

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2020] NZERA 398
3107553

BETWEEN E TŪ INCORPORATED
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Peter Cranney, counsel for the applicant
Kevin Thompson, counsel for the respondent

Investigation Meeting: 30 July 2020

Submissions received: 30 July 2020 from the applicant
30 July 2020 from the respondent

Further information received: 6 and 11 August 2020

Determination: 2 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns a dispute between the parties regarding the operation and application of collective employment agreements. The issue at the heart of the dispute concerns whether a category of cabin crew - pre-MUCA Flight Attendants - who transferred from long-haul to mid-haul in an earlier restructuring retain the first right to retain their positions in the event of future restructuring.¹

¹ MUCA is an acronym for multi union collective agreement.

[2] Given the ongoing impact on Air New Zealand of the COVID-19 pandemic this issue needs to be resolved prior to any future restructuring of cabin crew services.

The Authority's investigation

[3] On 18 June 2020 the Authority held a case management conference with the representatives. A date for an investigation meeting was agreed as was a timetable for filing evidence and submissions. The Authority directed the parties circulate among all cabin crew the minute issued subsequent to the case management conference which recorded the issues for investigation and determination and timetabling directions.

[4] At the investigation meeting the Authority heard evidence from Phillip Scott, a senior flight attendant and E tū delegate and Leanne Langridge, Air New Zealand general manager of cabin crew and received submissions from the representatives. Subsequent to the investigation meeting the parties filed further information.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and the submissions of their representatives.

Issues

[6] The issues identified for investigation and determination are:

- i. Whether, as is E tū's position, pre-MUCA flight attendants are those listed in the letter referred to at clause 1.1 of schedule 100 of the long-haul collective agreement and whether such persons retain that status on transfer to the mid-haul collective agreement?
- ii. Or, whether, as is Air New Zealand's position, pre-MUCA flight attendants are those listed in the letter referred to at clause 1.1 of schedule 100 of the long-haul collective agreement but only for so

long as those employees remain employed by the respondent under the long-haul collective agreement?

Relevant law

[7] In *Kiwirail Limited v Mobbs* Judge Corkill set out the legal principals relating to the interpretation of employment agreements:²

[24] In *The Malthouse Ltd v Rangatira Ltd*, the Court of Appeal provided a convenient summary of the correct approach to contractual interpretation, as stated by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*. The Court stated:

“[19] Briefly, these authorities confirm that New Zealand courts take an objective approach to contractual interpretation which does not limit the background material available to interpret the contract. *That material must however be reasonably relevant, and it must be objective; evidence of a party's individual subjective intentions is inadmissible to interpret the contract.*

[20] *Vector* established that there need not be any ambiguity in the meaning of a contract before regard can be had to extrinsic evidence to shed light on its meaning. That conclusion put to bed the need for counsel to prove that contracts had such ambiguities, and instead emphasised the need for courts to take a contextual approach that inquired into the meaning of contracts against the background information known to the parties.

[21] As the Supreme Court later clarified in *Firm PI*, the text of the contract remains ‘centrally important’. The Court there noted that:

‘If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.

[22] The provisional meaning derived from the language of the contract is cross-checked against the contractual context. As Tipping J explained in *Vector*:

[24] In some recent cases it has been suggested that contractual context should be referred to as a ‘cross-check’. In practical terms that is likely to be what happens in most cases. Anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view is, in a sense, then checked against the contractual context. This description of the process is valid, provided the initial view is provisional only and the reader is prepared to accept that the provisional meaning may be altered once context has been brought to account. The concept of cross-check is helpful in affirming the point made earlier that a meaning which appears plain and unambiguous on its face is always susceptible to being

² *Kiwirail Limited v Mobbs* [2020] NZEmpC 139 at [24]

altered by context, albeit that outcome will usually be difficult of achievement ...

[23] *It follows that, though there is in principle no limit to the amount of 'red ink' a court can use in interpreting a contract (as Lord Hoffman famously said in Chartbrook Ltd v Persimmon Homes Ltd), there is a practical need for the party seeking to rely on the red pen to point to clear evidence justifying its use. As Tipping J explained in Vector, the exercise 'is and remains one of interpretation'. There are limits to what the courts can do under the guise of interpretation, and words can only be construed with meanings that they can reasonably bear (subject, as Tipping J recognised, to considerations of rectification, private dictionary use by the parties, and similar)."*

(Footnotes omitted.)

[8] Mr Thompson's submission that the starting point in interpretation is to reach a provisional meaning of the words used in the relevant employment agreements and then to assess, supplement and/or cross check that provisional view against the context of wider setting and objective intended meaning at the time the agreement was entered is accepted as the correct approach.

Background

Project Wa Mua settlement

[9] In August 2013 Air New Zealand and E tū's predecessor unions entered the Project Wa Mua Full and Final Settlement Agreement (the Wa Mua settlement).³ The Wa Mua settlement resolved a number of ongoing disputes concerning then existing or recently expired collective agreements and laid the basis for three new collective agreements to cover cabin crew employed in short, mid and long haul flights.

