covering:

- Maintenance and Servicing of Aircraft, Engines, and Components
- Technical Support and Inventory (Purchasing & Stores)
- Clerical Administration and Support

in relation to aircraft of 120 or less passenger seats and as provided in the Payment Classification Schedules contained in this Collective Agreement and subject to the following:

- Heavy maintenance in Hamilton, Nelson/Blenheim is within coverage.
- Line maintenance in NZ within coverage excluding line maintenance in Christchurch and Auckland.
- ...

[23] Other engineering is referred to as being within coverage as is plant or aircraft inspections. Coverage excludes employees who hold positions above supervisory and/or a senior position with access to confidential or commercially sensitive material.

New Employees

[24] Clause 4 sets out requirements to offer the collective agreement to prospective employees where the position offered is covered by the collective agreement. For new employees if the current payment classification in the collective agreement does not contain a classification for an employee as defined in the coverage clause then clause 4 provides consultation should occur to establish a classification and pay scale.

Payment Classification

[25] Clause 49 is headed Payment Classification. Clauses 49.1 and 49.2 refer to Trades Assistant and Tradesperson. Clause 49.3 to Aircraft Maintenance Engineer AME 1, AME 2 and AME 3. Clause 49.4 refers to Certifying Engineer/RTS. Clause 49.5 to Team Leader.

[26] Clause 49.6 has a reference to a line maintenance position called a Line Maintenance Supervisor. That position was disestablished in 2017. The Authority heard evidence from

Nigel Sutton who after his line maintenance supervisor role was disestablished was appointed to a Team Leader - overnight role within line maintenance.

[27] E tū says that clause 49 is restricted in its application and operation to pay classification rather than describing positions. The word position is used at times in clause 49 and materially in clause 49.7 which provides for promotion and transfer. Clause 49.7 provides that an employee promoted or transferred within the Company to a position with a higher remuneration scale than they currently receive shall move to the applicable scale of the new position as specified in “Section 2, Schedule 1 “Pay Rates””.

[28] Neither clause 49 nor Section 2, Schedule 1 pay rates refer to positions of line maintenance engineer or heavy maintenance engineer.

[29] The Authority heard from E tū union delegate John Ivanof. Mr Ivanof worked as an engineer at Air Nelson then RML for 27 years in line maintenance and said there had never been “regular mixing of the heavy and line workers.” His evidence was that there were no position descriptions in the collective agreement and he said that was a failing of Human Resources from 2015 when RML was incorporated and staff transitioned to the company because there was an agreement that they would be provided. He said he had never seen the position descriptions included in the bundle of documents provided by the parties for reference in the Authority investigation.⁵

[30] In his evidence Mr Ivanof said that the Authority should look at other evidence to show the position the line engineers hold. He referred to reporting lines to the line manager central, payroll classification on line central engineer, letters of appointment, the fact only line maintenance engineers are rostered shift engineers, that a roster variation for a roster outside the collective was agreed and signed for line maintenance only by Line Engineers. Finally he said the majority of engineers in line had been employed into line and have only worked in line.

[31] There is no dispute that there is work at RML described as line maintenance and heavy maintenance work. There are references to line maintenance in the collective agreements in respect of hours of work and rosters.

⁵ Documents 4 – 6 p 205 – 215.

[32] It was appropriate for Mr Ivanof to advance the matters that he referred to in his evidence as a delegate in the consultation process with RML about selection pools. The appointment letters are relevant. Having assessed the evidence I do not find the other factors assist me in resolving the dispute. That is because they do not indicate or support a position of line maintenance engineer or team leader beyond confirming work is undertaken in line maintenance.

Letters of appointment

[33] Mr Ivanof maintained that some staff had letters of appointment to line maintenance engineer positions. 34 appointment letters were produced during the investigation meeting. Ms Hu-Davidson helpfully prepared a schedule of these. I was also provided with letters of appointment for some other employees following the investigation meeting so I was able to consider these as well.

[34] The letters showed that employees were appointed to positions consistent with those described in the collective agreement of Team Leader, Cert Eng/RTS or AME 1, 2, and 3 and not to positions in Line or Heavy Maintenance.

