

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 41
3065632 & 3078056

BETWEEN	AIR NEW ZEALAND LIMITED Applicant in 3065632 and Respondent in 3078056
AND	E TŪ INCORPORATED First Respondent in 3065632 and Applicant in 3078056
AND	AVIATION AND MARINE ENGINEERS ASSOCIATION INCORPORATED Second Respondent in 3065632 and Applicant in 3078056

Member of Authority:	Robin Arthur
Representatives:	Andrew Caisley and Scott Worthy, counsel for Air New Zealand Peter Cranney, counsel for E tū Jim Roberts and Eloise Callister-Baker, counsel for the Aviation and Marine Engineers Association
Investigation Meeting:	3 and 4 February 2020
Determination:	4 February 2021

DETERMINATION OF THE AUTHORITY

- A. The phrases “A320 Series” and “for NEO” used in clause 5.4.2 of the two collective agreements at issue in this matter were intended to and agreed to include both the Airbus A320 NEO and A321 NEO aircraft.**
- B. There was no live issue for resolution in interpretation or operation of terms relating to providing or participating in training provided by Air New Zealand.**

C. There was insufficient evidence to make a finding on whether any bonding arrangements presently made by Air New Zealand with individual employees breached terms of the relevant collective agreements or was otherwise unlawful.

D. Costs are reserved with a timetable set if a determination of that issue is necessary.

Employment Relationship Problem

[1] This determination concerns a dispute about the interpretation and application of two collective employment agreements – the Aircraft Engineering Employees Collective Agreement between Air New Zealand and E tū Incorporated (the E tū agreement) and the Aircraft Maintenance Engineering Employees Collective Agreement between Air New Zealand and the Aviation and Marine Engineers Association Incorporated (the AMEA agreement).

[2] A term in both agreements provided for an Aircraft Type Payment (AT Payment) for engineers who had the necessary training licences and company approvals to certify or ‘sign off’ work done on aircraft in one or more of the “aircraft series” in a list set out in that term. The term allowed for one AT Payment for each aircraft series the licensed engineer was authorised to certify.

[3] Negotiations for renewal of the two agreements, begun in 2018 and concluded by early 2019, resulted in a note being added to the term about Airbus aircraft in the “A320 series”. The note allowed for an additional payment of half of an AT payment to those licensed engineers who were authorised to certify work done on A320 series aircraft with a new, different engine type. The new engine type was referred to by the initials NEO, standing for New Engine Option.

[4] Airbus had introduced a NEO version of its existing A320 aircraft and a new, longer version of the aircraft called the A321 NEO. Air New Zealand purchased both A320 NEO and A321 NEO aircraft to add to its fleet. The fleet already included an earlier version of the A320 aircraft, referred to as the A320 CEO or “Current Engine Option”.

[5] The dispute arose from the parties’ different views over whether the A321 NEO aircraft was to be treated as part of the A320 series for the purposes of the half

AT payment to those licensed engineers authorised to certify work done on aircraft forming part of that series.

[6] Air New Zealand said the 2018 negotiations had resulted in agreement that both the A320 NEO and A321 NEO models were covered by the use of the words “A320 series” in the two agreements.

[7] However the two unions said the wording used in the agreed term was neither intended nor agreed to now include the A321 NEO. The unions’ view was that the additional half payment of the AT Payment only covered the signing off of work done on A320 NEO aircraft, not the A321 NEO as well. In their view this meant licensed engineers were free to seek a further payment for certifying work done on the A321 NEO aircraft.

[8] Air New Zealand applied for an Authority’s determination of the interpretation dispute. As part of their response to that application, E tū and the AMEA each made a separate application of their own raising issues related to or flowing from the interpretation dispute. Those additional issues concerned arrangements and costs for training to work on particular types of aircraft. All three applications have been investigated and determined jointly.

The Authority’s investigation

[9] The parties provided extensive background documents about their interactions over these issues. They also lodged written witness statements from:

- (i) Brent Foote, Air New Zealand’s Head of Aircraft Maintenance – Auckland who was the company’s lead advocate in the joint bargaining for the two collective agreements that were the subject of these proceedings;
- (ii) Stan Renwick, an AMEA national organiser (since retired), who acted as lead advocate for the two unions during the joint bargaining;
- (iii) Savage, E tū’s head of aviation, who attended the 2018 negotiations during the fifth week of bargaining after E tū’s lead advocate became ill;
- (iv) Jason Lilley, an aircraft engineer and AMEA delegate, who attended the bargaining as a member of AMEA’s bargaining team;

- (v) Milton Donovan, a licensed aircraft maintenance engineer and AMEA delegate, who attended the bargaining as a member of AMEA's bargaining team; and
- (vi) Allen Kennedy, a licensed aircraft maintenance engineer and AMEA delegate, who attended the bargaining as a member of AMEA's bargaining team.

[10] All witnesses attended the investigation meeting and answered questions under oath or affirmation asked by me and the parties' representatives.

[11] Mr Renwick answered questions on the first day of the investigation meeting from me and AMEA's counsel. In light of the answers Mr Renwick gave that day counsel for Air New Zealand opted not to ask any questions in cross examination of him. However at the outset of the second day of the investigation meeting counsel for AMEA and E tū asked for Mr Renwick to be given an opportunity to answer further questions. They said he had difficulty hearing some questions he was asked and reportedly became confused about which meetings or other events he was answering questions. Some answers he gave on the first day appeared to accept or support Air New Zealand's view of events rather than the unions' case. While there was some room to doubt the grounds given for the request, Mr Renwick was given that opportunity due to the prospect that his answers might genuinely have been affected by his hearing disability and a recent illness. He then answered further questions from AMEA counsel and, by way of cross examination, counsel for Air New Zealand. The extent to which there were significant differences between his earlier and later answers was the subject of some submissions by Air New Zealand as to which were the most reliable or likely to be true. In evaluating all matters for consideration, this determination has generally relied on what was apparent from contemporaneous documents and the recall of relevant events by the other witnesses from the two unions and Air New Zealand.

[12] At the end of the investigation meeting counsel for the parties gave closing submissions on the issues for resolution.

[13] 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. It has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.¹

Background to the dispute

[14] The evidence of the witnesses canvassed changes to Air New Zealand's fleet of aircraft, the history and content of the collective agreements, the particular terms in issue and what had happened both prior to and during their bargaining meetings and other discussions between representatives of the parties from around April 2018 through to early 2019.

