

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 636  
3133076

BETWEEN	NEW ZEALAND AIR LINE PILOTS ASSOCIATION IUOW INC First Applicant
AND	NIGEL FARMER Second Applicant
	MURRAY APPLETON Third Applicant
	TASMAN CARGO AIRLINES PTY LTD Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Richard McCabe, counsel for the Applicant Kyle Dunn, counsel for the Respondent
Investigation Meeting:	8 November 2022
Submissions and/or further evidence	8 November 2022 from the Applicant and from the Respondent
Determination:	1 December 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The First Applicant, New Zealand Pilots Association IUOW Inc (NZALPA), the Second Applicant, Mr Nigel Farmer, and the Third Applicant, Mr Murray Appleton, claim that the Respondent, Tasman Cargo Airlines PTY Ltd (TCA) breached its obligations to them by not paying a 3 % salary increase for the period 1 April 2019 to 1 April 2020.

[2] TCA denies that it has breached its obligations to the Applicants, denies that a 3% increase is owed to the Second and the Third Applicants, and claims that it has acted in good faith throughout.

### **The Authority's investigation**

[3] During the investigation I received written evidence and heard oral evidence from the Second Applicant Mr Farmer. The Third Applicant, Mr Appleton did not appear or provide evidence.

[4] I received written evidence and heard oral evidence from the Respondent witnesses Mr Andrew Sturrock, Head of Flight Operations, and Ms Veronica Evison, Senior HR Consultant.

[5] I also received written and oral submissions from counsel for the parties.

[6] 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 of the evidence and submissions received.

[7] Any persons not directly involved in this matter will be referred to by an initial bearing no relationship to the person's actual name.

### **Issues**

[8] The issues requiring investigation are whether or not:

- TCA has breached its good faith obligations to the Applicants;
- The Second and Third Respondents are owed any monies by TCA in regards to a 3% salary increase.

### **Background**

[9] NZALPA is a union representing pilots employed by TCA. Mr Farmer is retired but is a member of NZALPA and was previously employed by TCA as a Captain until 2018, and thereafter as First Officer until his retirement in 2022.

[10] On 16 June 2019 Mr Michael Young, at that time CEO of Tasman Cargo Airlines, emailed all employees. In the email he stated:

...

As many of you will know, the Board reviews remuneration once a year, usually in May, with any change backdated to April 1. I am pleased to say the Board has awarded a 3% increase in salaries backdated to April 1.

[11] On 17 June 2019 NZALPA initiated bargaining for a collective agreement. There has not been a collective agreement with NZALPA in place previously, although a number of the pilots employed by TCA, including Mr Farmer and Mr Appleton, were NZALPA members.

[12] Mr Sturrock said Mr Young forwarded the initiation document to him and to Mr D representative of a company which was assisting TCA with some HR matters. Mr Sturrock said Mr D provided some advice regarding the bargaining process, and also advised that if a collective agreement came into force, it would replace any other pay awards processes.

[13] The TCA bargaining team consisted of Mr Sturrock, Ms Evison, who was seconded to Tasman Cargo Airlines July 2019 to March 2020 to assist with HR matters including the bargaining process, and one other TCA management employee. The NZALPA bargaining team consisted of an advocate, and two TCA pilot employees.

[14] Mr Young emailed Ms K, the NZALPA advocate involved in the bargaining, and asked her to send a template for a Bargaining Process Agreement (BPA) and a copy of the intended collective agreement.

[15] On 8 July 2019 Mr Sturrock said he received an email from Mr Young asking him to advise pilots covered by the collective bargaining that the 3% salary increase would not be paid to them because remuneration changes would form part of the bargaining process

[16] Accordingly Mr Sturrock emailed the relevant pilots including Mr Appleton and Mr Farmer, and also the two pilot members of the NZALPA bargaining team. The email dated 8 July 2019 stated

I have been advised that the recently announced 3% increase to staff will not be paid to those pilots who are covered by the proposed Collective bargaining. This is because any future remuneration changes applicable to these pilots will become part of the bargaining process.

[17] Mr Sturrock said he did not receive any response to this email from any of the recipients of it.

[18] Ms Evison said that NZALPA sent through their initial claims as part of the draft collective agreement. This document did not include any pay related claims and she said NZALPA advised the TCA bargaining team that they wanted to get other issues resolved first.

[19] Mr Sturrock said at the first bargaining meeting he referred to his email dated 8 July 2019 and he said that the 3% increase would need to be discussed in the bargaining, and that it did not apply to union members.

[20] Mr Sturrock said that salary increases were discussed towards the end of the bargaining after all other claims had been agreed. When that occurred, he said the increase put forward by NZALPA was “massive” and after bargaining a compromise was reached which included the provision of more rostered days off (RDOs). Mr Sturrock said he was not in favour of providing more RDOs because they made scheduling more difficult.

[21] Mr Sturrock said no back pay was requested as part of the negotiations.

[22] Mr Farmer said he was aware that the 3% increase was not part of the bargaining and he sent an email to TCA because he was concerned about his own position and salary. He stated in the email:

... I am lead to believe that from the current collective bargaining process that this 3% remuneration is not included as part of the process ...