Shift designations

[35] Shift designation is also provided for in the letters of appointment.

[36] The collective agreements provide for three shift designations. These shift designations were referred to in the evidence of the Head of RML Wayne Nicholson.

[37] There are “Day” employees who work Monday to Friday between 6am and 7pm. At present there are 11 of these employees.⁶

[38] There are “Rostered Day Employees” who work Monday to Sunday between 6am and midnight. At present there are 69 of these employees.

[39] There are also “Rostered Shift Employees.” At present there are 32 of these employees.

⁶ Employee numbers may differ from those in the statements of evidence due to some employees taking voluntary redundancy since that time.

[40] “Day” and “Rostered Day Employees” undertake work variously described in the evidence as hanger, base or heavy maintenance. AMEA membership is predominantly “Day” or “Rostered Day” employees.

[41] “Rostered Shift Employees” carry out line maintenance some of which is carried out overnight. E tū’s members are predominantly “Rostered Shift Employees.”

[42] The shift designation in accordance with the collective agreements is provided in the appointment letters.

[43] Mr Ivanof’s appointment letter dated 31 March 2015 with RML is in the bundle. His letter states he will be employed in the role of AME 3, Shift Rostered Employee. He also had “grandfathering” of working regular night shifts as an employment condition.

[44] The Authority heard evidence from Stuart Bubb who started with Air Nelson in 2006 and some years later was employed to work on the night shift team as an AME. He has been working for the last four years on the day line maintenance team. Over that time Mr Bubb spent about 8-10 weeks on heavy maintenance but the rest of his time over that period of 14 years employment was in line maintenance. Mr Bubb’s appointment letter dated 31 March 2015 provides his role is Certifying Engineer/RTS, Shift Rostered employee. His letter notes that this may change going forward in line with clause 9.4 of the collective agreement.

[45] From the copies of appointment letters provided after the investigation meeting there is one dated 3 April 2018 for an employee I shall call T. T was appointed to the position of AME 2 on a fulltime rostered day basis. Another appointment letter was for an employee J dated 12 August 2015 who was appointed to a position of Cert Eng/RTS and this was referred to as a rostered employee position. Some of the letters in 2018 and 2019 separate out the positions from the designated shift and refer to shift designation under hours of work.

Rules for changing the roster

[46] Clause 9.4 of the collective agreement is headed Rules for Changing the Roster. It provides that at the commencement of the collective agreement rostered day and rostered shift employee shall be employed in accordance with their roster patterns in existence at that time. There is provision to make changes to roster with consultation.

Permanent transfer between the three different employment categories

[47] Clause 94(g) of the collective agreement provides that RML may permanently transfer a Rostered Shift Employee, Rostered Day Employee, or Day Employee between any of the three different employment categories by agreement or at the end of the 90 day consultation process.

Conclusion on positions

[48] Positions are described in the collective agreements material to the current dispute as Team leaders, Cert Eng/RTS and AME 1-3 and Trades. I am strengthened in that view by the appointment letters that appoint to these positions.

[49] The work to be undertaken by the AME positions is set out broadly in the coverage clause read in conjunction with the payment classification schedules. It is maintenance and servicing of aircraft, engines and components in aircraft of 120 seats or less including heavy maintenance and line maintenance, other engineering work, and some inspection work.

[50] The Cert Eng/RTS is required to demonstrate the skills and experience of AME 1-3 and is qualified to certify that work.

[51] The Team Leader is a Cert Eng/RTS and is responsible for carrying out the same work but leads a team and can certify the work.

[52] In conclusion there are no Line Maintenance Engineer/Team Leader positions or Heavy Maintenance Engineer/Team Leader positions in the collective agreements.

Should those working in line maintenance be kept safe from the downsizing process on the basis of work performed?

[53] Mr Cranney submits that the positions filed by line maintenance workers are not surplus to requirements as the work they undertake will continue to need to be undertaken.