The aircraft

[15] Since 2003 Air New Zealand's fleet has included A320 CEO aircraft.

[16] In 2017 Air New Zealand announced plans to buy 20 new Airbus aircraft comprising six of the A320 NEO model and 14 of the A321 NEO model.

[17] While the A320 NEO and A321 NEO have a PW1100G engine, different from the V2500 engine used in the A320 CEO, Airbus described the airframe of the NEO models as having with "95 per cent commonality" with other aircraft in its "A320 family". Airbus said the A321 NEO shared "a common type rating" with "other members of the A320 family". This rating meant pilots qualified to fly A320 aircraft could fly the A321 NEO without additional training.

[18] At the time of investing in those new aircraft Air New Zealand planned to continue operating its A320 CEO aircraft along with its new A320 NEO and A321 NEO aircraft. Its first A321 NEO planes arrived in November 2018 and the first A320 NEO planes arrived in March 2019.

The contractual terms

[19] At the time this dispute arose Air New Zealand employed around 1200 workers in its maintenance division, principally in Auckland and Christchurch. They were employed under the terms and conditions Air New Zealand and the two unions had renegotiated and renewed in more or less the same form over many years.

¹ Employment Relations Act 2000, s 174C(4).

[20] The E tū agreement set terms for around 320 members, effective from 21 January 2019 to 22 November 2020.

[21] The AMEA agreement set terms for around 850 members, effective from 16 January 2019 to 22 November 2020.

[22] Around 650 of those AMEA members worked in the light and heavy maintenance operation. Because they usually worked on aircraft taken out of the service schedule for major maintenance, they were referred to as the “hangar” engineers. The terms of those members were set out in Part 3 of the agreement.

[23] Around 200 of those AMEA members worked in the line maintenance operation. They usually worked on aircraft in service and operating to flight timetables. They did their work in an area on the airfield and near the air bridges known as “the ramp”, so were colloquially referred to as “ramp” or “line” engineers. Their terms were set out in Part 2 of the agreement. In respect of the aircraft types included for the purposes of additional payments, the wording of the terms in Part 2 differed from that found in Part 3 and in the E tū agreement. In their respective arguments the parties disagreed whether that difference in wording between Part 2 and the terms in the E tū agreement and Part 3 of the AMEA agreements was relevant in the interpretation dispute.

[24] The terms in Part 3 of the AMEA agreement, for the hangar engineers, and in the E tū agreement were effectively the same as one another. Their remuneration entitlements had three components – a base salary, certain “operational premiums” depending on the particular roster worked and certain “aircraft type payments” set out in clause 5.4. The relevant parts of clause 5.4 were:

5.4 Aircraft Type Payments

- 5.4.1 Subject to clause 5.4.3 Employees who hold either:
- a. NZ Basic License in Instrument, Electrical and Radio; or
 - b. NZ Basic Licence in Engines, Airframe and an LAA Company Approval for type if applicable.

And who have also received a Company Authorisation ... from Air NZ Engineering and Maintenance on one or more of the relevant Aircraft types in the Aircraft series (as specified in 5.4.2) will be paid an Aircraft Type Payment (“AT Payment”) as set out in Schedule 2 “Pay Rates”. For the avoidance of doubt, the Employee will be paid only one AT Payment for each Aircraft Series.

5.4.2 AT payments will be paid to Employees in respect of the following Aircraft Series:

- 737 Classic series
- 737 NG series
- 747 series
- 757 series
- 767 series
- 777 series
- 787 series
- A320 series
- ATR 72/74 series
- C130 series
- Embraer E-Jet series
- A330 series
- Q series

...

Note A320 series

For the A320 series there will an additional payment of 50 per cent of the AT payment for NEO.

5.4.3. Payment of any AT Payment is also subject to the Employee holding in addition to the licenses and approvals set out (sic) 5.4.1, any Customer/Overseas Approvals required to meet the business needs on any of the Aircraft types in the forgoing Aircraft Series. The Employer must provide all relevant training/experience in order for an Employee to gain and retain the relevant Customer/Overseas approvals.

5.4.4 The AT Payments will continue until Air NZ aircraft or Customer Aircraft type are no longer serviced by Air NZ Engineering and Maintenance and where there is no reasonable likelihood of future business opportunities. ...

[25] The rate for the AT Payment, set in Schedule 2, was an additional \$1.4481 for each hour worked.

Discussions about change

[26] In an email Mr Renwick sent to Mr Foote in April 2017 AMEA asked to meet with company representatives to talk about whether their collective agreement should be changed due to “a variation to the 320 series [to] be introduced into the Air New Zealand fleet in the next 12 months or so”. His request said AMEA recognised “the main difference between the two aircrafts is engine and possibly the length of the aircraft”.

[27] Discussions between the parties about a suitable AT Payment for the NEO aircraft began soon after and continued into early 2018. The subject was referred to as the “NEO issue”. From April 2018 onwards it was included as a topic for discussion at the monthly Problem Management Forum (PMF) attended by representatives of Air New Zealand, AMEA and E tū. By July 2018 they had reached no agreement on it. Conscious that the first of the NEO aircraft were at that time scheduled to arrive by around September 2018, the PMF delegated a sub-group of its attendees to look further into the issue.

[28] This sub-group, dubbed the Short Squad, used an internal Air New Zealand’s process through August and September 2018 to seek resolution of the issue. This included getting confirmation from the Civil Aviation Authority (CAA) that the NEO aircraft type was not designated as a different aircraft type.

[29] The Short Squad reported back to the PMF with a proposal for a half payment, that was 50 per cent of the AT payment, for aircraft with the NEO engine. At their September 2018 PMF meeting the parties discussed how to vary the collective agreements to incorporate the proposal. Under the heading of “NEO payments” the Minutes of that meeting recorded there was a “proposal for a half payment for NEO covering A320 Series” and “discussion concerning specificity as to A321 and relationship to A320 series”. A note said Air New Zealand “currently maintained Jetstar CEO 321s” which was a reference to a service provided to another airline.

[30] The PMF October meeting minutes described the variation as a “proposal for a half payment for NEO covering A320 Series/family including A321”. The Minutes also noted the E tū and AMEA hangar members had voted against it.

[31] The parties then attempted to resolve the issue through an Interest Based Problem Solving Process (IBPS). They held IBPS meetings on 15, 16 and 17 October 2018. One question for discussion was noted in this way: “how to appropriately recognise the work done on the A320/321 NEO Aircraft in both line and base maintenance?”

[32] Through this process the parties then agreed two further proposals to vary their collective agreements – one for members of E tū and the AMEA hangar engineers employed under Part 3 of their agreement and a differently worded one for line engineers employed under Part 2 of the AMEA agreement.

[33] The AMEA line engineers voted in favour of the proposed variation to Part 2 of their collective agreement. The agreed variation removed the words “A320” from a table listing the aircraft types for which additional certification payments were made and replaced them with two sets of words: “A320 Series V2500” and “A320 Series NEO PW1100G”. The additional letters were references to the different engine types used in the two models – the V2500 in the Airbus 320 CEO aircraft and the PW1100G in the Airbus 321 NEO aircraft.

[34] Although the changed words in Part 2 of the AMEA agreement referred only to “A320 series”, the variation proposal had referred to payment for “working on A320/321 NEO aircraft”. AMEA, in its closing submissions for the Authority’s investigation, said there was “no dispute” that the words “A320 series NEO PW1100G” applied to both A230 and A321 NEO aircraft.

[35] The variation proposal considered for the E tū agreement and the AMEA Part 3 agreement also referred to the payment “for those working on A320/321 NEO aircraft”. However this proposal sought a different form of wording in the list of aircraft types. It proposed leaving the words “A320 series” and adding, in brackets: “[the family includes the A318, A319, A320, A321]”. It also proposed adding a note reading:

To reflect the level of differences that exist between the A320 Family CEO and A320 Family NEO driven mainly by the engine differences, an additional payment of 50 percent of the AT payment will apply for those that have an authorisation covering both types.

[36] Both the E tū and AMEA hangar engineers voted against that variation proposal so the issue remained, for them, an unresolved matter. And, by the time those votes took place, the parties had already begun the bargaining process for renewal of the existing collective agreements.

The negotiations and outcome

[37] The parties met for bargaining on various dates from 29 October through into early December 2018.

[38] One offer to settle the collective agreements went to a round of ratification meetings in late November but was rejected. The bargaining continued and, on 6 and

7 December, the unions issued notices for strike action to occur during the Christmas and New Year holiday season.

[39] On 12 December Air New Zealand made a new offer for settlement, contingent on withdrawal of the strike notices. The company presented its offer to the unions' bargaining team on three PowerPoint slides. The offer included a general wage increase (GWI) of 2.75 per cent in the first year and 2.75 per cent in the second year along with a number of other terms. Another of those proposed settlement terms read: "NEO half payment and \$500 gross one-time payment (Part 2 & 3 employees will be eligible for 3 years from date of ratification of CAs). ..."

[40] In his evidence Mr Foote said that, during the ensuing discussion with the unions' bargaining team about that offer, Air New Zealand was asked to remove the NEO issue from the bargaining "as that was the big issue and roadblock to getting the bargain closed". He said he had replied the offer was a package deal "as it was a big issue for us and we needed to resolve the NEO issue". He said he referred to "aircraft in the hangar being worked on and more aircraft on the way shortly". Air New Zealand had taken delivery of some A321 NEO aircraft in November 2018 and was due to receive A320 NEO aircraft in March 2019.

[41] Bargaining continued throughout that day, focussing on the pay rate movement. Around 10pm the parties agreed a GWI of 3 per cent in year one followed by a further 2.5 per cent in year two. The unions confirmed their acceptance of Air New Zealand's settlement offer through a representative of each union sending an email to a company representative lifting the strike notices. The email from AMEA's national secretary Jacqui Roberts said the terms of settlement include those tabled by Air New Zealand that evening, with the only change noted being the wage increase amounts.

[42] Representatives of the parties then met on the following day, 13 December, to draft the written terms of settlement (the TOS) for distribution to the ratification meetings where union members would vote on whether or not to settle their collective agreements on those terms.

[43] The draft TOS, prepared by Air New Zealand representatives, proposed amending clause 5.4.2 of the E tū and AMEA Part 3 clauses by adding the following

note after the A320 bullet point: “[the family includes the A318, A319, A320, A321]” with a note to be added to the clause reading, in part:

Note A320

To reflect the level of differences that exist between the A320 Family CEO and A320 Family NEO driven mainly by the engine differences, an additional payment of 50 percent of the AT payment will apply for those that have an authorisation covering both types.

For the avoidance of doubt, an employee who holds a A320 Family CEO or A320 Family NEO authorisation, one AT payment will apply. For employees who hold both A320 Family CEO and A320 Family NEO authorisations the payments shall equal 1.5 time of an AT payment.

[44] Air New Zealand’s draft TOS also included a paragraph headed “Neo one-time payment”:

The Company will pay to each employee who has submitted their A320 NEO Family EQ 5050 for the Company Authorisation on or before 16 December 2021 a one-time payment of \$500 gross and any applicable deductions. The payment will be made in the next pay period following the engineer receiving the Company Authorisation. For the avoidance of doubt, only one payment will be made to each employee who satisfies the terms of this clause ...

[45] Attached to the draft TOS was a draft memorandum of understanding listing some items which the parties agreed to discuss further during the term of the agreements. The identified items were matters where agreement had not been reached. Those items did not include the NEO issue or any aspect of it.

[46] When the parties met that day to talk about the draft TOS Mr Renwick and some delegates questioned whether the additional half payment applied only to A320 aircraft, for the model with the NEO engine, or also included the A318, A319 and A321 aircraft. Mr Foote, in his evidence, said the Air New Zealand representatives made it clear that the NEO half payment offered was for the A320 NEO and the A321 NEO.

[47] The evidence of all witnesses agreed that Mr Renwick had spoken angrily about the content of the bracketed list of aircraft types to be referred to as part of the A320 series. However their evidence differed over whether his concern was focussed on the inclusion of A318 and A319 models in that list or whether he was also critical of including the A321 NEO model as part of the A320 series.

[48] Air New Zealand did not have any A318 or A319 aircraft in its fleet. Prior conversations during the negotiations had only been about what additional payments should be made to licensed engineers certified as capable of working on the A320 NEO and A321 NEO aircraft.

[49] The parties took a break in their discussions. The Air New Zealand representatives then asked Savage and Ms Roberts to meet with them. During that discussion a member of Air New Zealand's bargaining team wrote on a whiteboard a summary of what AT payments the company understood were agreed for the NEO issue. What he wrote included the following:

A320 CEO = 1
A321 NEO = 1
A320 CEO + A321 NEO = 1.5
A320 NEO + A321 NEO = 1.5
A320 CEO + A320 NEO + A321 NEO = 1.5

[50] He sent Savage a photo of the whiteboard summary which Savage discussed with the unions' bargaining team that afternoon. Later that day Savage sent a 'tracked changes' version of the draft TOS to an Air New Zealand representative. This tracked version identified various concerns discussed by the unions' bargaining team. It deleted the entire NEO payment clause from Air New Zealand's draft and included the following comment:

This was not discussed in mediation as the NEO conversations were solely about A321 NEO. These paragraphs are the company's suggested long term solution and would be part of a subsequent discussion.

[51] In the clause on the NEO one-time payment the words "A320 NEO Family" were deleted with a comment reading: "This was not agreed in bargaining so at this stage it relates only to the A321 NEO".

[52] This reference to "only" and "solely" the A321 NEO being covered was different from the later position taken by the unions, and as they advanced it in this proceeding, that only the A320 NEO models were meant to be covered by the agreed term.

[53] In the following days during mid-December 2018 the parties' representatives then exchanged various emails, including one from Ms Roberts proposing further mediation on the NEO issue. Air New Zealand did not agree to further mediation on

that issue because it considered the parties had already reached agreement on it. Mr Foote summarised the company's view in an email sent to Ms Roberts, Mr Renwick and Savage on 14 December. Relevant parts of that email said:

The unions agreed to the NEO half payment as recorded on the PowerPoint which was part of the offer. A resolution to the NEO was a critical reason for the Company agreeing to the other terms as proposed by the unions. It was the reason why the company agreed to the 24 month period to protect people who only had 1 license (which was the union's request). The company got agreement on the NEO being a half payment and in return agreed to the 24 month term. ... The notes from the bargain and the mediation have never referred to the A321 only in relation to this half payment it has always said "NEO" not "A321 payment". The union's offer to the company also used the same language and just referred to NEO – never referring to A321 payment. ...

[54] In a reply email, on 17 December, Ms Roberts said the unions believed references "to the NEO" were discussions about what hangar licensed engineers should get paid for certifying the A321 NEO recently added to Air New Zealand's fleet. She said the discussions "were not about the A320 family". She said she did not recall the A320 family or the A321 NEO being mentioned in the bargaining sessions held with a mediator and "the NEO was all that was referred to".

[55] Mr Foote responded with an email attaching a further draft with amendments to the TOS and collective agreement wording. His email included the following explanation of the changes made:

In relation to the NEO, the Company maintains that the wording it had proposed was agreed as part of the bargaining agreement. However, given you are suggesting this is becoming difficult for you, and in the interests of progressing to ratification, we have considered how to reflect the exact words "Neo Half Payment" in the TOS and CA (which we all agree have been agreed to and are set out on the PowerPoint slide). In this regard, the suggested change to the CA (which are already the words used in the current CA) would just be: For the A320 series there will be an additional payment of 50 per cent of the AT payment for NEO. This is now reflected in the terms of settlement and the CA has been marked up in relation to the same.

[56] This change in the draft TOS and in clause 5.4.2 of the two collectives removed the earlier version's bracketed reference beside A320 series to "the family includes A318, 319, A320 and A321" and replaced the proposed "Note A320" wording (see paragraph [43] above) with just the wording as it now appears in the agreements later signed by the parties' representatives:

Note A320 series

For the A320 series there will be an additional payment of 50 per cent of the AT payment for NEO.

[57] However a subsequent paragraph in this amended draft TOS referred to the \$500 payment that Air New Zealand had also agreed to pay for each employee who completed the NEO training course approval by 16 December 2021. This described the course as the “A320 NEO Family EQ 5050”.

[58] In a reply sent on behalf of the two unions Savage advised that they agreed to the new wording regarding the NEO issue provided the word “Family” was removed from the EQ 5050 course approval clause.

[59] Mr Foote, by email on 18 December, acknowledged both unions were “now happy to sign both TOS”. He said Air New Zealand had “amended those items you picked up” and included the following explanation:

Just note that we have removed the word “family” in relation to the EQ5050 but need to replace that with “series” to match the wording in the CA so that if someone has either an A320 NEO 5050 or an A321 NEO 5050 they will get the [One Time Payment] (they only get one payment irrespective of whether they have one or the other or both). Given it’s the word family that seems to be the issue, we trust this addresses the concern.

[60] Neither union’s representatives gave any indication that they disagreed with Mr Foote’s explanation. Later that day Ms Roberts advised him that Mr Renwick was signing the TOS for scanning and returning to Air New Zealand. An E tū representative also signed and returned the TOS later that day.

[61] During the course of those email exchanges between 14 and 18 December Mr Foote also spoke by telephone with Mr Renwick and Savage about the unions’ concerns and how they could be resolved. Mr Foote’s evidence was that he understood from those conversations that both Mr Renwick and Savage accepted the NEO payment referred to in the finally agreed wording covered both the A320 NEO and A321 NEO aircraft. On his account the words used clearly could not have included the A318 and A319 models from being seen as part of the “A320 series”.

[62] Savage did not accept Mr Foote’s understanding of their conversations. Rather he believed Mr Foote understood removal of the word ‘family’ from the wording had “returned the deal” to being about A320 numbered aircraft types only,

that is not including the A321 NEO. Mr Renwick, in his written statement, said he had told Mr Foote changing the reference from the A320 “family” to the A320 “series” would allow for ratification but did not remember Mr Foote referring to the A320 and A321 aircraft.

[63] The evidence of witnesses who attended union meetings held to vote on ratification of the two collective agreements – that is Mr Renwick, Savage, Mr Lilley, Mr Donovan and Mr Kennedy – suggested there was vigorous discussions with members about some aspects of the bargaining, particularly the decision to withdraw strike notices, but only limited discussion about the meaning of the clause 5.4.2 wording. However Mr Lilley and Mr Donovan said they and other AMEA members had voted to ratify the agreement on the basis that the words “A320 series” did not refer to the A321 NEO aircraft.

Subsequent disagreement

[64] Soon after the ratification process was completed strongly differing views became apparent over whether the A321 NEO aircraft was covered by the agreed terms. This difference emerged when Air New Zealand asked licensed engineers who had completed NEO training requirements to submit their EQ5050 certification forms to be processed. The form is a request for confirmation of authority to ‘sign off’ work on an aircraft type. Once company approval of those certificates was complete the engineer was entitled to receive the OTP of \$500 provided for in the agreements.

[65] Mr Lilley sent Mr Foote an email on 24 December 2018 saying the issue of whether the A321 NEO model was covered by the reference to the A320 series had been left unresolved in the collective negotiations. Mr Foote then asked Mr Renwick and Savage to confirm the issue had been resolved.

[66] In ensuing correspondence on the issue Mr Foote said Air New Zealand was not willing to “re-bargain” the ratified outcome which he described as a solution that “was a compromise for all parties to get the issue resolved”. He said all licensed engineers who had completed a four day “differences course” training them for work on the NEO aircraft were expected, as part of their terms and conditions of employment, to then complete the process of submitting their EQ5050 form for approval by the company.

[67] Mr Foote's letter cautioned that Air New Zealand might "need to move into a more formal compliance process" with licensed engineers who refused to achieve their rating on the NEO aircraft and to carry out work on the A321 NEO aircraft already in service with Air New Zealand. He said Air New Zealand was prepared to review the similarity of A320 NEO and A321 NEO air frames after they had been worked on for several months but meanwhile said the company had "bargained a solution to the A320/A321 NEOs and everyone needs to comply with that agreement".

[68] The disagreement escalated when some Auckland licensed engineers said they would not complete the NEO certification process. In an email to E tū and AMEA representatives Mr Foote expressed concern about the situation. He said line engineers covered by Part 2 of the AMEA agreement and some hangar engineers in Christchurch covered by Part 3 of that agreement were "picking up their A320/A321 NEO certifications" but some licensed hangar engineers in Auckland were refusing to do so. He said those engineers had reported being told by their union delegates that the changes to their collective agreement did not include both the A320 and A321 NEO aircraft.

[69] Ms Roberts and Mr Renwick met with Mr Foote to discuss those issues. In an email he sent them the following week on 6 March 2019, Mr Foote summarised his account of what they told him, in this way:

1. **People don't believe the bargain settled and/or included the A321 issue.** Stan confirmed that he had told everyone through the ratification meetings that the bargain resolved all the issues including the 320/321 issues. This is consistent with what you advised me at the time while we were negotiating the TOS so I appreciate that. You also confirmed that the offer was balloted on and it was voted up – people just don't like the outcome. Jacqui you mentioned that you weren't party to all the discussions so thought it was just the A321.
2. **People fundamentally don't believe they are obliged to pick up a rating after training they see that it is their choice whether to do so and they are electing not to.** You confirmed that you have advised members that the expectation is that they collect the authorisation after being trained. You noted however that you can't actually instruct anyone to pick up the authorisation because the engineer has to certify that they are a fit and proper person when they put the EQ5050 form in. You said that it was your view however that the CA did not require members to collect it and pointed out that in the past we have allowed people to get away with this. We asked if we started instructing people to collect the authorisation would that change your view and you confirmed it wouldn't and that you would be obligated to represent your members.

3. **The A321 is not part of the A320 series.** Both of you said that you do not have the respective qualifications to be making that assessment. Stan did confirm that you agreed right back at the IBPS process that you would accept the CAA view being the appropriate body to make the determination which has determined it is the CAA's view that the A321 is part of the A320 series.

[70] Mr Renwick, in his written statement for the Authority's investigation, said he did not "entirely agree" with Mr Foote's summary. In his oral evidence he confirmed that he had not sought to correct any part of that account by responding to the email at the time of receiving it.

[71] In late March 2019 an Air New Zealand manager wrote to various engineers who had completed the training needed for certifying work done on the A320 NEO and A321 NEO aircraft but had not then taken the steps necessary to complete the approval process, including by not submitting their EQ5050 application form.

[72] The letters sent to those individuals directed them to make their EQ5050 application as they had completed the necessary training. They were warned that failure to complete the authorisation process "could result in disciplinary action being taken for refusing this request and/or failing to have the necessary ratings/approval to carry out your role".

[73] AMEA responded to those letters with a letter of its own. Its letter said whether or not its members working in that area undertook training or completed training had always been voluntary. It said "the bargain" between the union and the company, expressed in the collective agreement, was that the worker had the incentive of an extra payment for voluntarily completing the training. It referred to the link with the A321 issue in this way:

... [T]he company tried to include wording into the Collective Agreement during bargaining that provided a half payment for A321 aircraft. That was rejected by both unions. There is a provision for A320 Neo aircraft but nothing for A321. If the company wants A321 aircraft included then it needs to agree a payment for that work, which requires a variation. When a company claim is rejected during collective bargaining it cannot just invent a provision that it wished it had or misrepresent a provision as something that it is not.

[74] AMEA also said Air New Zealand was trying to add additional conditions to training for aircraft types or approvals by "attempting to bond workers". It said if Air

New Zealand wanted union members to be bonded for any training provided, the company needed to present a claim in bargaining and see if it was able to negotiate suitable terms for doing so.

[75] AMEA's statement of problem did not specify what the alleged bonding arrangement consisted of, or instances of it being sought, but Air New Zealand's reply to that claim accepted it had "for many years offered certain training to certain employees, subject to certain bonding arrangements". Air New Zealand said it was not a breach of the collective agreement, or otherwise unlawful, for the company to endeavour to ensure it got an appropriate return on its investment for providing certain training.

[76] For the Authority's investigation Air New Zealand provided a copy of a template letter used for its rating training courses, which set out arrangements for a bond of \$20,000 for a two-year period, and a copy of a different template letter used for its A320/321 NEO differences course. The latter letter included no bonding requirement.

[77] The differences course letter did however have a provision requiring an employee who completed the training to then also complete the employee's part of the documentation process for certifying they were able to work on those aircraft. This was said by Air New Zealand to be a necessary response to some licensed engineers completing the differences training about the A321 NEO but refusing to complete the certification process so that, although trained to certify work done on the aircraft, they were not formally authorised to do so. Air New Zealand, from its point of view, was incurring the expense of training those licensed engineers but not getting any benefit for that cost. AMAE, from its stated point of view on the interpretation dispute and the concluded terms of the collective agreement, considered those engineers were not and should not be required to complete a certification process to work on A321 NEO as an appropriate payment for doing so had not been agreed.

The issues

[78] Against that background the issues for determination, broadly, were:

- (i) What was the scope and effect of clause 5.4 of the E tū agreement and Part 3 of the AMEA agreement about aircraft type payments – did it

cover only the A320 NEO or did it also cover aircraft types A318, A319 and A321?

- (ii) Under the terms of their respective collective agreements could Air New Zealand require members of E tū and AMEA to undergo training for different types of aircraft listed in clause 5.4.2?
- (iii) Were bonding arrangements in relation to some training provided by Air New Zealand to engineers made in breach of the terms of the relevant collective agreements or otherwise unlawful?
- (iv) Should any party contribute to the costs of representation of any other party?

Interpretation of terms of collective agreements – relevant principles

[79] The Supreme Court has summarised the principles to be applied in resolving disputes about the interpretation of the terms of collective agreements in this way:²

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

[62] It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language ... is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties ...

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context

² *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60]-[63] (footnotes omitted) and confirmed by the Supreme Court in its decision in *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [71] as applying to interpretation of employment agreements.

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. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[80] In *New Zealand Air Line Pilots' Association Incorporated v Air New Zealand Ltd* the Supreme Court accepted interpretation of collective agreements may consider the context of their “relational” nature representing the progression of an employment relationship on an ongoing basis over a lengthy period; the reality that the agreements are not generally drafted, negotiated or settled by practising lawyers; the good faith duty applying to the parties while bargaining; and the equity and good conscience jurisdiction. The Court emphasised the wording of terms was to be interpreted in light of the background, not a particular judicial (or investigative) decision-maker’s view of “common sense”.³ It cautioned against focussing on the negotiations and the subjective intentions of what parties or individuals sought to achieve to an extent that detracted from what was objectively apparent from the contextual background evidence about the parties’ consensus.⁴

[81] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court explained how the ordinary meaning of the terms may need to be further assessed against any specialised meanings of some words used by the parties and how commercial absurdity of an outcome may weigh in reaching an outcome:⁵

Specialised meaning

[84] Parties to contracts will sometimes use words that have specialised meanings within a particular profession, industry, trade or locality, or words that have a particular meaning simply to them (the private dictionary principle). It is well established that a court is entitled to receive evidence which demonstrates that the parties have adopted such a specialised meaning.

...

Commercial absurdity

[88] Where contractual language, interpreted in the context of the contract as a whole, has a natural and ordinary meaning, the courts will generally give effect to that as they “do not easily accept that people have made linguistic mistakes, particularly in formal documents”. The “primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage”. It requires a “strong case” to persuade a court that something must have gone wrong with the language. ...

³ [2017] NZSC 111 at [75]-[77].

⁴ At [85]-[86].

⁵ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 2, footnotes omitted.

[89] But if consideration of the relevant background forces a court to the conclusion that something has gone wrong with the contractual language, it is not required “to attribute to the parties an intention which they plainly could not have had”. Just as the courts have accepted that understanding the commercial purpose of a commercial contract is relevant to its interpretation, so have they accepted that that if a particular interpretation produces a commercially absurd result, that may be a reason to read the contract in a different way than the language might suggest. However, it has also been accepted that a court is not justified in concluding that a contract does not mean what it seems to say simply because the court considers that, so interpreted, the contract is unduly favourable to one party. There is an obvious tension between these two positions, and it will often be difficult to determine whether particular cases fall within one category or the other.

[90] Moreover, there is reason to be cautious in this area because commercial absurdity tends to lie in the eye of the beholder. ...

[91] In addition, those who negotiate commercial contracts will be influenced by a range of considerations in reaching their final bargains. The contracts that emerge from the process of negotiation will reflect accommodations of the parties’ varying interests, as they assess them at the time. The reasons underlying the compromises that typically occur in commercial negotiations may not be easily perceived or understood by a court, even if they are exposed as part of the relevant background.

...

[93] All this means that where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.

What was the plain and ordinary meaning?

[82] On a plain and ordinary reading the words “A320 series” used in clause 5.4.2 do not include the A321 NEO aircraft. The standards used by the CAA and the European Aviation Safety Agency (EASA) for certifying aircraft describe each type of such aircraft as part of a separate series. Those agencies refer to the A318 series, the A319 series, the A320 series and the A321 series. On that approach to classification the A321 NEO model is part of the A321 series and not within the ordinary meaning of the A320 series.

[83] However, in interpreting the use of those words in this particular clause of these two collective agreements, the phrases “A320 series” and “payment for NEO” had to be determined objectively on the basis of what those words would mean to a reasonable person having all the background knowledge available to these particular parties at the time of making these particular agreements.

[84] On the evidence available for the Authority investigation Air New Zealand had a compelling case that the context of the negotiations and subsequent agreement

reached had not resulted in the parties intending those phrases, and the term as a whole, to apply only to aircraft of the type or model that started with the numbers 320.

[85] Rather, those words had developed a specialised meaning to the parties which was apparent from:

- (i) the language used by the parties in their extensive discussions about “the NEO issue” before bargaining began;
- (ii) the reference to a “NEO half payment” in the offer Air New Zealand made on 12 December and, after Mr Foote had expressly refused to remove resolution of that issue from the offer, the unions accepted later that day; and
- (iii) by closely examining what the content of the subsequent communications over the TOS disclosed about the mutual intention of the parties.

[86] What is excluded from that analysis is the post facto evidence of the parties, through the various witnesses, about their subjective intentions, that is what they say now about what they meant then.

Specialised meaning

Prior discussions

[87] Through the course of the discussions in 2017 and before bargaining began in 2018 all parties clearly understood the basis of their discussions and the phrase “the NEO issue” and payment “for NEO” related to both the A320 NEO and A321 NEO type of aircraft. It related to the training and certification process required for both aircraft, because Air New Zealand was buying some of each type, and those phrases became a form of ‘shorthand’ in the communication between the parties about it.

The 12 December offer and acceptance

[88] The evidence of Mr Foote, confirmed by Mr Lilley’s oral evidence, established that the unions asked on 12 December for the NEO issue to be put aside and Air New Zealand unequivocally insisted resolution of that issue was essential to its offer.

[89] There was no sustainable argument that the union bargaining teams, at the time of accepting that offer, were not clear that the scope of the “NEO half payment”

included both the NEO types of aircraft. By including that term amongst others, Air New Zealand was achieving through the overall deal what it had not got when the licensed engineers covered by the E tū and AMEA Part 3 agreements had rejected the earlier variation proposal made before bargaining of the entirety of those agreements had begun. It was clearly, and put simply, part of the price Air New Zealand extracted for agreeing to a larger GWI for all employees covered by the two agreements.

Subsequent communications

[90] The significant and more difficult point of contention concerned whether the substance of that part of the agreement then changed during negotiations on the content and wording of the ToS, as it developed from 13 December onwards.

[91] There were two aspects of how the ‘to and fro’ on that wording may have changed the substance of the agreement – firstly, the reference in the unions’ response to the draft TOS which said only the A321 NEO was covered and, secondly, what meaning was intended and agreed in removal of the word “family” from paragraphs of the TOS and the wording of the Note about the A320 series.

[92] As already noted the comment in the unions’ response to the draft TOS on 13 December that the half AT payment “only relates to the A321 NEO” was not consistent with their later position, in these proceedings, that the agreed outcome related only to certification of A320 NEO work. The evidence of Savage confirmed that the reference to the A321 NEO type in that response document was deliberate, not a typographical slip. What its use indicated was that there was no real doubt that inclusion of the A321 NEO was clearly contemplated throughout the discussion. Objectively assessed, that reference supported Air New Zealand’s submission that both parties knew inclusion of the A321 NEO was an intended outcome of the NEO half payment term included in the package accepted on 12 December. However it was also apparent that, in negotiating the precise wording of the TOS and the collective agreements, the unions’ bargaining team were still seeking to alter the scope of that term.

[93] However Air New Zealand’s proposed draft would have included A318 and 319 aircraft as part of the A320 series and clearly went beyond what the parties discussed, both before and during bargaining. This, as a matter of likelihood, was

what sparked the angry response of Mr Renwick, rather than the reference to the A321 aircraft as part of the A320 series for the purposes of the two agreements.

[94] This was resolved by the subsequent adjustments to the wording. Two documents supported the conclusion that the mutual intention remained for the AT half payment to cover certification of both the A320 and A321 NEO aircraft types. Firstly, the whiteboard summary written out by an Air New Zealand representative and seen by the unions' bargaining team on 13 December, clearly showed both aircraft types were to be included in the calculations that would result in an additional half AT Payment. Secondly, Mr Foote's final email on 18 December, referring to the criteria for the one-time payment, clearly showed both the A320 NEO and A321 NEO were contemplated as being covered by the term. If there were still doubt or contention on that point, given the supposed heightened sensitivity and attention to the detail of aircraft types at that time, this reference could have been expected to illicit a strong response from the union representatives. It did not. Rather, they immediately made arrangements to sign the TOS.

Contractual context

[95] A related contextual point concerned the wording used in Part 2 of the AMEA Agreement in the variation agreed earlier between the line engineers and Air New Zealand. They agreed to add "A320 Series NEO PW 1100G" to the list of aircraft attracting certification payments. As already noted, AMEA accepted this reference to the 'A320 Series' encompassed the A321 NEO as well as the A320 NEO.

[96] This supported a conclusion that a specialised meaning had developed in this employment relations context about what may be considered part of the A320 series for certain purposes. This Part 2 reference could not be minimised or distinguished because it also specified the engine type. The Part 3 term in contention was similarly specific in linking the "A320 series" to the engine type by use of the phrase "for NEO" in the note to clause 5.4.2.

Commercial and employment relations context

[97] Some aspects of these conclusions and the parties' submissions still needed to be checked against the context of the negotiations and agreement reached, including an assessment of whether the commercial and employment relations outcome was so absurd there was reason to read the words used in a different way.

[98] E tū and AMEA both submitted that Air New Zealand could not seek to be rescued from what was effectively “a bad bargain” if the term was interpreted in the way that the two unions said it should be, that is by providing for a payment which covered only part of its new fleet and not the other half. There was an obvious lack of business logic if the term agreed to by Air New Zealand by the end of 2018 had allowed for certifying of A320 NEO aircraft it had not yet taken delivery of but delayed its ability to complete that process for A321 NEO aircraft it already had in the air and in its hangars by that time. Settling on such an arrangement, that undermined the operational effectiveness of its engineering business to complete servicing requirements for all its aircraft, would have been commercially absurd.

[99] The union argument acknowledged such an outcome was illogical, from a business perspective, but suggested Air New Zealand had accepted that situation in order to secure settlement shortly before a busy holiday season. The company was described as having “capitulated” under that pressure by, during negotiations over wording of the TOS, abandoning its previous insistence that the NEO issue be resolved with both aircraft types being included for the purposes of the AT half payment.

[100] However close attention to the dynamics of the bargaining suggested a similar but different pressure operated within the union parties. As the oral evidence of Mr Lilley and Mr Donovan disclosed, changes to the AT Payment criteria was of direct interest and effect to a relatively small number of licensed engineers within the wider ranks of workers covered by their agreement and who would vote in the ratification meetings. As Mr Lilley put it, those engineers did not want the cleaners voting on an issue that related purely to the certifiers. It was this concern which led to the union bargaining team on 12 December seeking to have “the NEO half payment” removed from Air New Zealand offer. The request was however firmly rejected by Air New Zealand so that the terms accepted on 18 December, objectively assessed, had overridden what Mr Donovan called the interest that licensed engineers had as a minority group.

[101] However both points, on motivations for an illogical business outcome or for seeking to resile from a mutually agreed term, speculate on the subjective intentions

or aims of parties and detract from what was objectively apparent from the contextual background evidence about the parties' consensus.⁶

[102] E tū's submission that ambiguity in use of the phrase "A320 series" should be resolved in the unions' favour could be similarly answered. It suggested the phrase "A320/A321" would be expected to have been used by the parties if the term was intended to encompass both types of aircraft in those series. While that may be correct in hindsight, a decision maker called upon to interpret words as they were used and meant at the time cannot substitute better words or a better bargain than what the parties chose to settle on.

[103] Similarly the interpretation cannot be affected by the view, expressed in some evidence from the delegates who attended the ratification meetings, that some members did not understand or were incorrectly informed about import of the words used in the TOS and the note in clause 5.4.2.