... I would like to request that consideration be given to the awarding of the 2019 pay rise, back dated to April 2019.

I feel that withholding the increase based on us being in the union and undergoing collective bargaining, which we are still awaiting the outcome of, is in effect penalising us for Union membership; this you will be aware goes against the spirit of NZ Employment Law.

[23] Mr Farmer included Ms Evison as recipient on 1 April 2020, but she said she had not responded to the email because she had assumed the other recipient of the email had done so.

[24] Mr Sturrock said that during the bargaining on remuneration, how the pay increases would apply to Mr Farmer was discussed. He explained that upon Mr Farmer stepping down from Captaincy to First Officer, his salary had been reduced, but not to a First Officer salary. Mr Farmer’s salary before the bargaining had been higher than a First Officer’s salary after the increase.

[25] Mr Farmer’s position had been discussed with the two TCA pilot members on the bargaining team for NZALPA. Mr Sturrock said they had told him they would deal with it.

[26] A collective agreement was signed by the parties on 22 April 2020 but came into force on 1 April 2020 with a term from 1 April 2020 until 31 March 2023 (the Collective Agreement).

[27] The relevant terms of the Collective Agreement are:

#### 1.2 COVERAGE

- 1.2.1 This collective agreement shall cover persons who are members of NZALPA employed as pilots, in a full time or part time basis based in New Zealand, by Tasman Cargo Airlines Pty Limited and who are employed to fly aircraft owned by/or operated by Tasman Cargo Airlines Pty Limited.

## 1.5 SAVINGS/COMPLETE AGREEMENT

1.5.1 This Agreement, including the attached Appendices comprise the entire Agreement between the Parties and supersedes any previous representations, agreements or understanding (whether written or oral) relating to the pilot's employment with the Company.

1.5.3 Notwithstanding the foregoing, no pilot covered by this Agreement shall incur any reduction in his/her current equipment category, salary or rank by virtue of the making of this agreement, except where provided for and in accordance with the terms of this agreement.

## PART 11 REMUNERATION

11.2.4. The rates will apply from the beginning of the first full pay period following ratification of this Agreement.

[28] Mr Sturrock said that the 3% increase was raised by NZALPA at a meeting on 28 January 2021. He had responded that NZALPA members were not entitled to the 2019 3% increase, and that an increase for them had been negotiated as part of the bargaining.

### **Has TCA breached its obligations to the Applicants?**

*Was there any obligation to pay the 3% salary increase to the pilots?*

[29] It is submitted by Mr McCabe on behalf of NZALPA that if the 3% pay increase been included in a separate pay run, or if the NZALPA notice to commence bargaining been issued one day after the next monthly pay run, the pilots would have received the increase.

[30] It is submitted by Mr McCabe that as the TCA Board had decided to award the 3% increase, only it could rescind that decision. On the basis that there is no TCA Board minute cancelling the 3% award, it is submitted that the bargaining team was acting outside its authority in withholding the 3% award.

[31] There is no evidence that only the TCA Board could award or rescind increases and therefore I turn to the issue of whether or not TCA did not act in good faith by not paying the TCA union pilots the 3% increase.

*Was there a breach of the obligation to act in good faith by TCA?*

[32] Prior to the commencement of the bargaining there had been the email from Mr Young dated 16 June 2019 which informed all TCA pilots that a 3% increase to all full time and part time TCA employees had been agreed. The following day, bargaining had been initiated.

[33] The email from Mr Sturrock dated 8 July 2019 stated that the 3% increase would not be paid to pilots involved in the bargaining for a collective agreement.

[34] According to Appendix 1 of the BPA the first bargaining meeting was scheduled to take place on 5 November 2019.

[35] The recipients of both the 16 June and 8 July 2019 emails included the two TCA pilot members of NZALPA who were on the bargaining team for the Collective Agreement. By virtue of the second email, both TCA pilot members of the NZALPA bargaining team would have been aware at the commencement of the bargaining that the 3% increase did not apply to pilot members of NZALPA.

[36] As stated in the email, this was because any future remuneration changes applicable to them would be included as part of the bargaining process. Significantly Mr Sturrock received no response to that email.

[37] I find that there was no obligation to pay the 3% pay increase on the basis that it was made clear to the TCA pilots who were members of NZALPA that it would not be paid but would be addressed during the bargaining process. There was no objection raised by NZALPA with that position as set out by TCA.

[38] Mr Sturrock's evidence was that at the first bargaining meeting he had referred to the 8 July 2019 email he had sent and reiterated that the 3% increase did not apply to pilots and would need to be discussed in the bargaining.

[39] On that basis I find that all the parties and significantly the NZALPA bargaining team members, would have been fully aware of the position regarding the non-payment of the 3% salary increase to the pilot NZALPA members upon entering into the bargaining.

[40] A collective agreement represents an agreement reached between the bargaining parties. It is clear from the evidence that in the negotiations for the collective agreement between TCA and NZALPA there was discussion on remuneration towards the end of the bargaining. The resulting conclusion to that discussion is set out in Part 11 of the Collective Agreement.