[54] Mr Caisley does not accept in submissions this is a valid argument as there are no line maintenance roles and not all the work is continuing and some roles must be made redundant because RML only requires 34 workers.

[55] Mr Roberts in his submissions focussed predominantly on a dispute about positions in the collective agreements.

[56] It is helpful at this point to set out what occurred during the consultation process with respect to selection pools.

Selection option number one - roles

[57] With option one RML took the view that it had three selection processes as follows:

- (a) Team Leader roles – reduced from 17 to 4 roles.
- (b) Cert Eng/RTS roles – reduced from 40 to 16 roles.
- (c) AMES/Trades roles – reduced from 54 to 18 roles.

[58] Mr Caisley submits that RML consider this the correct approach to downsizing.

[59] During consultation E tū in correspondence to RML put some emphasis on the roles having the shift designation alongside them in appointment letters as has been set out earlier. Mr Nicholson said that this gave rise to the option 2 selection pool on the basis of role and shift designation.

Selection option number 2 - roles and shift designation

[60] There was some dispute in the evidence about whether there was agreement by both unions to option 2. RML thought there was but that was not the evidence from E tū. It is now clear that there was no agreement. Agreement from AMEA appeared a compromise position with knowledge of these proceedings.

[61] Option 2 is to have a 10 person team with certain specialist capabilities to carry out transit work, aircraft on the ground (AOG) work and specialist support. This was referred in the consultation documents as resulting from feedback around an AOG day team and retention of some heavy experience and skills in Nelson.⁷ Mr Nicholson in his evidence said that this work is undertaken by employees with the shift designation “Day Employee” and “Rostered Day Employees.” There are 78 of these employees and the selection process RML required would need to reduce them to 10 employees. There would be one pool for each role – Cert Eng/RTS, AME’s etc. This is called the heavy maintenance pool.

⁷ Bundle of documents at p 276.

[62] The remaining 24 roles would be allocated to the “Rostered Shift Employees.” There are currently 32 of these. Eight would be selected for redundancy with a separate pool for each role. There are also four employees who are employed as “Rostered Shift Employees” but they work during the day. They would be included in the rostered shift employees’ pool. This is called the line maintenance pool.

[63] Feedback received during the consultation process recommended splitting the Cert Eng/RTS roles in each reduction pool between Avionic and Mechanical because of specialisation each employee has in one or other and the ongoing work requirements. That feedback was adopted.

[64] RML did not accept option 2 was the correct approach to downsizing. RML accepts that it could be arguable that roles could be considered as role plus shift designation on the basis of how the letters of appointment are worded. There are some references in the collective agreement such as in clause 9.4 and the reference to employment categories that could also support that additionally to the appointment letters.

Selection option 3 – work

[65] E tū’s view is that the redundancies should be from those employees’ currently undertaking heavy maintenance work and employees undertaking line maintenance work should be safe. As line work is continuing E tū say that they are entitled to perform the work to be undertaken even if some is transferred from night to day using the provision in the collective agreement in clause 9.4 to transfer line employees to day work.

[66] Mr Nicholson said that he did not think this was the right approach as there are no such positions as line and heavy maintenance engineers/team leaders. He considered however if AMEA agreed then RML would proceed on the agreed basis. AMEA did not agree.

Conclusion on redundancy situation

[67] As set out earlier case law provides that redundancy is a situation where the position filled by the worker is or will become superfluous to the needs of the employer.

[68] An argument that the positions filled by E tū members will not become surplus in a situation where RML needs 78 fewer positions is weakened by the earlier findings about positions in the collective agreements.

[69] Mr Cranney in submissions focuses on work undertaken and whether it is the same or similar and whether there is sufficient difference to break the continuity of employment. He refers the Authority to the judgment of the Employment Court in *McCulloch v NZ Fire Service Commission* and statements made on the work done in that case.⁸ He submits that if an employee is doing work and the employer still needs the work done, and the work can be done under the existing contractual terms, the position is not surplus. That he submits is the situation with the workers on line maintenance.