[10] Clause 6 of the Wa Mua settlement provides certain priority rights to voluntary redundancy and certain protections from compulsory redundancy under the proposed collective agreements. Clause 6 names the category of worker as "Pre-MUCA Employees" to whom those priority rights accrue and requires their names to be listed in an appendix to the Wa Mua settlement document.

[11] Since the Ma Wua settlement the parties have entered a number of collective employment agreements (CEAs) – two succeeding long-haul CEAs (LHCA) with

³ Flight Attendants and Related Services (NZ) Association Inc (FARSA) and New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (EPMU).

terms running 2013 – 2015 and 2019 – 2022 and a mid-haul CEA 2019 – 2022 (MHCA). The CEAs all contain mirror provisions preserving priority rights for Pre-MUCA flight attendants in a redundancy setting as broadly described in the Wa Mua settlement document.

[12] This year, due to the impact of the COVID-19 pandemic, Air New Zealand has significantly reduced its long haul flights. Redundancies of workers employed in those services followed and, consequent to the priority set of rights for Pre-MUCA flight attendants, workers in that category transferred to mid-haul flight services with concomitant collective agreement coverage moving from the LHCA to MHCA. These transferred workers displaced mid-haul flight attendants resulting in a significant number of redundancies. Mr Cranney has correctly described the displacement of workers caused by the transfer of Pre-MUCA flight attendants as a tragedy albeit one compliant with the parties’ rights and obligations under the relevant collective agreements.

[13] The impact of the COVID-19 pandemic on Air New Zealand is ongoing and future redundancies of workers may be necessary. The question before the Authority concerns whether the transferred flight attendants retain their priority rights.

The parties’ positions

E tū

[14] E tū’s primary argument is the Wa Mua agreement preserves pre-MUCA employee status for workers who transfer between the MUCAs under the redundancy provisos. The argument is developed as follows:

- The redundancy provisos confer two sets of substantive rights on pre-MUCA flight attendants;
- The first set of rights gives pre-MUCA flight attendants priority when volunteers for redundancy are called for;
- The second set of rights excludes pre-MUCA flight attendants from compulsory redundancy because they are excluded from application of the selection criteria in the relevant agreement or further application and transfer as “survivors”;
- The pre-MUCA flight attendant status is preserved on transfer;

- Clause 20.2.1 defines a redundancy condition as “a condition in which an employer has Flight Attendants surplus to requirements”;
- A pre-MUCA flight attendant can never meet the redundancy condition because a pre-MUCA flight attendant can never become surplus to requirements.

Air New Zealand

[15] Air New Zealand’s primary argument is the pre-MUCA status is suspended upon transfer. The argument is developed as follows:

- the consensus position expressed in the Project Wa Mua agreement which created a career pathway for a grand-parented group of employees (pre-MUCA Flight Attendants) who could transfer to the other work group in the event of a redundancy situation;
- E tū’s argument can only succeed if the Authority is prepared to apply “red ink” to clause 2.1.1 of the redundancy proviso and delete the requirement that the effected worker “remain[s] employed by the Company under this Agreement” which introduces a temporal limitation;
- The interpretation advanced by E tū is not only contrary to accepted principles of contractual interpretation but would produce an absurd outcome because, amongst other things, such adverse consequences to other employees cannot have been intended.

Discussion

[16] This is a dispute about the meaning and application of the relevant collective agreements to Pre-MUCA Flight Attendants in a future redundancy setting. A useful starting point is to step through the relevant provisions as if the parties were undertaking a redundancy process under the MHCA, the collective agreement to which Pre-MUCA Flight Attendants were most recently transferred:

Step 1 - the first question is whether the situation meets the definition of redundancy the parties have agreed as set out in clause 20.1.2:

20.2 Definition

20.2.1 Redundancy is a condition in which an employer has Flight Attendant(s) surplus to requirements because of the closing down of the whole or any part of the Employer’s operations due to a change

in plant, methods, material or products, or reorganisation or like cause requiring a permanent reduction in the number of permanent Flight Attendants who have not achieved the Airline's retirement policy.

...

Step 2 – If the conditions defining redundancy in clause 20.2.1 are met, then the process the parties have agreed for redundancy selection must be applied as required by clause 20.3.3:

20.3 Selection Criteria of Redundant Employees

...

20.3.3 The parties have agreed to a Redundancy Selection proviso set out in Appendix V of this Agreement.

Step 3 – The redundancy proviso in Appendix V applies if a redundancy event as defined in clause 20.2 exists (Appendix V clause 1.1). Appendix V terms resolve any inconsistency with any term in the MHCA (Appendix V clause 1.1).

Step 4 – If the conditions of a redundancy event are met then voluntary redundancies must first be called for (Appendix V clause 2). Pre-MUCA flight attendants are the first group to be given the opportunity to volunteer for redundancy. Clause 2.1.1 purports to incorporate a definition of Pre-MUCA Flight Attendants:

that Pre-MUCA Flight Attendants (as defined in Schedule 100 of the Long Haul Collective Agreement) employed in that rank on either this Agreement or the Long Haul Collective Agreement are given the opportunity to volunteer for redundancies arising in either or both Collective Agreements; ...

Step 5 – Consideration is then to be given to which flight attendants are Pre-MUCA Flight Attendants.

Step 6 – Following the call for volunteers, if compulsory redundancies are required then the second set of priority rights for Pre-MUCA Flight Attendants is invoked.

Step 7 – The process then needs to be tested against the “avoidance of doubt” provisions set out at clause 4 which include:

4.1.4 In the event that any Pre-MUCA Flight Attendants or FSMs transfer into the Mid Haul Fleet and become covered by this Agreement:

4.1.5 The transferring Pre-MUCA Flight Attendants or FSMs shall be entitled to retain his/her existing salary, overtime, allowances, sick leave any retirement leave entitlements as provided for under the Long Haul Collective Agreement; and

4.1.6 In building rosters under this Agreement the Company will not take into account whether an employee is a Pre-MUCA Flight Attendant or not.

[17] The provisions themselves are straightforward. The difficulty arises as to the definition of Pre-MUCA Flight Attendant.

[18] Clause 2.1.1 refers to a “definition” of Pre-MUCA Flight Attendant in Schedule 100. In strict terms there is no definition of Pre-MUCA Flight Attendant in Schedule 100. What is contained is an application clause (clause 1) which describes Pre-MUCA Flight Attendants followed by a definition clause (clause 2):

SCHEDULE 100 – TERMS APPLICABLE TO PRE-MUCA FLIGHT ATTENDANTS

1. APPLICATION OF THIS SCHEDULE

1.1 The terms and conditions set out in this Schedule shall apply only to Flight Attendants who are listed in the letter from the Company to the Flight Attendants and Related Services Association and the New Zealand Engineering Printing and Manufacturing Union Inc called Pre-MUCA Employee List” (MUCA stands for Multi Union Collective Agreement) for so long as those employees remain employed by the Company under this Agreement (“**Pre-MUCA Flight Attendants**”).

2. DEFINITIONS

2.1 A Flight Attendant is a part time or full time crew member...

[19] The Authority is satisfied clause 1.1 of Schedule 100 is a definition of Pre-MUCA Flight Attendants because this is what the parties have agreed it to be – clause 2.1.1. of Appendix V has been drafted, bargained and ratified in contemplation of the nomenclature and wording of Schedule 100, clause 1.1.

[20] How then does clause 1.1 define “Pre-MUCA Flight Attendants”? The starting point is the wording of the clause itself.

[21] The ordinary and natural meaning of the words of the clause is that Pre-MUCA Flight Attendants are those flight attendants listed on the “Pre-MUCA

Employee List” attached to the Wa Mua settlement document as long as they remain employed by Air New Zealand under the MHCA that is, “this Agreement”.

[22] It does not follow that transfer to the MHCA from the LHCA under the redundancy proviso discharges or suspends “Pre-MUCA Flight Attendant” status. The transferred workers maintain their priority status under the mirror clause 1.1 of Schedule 100 because at transfer they attain coverage under that Agreement and from then satisfy the requirement to “remain employed by the Company under this Agreement” the transfer having moved them seamlessly to the MHCA from the LHCA.⁴

[23] The interpretation that the priority obligation is not discharged or suspended on transfer from LHCA to MHCA (or the reverse) is supported as follows:

- The definitional requirements of “Pre-MUCA Flight Attendant” in schedule 100, cl 1.1 (mirror provisions in MHCA or LHCA) are met if a worker is (i) named on the “Pre-MUCA Employee List”, (ii) employed by Air New Zealand and (iii) remain employed under the qualifying “this Agreement”;
- Employment is continuous on transfer from LHCA to MHCA. A Pre-MUCA Flight Attendant is never not able to hold that status because they always remain employed under a qualifying Agreement⁵;
- There is no explicit mechanism in the LHCA or MHCA to remove “Pre-MUCA Flight Attendant” status; and
- The retention of “Pre-MUCA Flight Attendant” status on transfer is consistent with the post transfer rights at clause 4.1.5 and 4.1.6.

[24] Careful consideration has been given to the contextual argument including that mid haul flight attendants have not agreed to permanently inferior redundancy rights to transferees. This argument does not succeed because it is not apparent on the face of the MHCA that a Pre-MUCA Flight Attendant would not have that status on transfer because they are someone who “remains employed by the Company under this Agreement”. When cross checked against the framework of collective

⁴ LHCA 2019 – 2022 schedule 100, clause 1.1.

⁵ If employment is not continuous a worker’s name is removed from the Pre-MUCA employee list appendix D by operation of clause 6 of the Wa Mua settlement document.

agreements and the Wa Mua settlement agreement the Authority is satisfied the parties' intention was not to suspend or discharge pre-MUCA flight attendant status on transfer.

Outcome

[25] The question is answered in favour of E tū. The declaration is granted as sought.

Costs

[26] Given the nature of this dispute the Authority is minded to allow costs to lie where they fall. Notwithstanding, if E tū seeks an award of costs, memorandum to be filed and served within fourteen days of the date of determination and Air New Zealand to file and serve any reply memorandum within seven days of receipt.

Marija Urlich
Member of the Employment Relations Authority