[41] Part 11 sets out the pay rates agreed in the bargaining in clauses 11.2.2 and 11.2.3. Clause 11.2.4. states that the new pay rates will apply from: "the beginning of the first full pay period following ratification". There is no provision in the Collective Agreement for back-dating, although this was open to the parties to negotiate as part of the bargaining process.

[42] The Collective Agreement includes a Savings/Entire Agreement clause at clause 1.5. This clause clarifies that the Collective Agreement is entire in itself and replaces any prior representations, agreements or understandings relating to the pilots' employment with TCA.

[43] I find that the increase referred to in 16 June 2019 email from Mr Young would have been a prior representation and accordingly was replaced by the provisions of the Collective Agreement.

[44] The bargaining team for NZALPA included an experienced NZALPA advocate and two TCA pilot members of NZALPA. There is no evidence to support a proposition that TCA concealed the position regarding the 3% salary increase. On the contrary I find that the NZALPA bargaining team were fully advised of the position taken by TCA in regard to the 3% increase prior to entering into the bargaining, and did so having that knowledge.

[45] There is no evidence that NZALPA raised the communications regarding the 3% increase or the reason behind the decision not to pay it until 28 January 2021, almost a year after the Collective Agreement came into effect.

[46] There is no evidence that this issue was raised prior to the bargaining commencing or during the bargaining, although the TCA position was known to the pilots because it was set out in the 8 July 2019 email from Mr Sturrock whose evidence is that he also raised it at the first bargaining meeting.

[47] There was no attempt by TCA to conceal its intention in regard to the non-payment of the 3% increase to the pilots involved in the bargaining, and I find it was open to the NZALPA bargaining team during the bargaining process to put forward a remuneration claim in that knowledge.

[48] I find no breach of good faith on the part of TCA.

*Was there undermining of the bargaining pursuant to s 32(1)(d) of the Act?*

[49] Section 32(1)(d) of the Act states that the union and the employer must not undermine or do anything likely to undermine the bargaining.

[50] I accept that the 3% increase was paid to non-union members. As set out in Mr Farmer's email dated 1 April 2020, he was fully aware of this situation and that it was not included as part of the collective bargaining process.

[51] It was also a fact known to the NZALPA bargaining team: remuneration was an issue to be bargained by parties in full knowledge of the 3% increase provided to non-union members.

[52] I have found no breach of good faith on the part of TCA and I find no basis that TCA acted in such a way as to undermine the bargaining by paying the 3% increase to non NZALPA pilots.

[53] The agreement on remuneration as set out in Part 11 of the Collective Agreement includes rates of pay applicable to Captain and First Officer. Also agreed between the parties on bargaining was an agreement by TCA to additional RDO for the pilots. This was an agreement reached in the bargaining although Mr Sturrock was not in favour of it and this I find underpins the nature of bargaining between the parties to a collective agreement.

[54] I find that the Collective Agreement was the result of informed bargaining between the parties and represents an agreement reached on the terms and conditions of employment to apply to the employment of TCA pilots who were members of NZALPA, including remuneration.

[55] I find no evidence that TCA acted in such a way as to undermine the bargaining.

[56] I determine that TCA did not breach its obligations to the Applicants.

**Are the Second and Third Applicants owed any monies as wage arrears by Tasman Cargo Airlines?**

[57] The email dated 16 June 2019 referred to a pay increase of 3% backdated to 1 April 2019.

[58] As has been observed above, TCA made its position clear to the TCA pilots who were NZALPA members that salary increases for 2019 would need to be bargained. Messrs Farmer and Appleton were NZALPA pilot members and therefore covered by the terms of the Collective Agreement.

[59] The bargaining did agree increases but new pay rates which were to come into effect from the first full pay period following ratification. There was no provision in the Collective Agreement. For back pay.

[60] As set out in clause 1.5.1 of the Collective Agreement, it comprises the entire agreement between the parties and supersedes any previous representations.

[61] I find that for the Authority to order TCA to pay NZALPA pilots the 3% increase for the period from 1 April 2019 would be for the Authority to order new terms and conditions of employment.

[62] The Authority has no jurisdiction to make a determination fixing new terms and conditions of employment pursuant to s 161(2) of the Act, and I find that altering the agreement reached between the parties as set out in the Collective Agreement would be doing so. I also

have no jurisdiction to make an order cancelling or varying the agreement or any term of it pursuant to s 163 of the Act.

[63] I determine that no monies are owed to the Second and Third Applicants as wage arrears by Tasman Cargo Airlines.

**Should a penalty be awarded against TCA for a breach of good faith obligations?**

[64] I have determined that there has been a no breach of its good faith obligations by TCA and no issue of a penalty therefore arises.

**Costs**

[65] Costs are reserved. However, I consider that this matter could be considered as falling within the category of matters not subject to the daily tariff.<sup>1</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

---

<sup>1</sup> Employment Relations Authority Practice Note 2 on Costs 29 April 2022