[104] During the course of the Authority's investigation meeting Mr Renwick's evidence changed on what he had said about the NEO issue to union members at the ratification meetings. He had however, according to notes of a conversation Mr Foote summarised in writing in March 2019 and which Mr Renwick did not question at the time, said then that members were told "that the bargain resolved all the issues including the 320/321 issues" but also said some people did not like the outcome. The other witnesses who attended some of those ratification meeting disagreed or were more equivocal about what, if anything, was said about the change involving the NEO issue.

[105] If the information union members were given was inadequate, that is a matter between those members and their representatives rather than affecting or altering the objective assessment of the terms agreed by the parties.

[106] To the same effect was the evidence that a number of union members considered the NEO issue, including training for certification of A321 NEO aircraft, was resolved and had proceeded with the subsequent training and certification process in a way consistent with Air New Zealand's view of events. This too showed some union members had differing views of the outcome but that was not determinative,

⁶ *New Zealand Air Line Pilots*, above n 3, at [85]-[86].

either way, in assessing what was objectively apparent from the contextual background evidence about the parties' consensus.

Conclusion on interpretation of clause 5.4.2

[107] For the reasons given, the phrases "A320 Series" and "for NEO" as used in clause 5.4.2 of the E tū agreement and of Part 3 of the AMEA agreement were intended to and agreed to include both the Airbus A320 NEO and A321 NEO aircraft. A318 and A319 aircraft were not encompassed by the words used in that clause.

[108] In light of that conclusion it was not necessary to consider Air New Zealand's alternative submission that E tū and AMEA were estopped from relying on their different view of that term because of what their representatives had said about the A321 NEO aircraft being encompassed by those phrases.

Training

[109] AMEA and E tū sought findings on what the collective agreement terms permitted in offering, undertaking and completing training and certification processes. Those findings were sought on the basis, not accepted in this determination, that the terms of clause 5.4.2 and the Note on the A320 series in Part 3 of its agreement did not encompass the A321 aircraft.

[110] The issues around training requirements, and the extent to which Air New Zealand was obliged to provide training and the degree to which workers undertaking and completing it was voluntary, arose from how the parties had acted and reacted when the A320 series interpretation dispute arose from late December 2018 onwards. As noted earlier this included some hangar engineers either not undertaking training or not completing the certification steps and Air New Zealand cautioning them about potential consequences of that situation.

[111] However by the time of the Authority's investigation meeting there was effectively no live issue for interpretation and resolution as a dispute under s 129 of the Act. As noted in AMEA's closing submissions Mr Foote's evidence had confirmed no engineers were being compelled or required to undertake training. Sufficient numbers were volunteering to undertake the NEO differences course and Air New Zealand did not anticipate any need to require any employee to do so in the future. No disciplinary action had been taken or was contemplated, he said.

[112] In that light no findings are made in respect of interpretation or operation of terms of the collective agreements relating to the provision of and participation in training and certification processes.

Bonding

[113] Air New Zealand took the position that bonding arrangements in place for some categories of training over many years were neither controversial nor incompatible with what the two collective agreements said about training. However AMEA submitted Air New Zealand's practice was inconsistent with terms of its collective agreement where, among other things, the company was obligated in clause 5.4.3 to "provide all relevant training/experience in order for an Employee to gain and retain the relevant customer/overseas approvals" for certifying the various aircraft types in each aircraft series.

[114] Although more elaborately expressed, AMEA's submissions on this issue boiled down to saying Air New Zealand could not lawfully bond employees for training it was required to provide under the terms of its collective agreement. Schedule 4 of Part 3 of the AMEA agreement set out payments and conditions for workers "required to attend an approved training course" and, in AMEA's submission, Air New Zealand would need to negotiate and agree any terms providing for bonding in relation to that training.

[115] Some support for the concerns AMEA raised about those bonding arrangements and how they came about was found in the Employment Court's decision in *New Zealand Amalgamated Engineering Union v Energex Limited*.⁷

[116] In the *Energex* case the employer had sought to introduce a bonding arrangement after negotiating a collective agreement with the union. The court found such an arrangement was a unilateral attempt to add to the conditions that the parties had agreed about the way the training was undertaken. The change was significant, not slight, as it forced the workers to either refuse to do training they had agreed in their collective agreement to undergo or to sign a bond condition that was a less favourable term than found in that agreement. It also placed a restraint on the ability of those workers to change jobs without financial penalty. Being less favourable, the bonding condition was found to be inconsistent with the terms of the collective

⁷ [2006] ERNZ 749.

agreement. The circumstances in which the bonding arrangement was sought were also found not to form part of the entire agreement between the union and the employer contained in their collective agreement. As a result the employer's move to introduce the bonding arrangement was found to be a "new matter" which then should have been dealt with under a term of the agreement providing for negotiation and ratification of any variation to the terms of the collective agreement.⁸

[117] However the Court's conclusions in *Energex* were reached in light of evidence that was not available in the present case.

[118] There was no evidence that established whether or not the bonding issue was a topic of negotiation in the current or previous collective agreements with E tū and AMEA. Neither was there any evidence from any workers affected by Air New Zealand's bonding arrangements, either when they had been agreed to or refused. And, given there was some information suggesting some form of bonding had been a long term practice in the arrangements Air New Zealand made with individual employees for some types of training, neither was it possible to establish this was an entirely new matter arising after conclusion of a collective agreement and therefore properly dealt with under relevant variation provisions (at clause 1.5 of the E tū agreement and Part 3 of the AMEA agreement).

[119] Accordingly, in light of the evidence available and considered, the finding sought by AMEA could not be made. This was not to say, however, that the position advanced by Air New Zealand regarding bonding arrangements in practice or introduced was correct. Whether those arrangements are appropriately in place and, if so, in what circumstances and on what terms, was a matter that appropriately could be considered in the full context of any future collective agreement negotiations. Otherwise, if that issue were to be investigated and determined by the Authority as a matter of interpretation of existing terms or an alleged breach of existing terms, fuller and further evidence would have been needed.

Costs

[120] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁸ At [43]-[44] and [47]-[50].

[121] If they are not able to do so and an Authority determination on costs is needed any party seeking an award of costs in its favour may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the party or parties against who costs are sought would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[122] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Robin Arthur
Member of the Employment Relations Authority

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].