IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 445
3142921

BETWEEN	KATHERINE STACEY Applicant
AND	BEN STACEY Applicant
AND	JETSTAR AIRWAYS LIMITED Respondent

Member of Authority:	Andrew Gane
Representatives:	Richard McCabe, counsel for the Applicant Michael O'Brien, counsel for the Respondents
Investigation Meeting:	27 April 2022 at Auckland
Submissions and further Information received from Applicant and Respondent	8 June 2022
Date of Determination:	8 September2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicants Ben and Katherine Stacey (the Staceys) are employed by the Respondent (Jetstar) as pilots operating Jetstar's aircraft. Both currently hold the position of Captain.

[2] The Staceys seek to have the Authority resolve a dispute between the parties which has arisen over the application, operation, and interpretation of provisions in the collective agreement (the CA) between the New Zealand Air Line Pilots' Association

Industrial Union of Workers Incorporated (NZALPA), and the Respondent, Jetstar Airways Limited (Jetstar).

[3] The dispute has arisen in relation to the implementation of clause 11.7 of the CA, which requires Jetstar to make a payment annually in May to pilots in compensation for the rest and meal breaks for the previous year. This raises a question in relation to the interpretation and application of clause 11.7 when First officers are promoted to Captain during the year.

The Authority's investigation

[4] During the investigation meeting I heard evidence from three witnesses, who have considerable experience in the industry. There was one witness on behalf of the Staceys, Adam Nicholson who was employed for 21 years prior to his retirement as the NZALPA Legal Officer.

[5] Witnesses for Jetstar were Tony McDonald, Senior Manager Flying Operations and Timothy Faulkner, Employment Relations Manager- Flying.

[6] In my investigation meeting, under oath or affirmation, these witnesses confirmed their statements and gave oral evidence in answer questions from myself and the parties' representatives.

[7] The representatives then provided written submissions by 8th June 2022

[8] 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.

Issues

[9] The issues requiring investigation are:

- What is the correct interpretation of clause 11.7 of the CA?

- How is the increase to be paid to newly appointed pilots?

History

[10] Jetstar is an aviation carrier which operates domestic and trans-Tasman services. As a value-based carrier, Jetstar operations are based on a short turnaround time between flights to maximise aircraft utilisation. Jetstar is required to comply with both New Zealand and Australian Civil Aviation law.

[11] Jetstar and NZALPA have previously been engaged in protracted litigation concerning rest and meal breaks to its pilots under Part 6D of the Act. In *Greenslade v Jetstar Airways Ltd* [1] the Employment Court investigated what a "rest break" means, and in doing so refers to the definition of "work periods" in s 69ZC of the Act. Jetstar argued that "rest break" could include a break between working days or work periods. The Court concluded (and affirmed in *Jetstar Airways Ltd v Greenslade*[2]) that "rest break" is a rest break during a period of work and not between periods of work **(**at [37) That litigation ended in June 2016 by way of a settlement.

[12] NZALPA and Jetstar entered into a CA on 24 March 2016.

Current Dispute

[13] What has triggered the current dispute is how clause 11.7 applies when a First Officer is promoted to Captain.

[14] In order to address this issue, an interpretation of clause 11.7 by the Authority is required. Once that has been established, the issue of how the clause should be applied can be determined.

[15] Clause 11.7 of the Collective Agreement requires Jetstar to make a payment annually in May to pilots in compensation for the rest and meal breaks for the previous year. This payment provides financial compensation to pilots as, given the nature of their work, they are unable to take rest and meal breaks as prescribed under Part 6D of the Employment Relations Act 2000 ('the Act').

> 11.7 COMPENSATORY PAYMENT FOR REST BREAKS AND MEAL BREAKS The Company shall make an annual payment to the pilot based on rank as a compensatory measure pursuant to s 69ZB of the Employment Relations Act 2000 (and any amending or substituting

[1] [2014] NZEmpC 23, [2014] ERNZ 157.
[2] [2015] NZCA 432, [2015] ERNZ 7.

> Acts that provide for such compensatory measures). The amount of that annual payment shall be:
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> (a) For a Captain, $3,500 less applicable tax; and
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> (b) For all First Officers, $2,000 less applicable tax.
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> The payment shall be calculated and made retrospectively in the next full pay period after 18 May each year commencing from 18 May 2017. In recognition of this payment, the pilot acknowledges that the pilot is not entitled to rest and meal breaks (or any other compensatory measure) under Part 6D of the Employment Relations Act 2000.
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> If the pilot's employment commences, or is terminated (for whatever reason), during the period from 18 May in one year to 18 May in the next year a pro-rated amount based on the actual length of employment in that compensation year will be paid to the pilot.

Relevant Facts

[16] On or about 11May 2017, Ben Stacey was promoted in rank from the position of First Officer to Captain, with a corresponding increase in monthly base salary payments.

[17] On or about 12 April 2017, Katherine Stacey was promoted in rank from the position of First Officer to Captain, with a corresponding increase in monthly base salary payments.

[18] In June 2017, Jetstar made the compensatory annual payment to Ben Stacey under clause 11.7 of the CA in the sum of $2,000 (the First Officer rate of compensation under clause 11.7 of the CA). When he questioned why he had not received the full Captain rate of compensation under clause 11.7 of the CA, Jetstar paid him an additional $32.88 in July 2017 (a total compensation payment under clause 11.7 of $2,032.88).

[19] June 2017, Jetstar made the compensatory annual payment to Katherine Stacey under clause 11.7 of the CA in the sum of $2,000 (the First Officer rate of compensation under clause 11.7 of the CA). When she questioned why she had not received the full Captain rate of compensation under clause 11 .7 of the CA, Jetstar paid her an additional $152.05 in or about July 2017 (a total compensation payment under clause1 1.7 of $2,152.05).

[20] NZALPA enquired as to why Ben and Katherine Stacey had not received the compensatory annual payment under clause 11.7 of the CA in the sum of $3,500,

[21] Jetstar asserted that it was entitled to pro rate the annual compensatory payment to account for the period during the 2015 — 2016 year when Ben and Katherine Stacey were operating as First Officers.

What is the correct interpretation of clause 11.7 of the CA?

[22] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* set out the approach to be used in contractual interpretation.[3] The focus is on the objective meaning of the words the parties have used. Background material can be helpful as a 'cross check' even if the words used appear to be unambiguous. However, what was discussed in prior negotiations is only helpful if it shows what the parties objectively intended the words to mean.

[23] This approach has been carried through to collective agreements.[4] In *Tertiary Education Union* v *V-C of Auckland University* Judge Inglis summarised the principles of interpretation in the context of collective agreements:

> [6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context.
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> [7] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made. ...
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> [8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which the agreement was entered into. ... Evidence of what a

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[3] Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444 at [19].
[4] NZ Amalgamated Engineering, Printing and Manufacturing Union v Amcor Packaging (New Zealand) Limited [2011] NZEmpC 135 at [12]; NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)2 ("Silver Fern Farms") [2010] NZCA 317.

> party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.[5]

[24] The starting pointing in analysing clause 11.7 of the Collective Agreement is to examine the words of the clauses regarding the special leave entitlement to see whether they are clear and unambiguous.

[25] The court must give effect to the intentions of the parties. In doing so the Court will consider what would have been the intention of hypothetical reasonable parties placed in the same position as the actual parties contracting in the words used by them.

Discussion

[26] There was evidence provided by both Jetstar and NZALPA witnesses, during the course of the investigation about bargaining for the clause 11.7 and how the payment under clause 11.7 has been applied in relation to the meal breaks.

[27] The evidence of both parties was the negotiation of rest and meal breaks clause did not address whether the payment would be made pro rate.

[28] The Jetstar witnesses stated that since the operation of the CA there has been 15 pilots, including the Stacey's who have been promoted from First officer to Captain. All but two have been paid on a pro rate basis. The two pilots who received the full amount were treated as an overpayment, but it was unclear whether the alleged overpayment had been recovered.

[29] Jetstar submitted that because clause 11.7 states that "the payment shall be calculated and made retrospectively...", means that a calculation process is required to determine the compensatory sum for each pilot when looking retrospectively during the year.

[30] The intent and application of clause 11.7 of the CA is aligned with other financial entitlements a pilot may receive during their employment such as Flight Allowances (clause 11.4); Performance Bonus (clause 11.5); and Training, Checking and Secondary Allowances (clause 11.6). The calculation and payment of these

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[5] Tertiary Education Union v V-C of Auckland University {2015] ERNZ 979 at [6] – [8].

provisions is in accordance with the rank held at the time the provision is applicable for payment methodology.

[31] The Stacey's argue that the above clauses have an entirely different purpose and application to that of clause 11.7.

[32] Jetstar submitted that its approach is consistent with the application of the clause to new pilots or pilots who leave during the prior year (payment being is pro-rated based on duration of employment in that prior year).

[33] The Stacey's argue that clause 11.7 expressly includes the circumstance of pro rating for incomplete service. If pro rating was meant to apply to the transition of First Officers being promoted to Captains throughout the year the wording of the clause would reflect this.

[34] The Stacey's submitted that a payment under Clause11.7 is a compensatory payment and as such Jetstar cannot reduce the payment by claiming it is entitled to pro rata compensation based on rank as clause 11.7 does not allow for this. When a First Officer is promoted to Captain, he/she is entitled to the full year compensatory payment at the Captains rate.

[35] I find the use of the word calculated in the phrase "calculated and made retrospectively" would be superfluous if the parties did not intend that there had to be some form of calculation taking place as to how much the new pilot would receive, there would be nothing to calculate as the payment amounts are specified at $3,500 for a Captain and $2,000 for a First Officer. 'Calculate' is to arrive at something by mathematical calculation, which is consistent with the pro rate method. The Stacey's argue that use of the word "calculated" is in reference to tax implications. In my view the wording of the clause does not reflect this as the clause specifically refers to the amounts being less applicable tax.

[36] I find there is some merit in Jetstar's argument about what happens "*if a pilot was to change rank from First Officer to Captain in the period between 18 May and the next full pay period? On the applicants' view, even though a pilot may have held the rank of Captain for no time in the period being compensated for (18 May to 18 May), the pilot would receive full payment at the Captain's amount*".

[37] This does seem to lead to an absurd result and would seem to be a major change in the application of the CA. Even if the explicit wording of the clause did not support the retrospective pro rating of the compensatory payment for rest and meal breaks (and I think it does) such a term could be implied to give efficacy to the contract. Such a term would be reasonable and equitable, is obvious, capable of clear expression and does not contradict any express term in the contract.[6]

Conclusion

[38] Having heard the evidence of the parties and considered and analysed the parties' submissions I am persuaded by Jetstar's approach in implementing the compensatory payment for rest breaks and meal breaks on a pro-rata basis.

I determine that compensatory payment for rest breaks and meal breaks is to be paid in accordance with clause 11.7 of the Collective Agreement on a pro rate basis.

Costs

[39] I consider it appropriate in this matter that costs lie where they fall.

[40] However, if a party seeks costs, they 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 other party 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.

[41] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. [7]

Andrew Gane
Member of the Employment Relations Authority

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[6] Bathurst Resources Ltd v L & M Coal Holding Ltd [2021] NZSC 85.
7 For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.