[70] *McCulloch* is a case where it was found that the employer could not disestablish all firefighters' roles and replace them with another title and subtly altered job content. The reference by the then Chief Judge Goddard to work undertaken by the firefighters still being needed and the substantial similarity of the new proposed work was considered in that context. A statement in the judgment supports a difference between that case and this:⁹

The defendant has the same right as every other employer to decide on commercial grounds that it could cope with a smaller number of employees, subject to complying with contractual duties as to consultation or otherwise by which it may have limited its own freedom of action. Subject thereto, after adopting a fair process of selection, it was open to it to have terminated the employment contracts of the surplus staff on such terms as the contracts provide for it in such situations or, of course, on such terms more favourable to employees as it might see fit to adopt.

The defendant, however, chose not to go down that path. It chose to declare all the positions surplus.....

[71] Unlike the situation in *McCulloch* the evidence in this case is that there is a decrease in overnight work for those working in line maintenance to a requirement for 24 employees together with a need for 10 day workers. Accordingly RML says there is a requirement to disestablish 78 roles and continue with a smaller number of employees.

⁸ *McCulloch v NZ Fire Service Commission* [1998] 1ERNZ at 378.

⁹ At 390.

[72] In *Carter Holt Harvey v Wallis* there was an attempt to redeploy an employee from an outdoor position at a coal mine to an indoor position at a paper mill.¹⁰ The Court considered the difference between the roles and concluded the positions were not substantially similar.¹¹ In so finding the Court set out a test that Mr Cranney refers to when considering whether there was sufficient difference to break the essential continuity of employment.¹² The test involves considering from the perspective of a reasonable person and, taking into account the nature, terms and conditions of each position and the characteristics of the employee, whether there is a difference in the roles of a significance to break the continuity of employment.

[73] The test in *Wallis* involves a comparison between an existing role and a new role to ascertain objectively whether there is sufficient difference between the two to break the continuity of employment. The Court of Appeal in *McKenna* considered and approved its application where one meat processing plant had closed and another opened and the issue was whether the plaintiffs were entitled to regard themselves as redundant.¹³ The Court of Appeal in *Sanson*¹⁴ considered the test appropriate to apply when considering a proposed position and current job description.

[74] In this case it is a downsizing situation. The circumstances are different to those cases where the test in *Wallis* has been held to be both appropriate and relevant. RML requires fewer of the roles described in collective agreements and appointment letters in the future. There has been consultation. There was a change to the selection pool following consultation to reflect views about roles and shift designation and retention of some specialist skills.

[75] I am not satisfied in all the circumstances those undertaking line maintenance work are safe from the process of downsizing because of the work that they undertake and the fact line work is continuing. They are employed in the same positions as the other employees in roles of Team Leader, Cert Eng/RTS, AMES 1, 2 and 3 and Trades. They are not employed as Line Maintenance Engineers/Team Leaders. The distinguishing feature in the appointment letters is not positions but rather shift designations.

¹⁰ *Carter Holt Harvey Limited v Wallis* [1998] 3 ERNZ 984 dicta approved by the Court of Appeal in *McKenna v AFFCO NZ Limited* [2001] 1 ERNZ 75, 79 and *Auckland Regional Council v Sanson* [1999] 2 ERNZ 596,604.

¹¹ At 996-997

¹² At 995

¹³ *McKenna v AFFCO NZ Limited* above n 1 at [17].

¹⁴ *Sanson* above n 1 at 604 and 607.

[76] E tū's argument that its members working in line maintenance fall outside a redundancy situation is answered in favour of RML and AMEA. The process is therefore not restrained and consultation should continue.

Final comments

[77] In its opening submission RML stated that the Authority could be entitled to assess whether its approach meets the s 103A test in the Employment Relations Act 2000 (the Act) and is something a fair and reasonable employer could do in the circumstances. This was not repeated in closing submissions.

[78] For completeness the Authority could only assess the reasonableness and fairness of a selection process if the claims were personal grievances. It could then evaluate the process on the basis of whether the actions were those of a fair and reasonable employer. That is not however the nature of the claim before the Authority in this case. It is a dispute about the interpretation and application of the collective agreements.

Costs

[79] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority