

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 471
3151301

BETWEEN NEW ZEALAND AIR LINE
 PILOTS' ASSOCIATION
 INDUSTRIAL UNION OF
 WORKERS INCORPORATED
 Applicant

AND AIR NEW ZEALAND LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: John Hall, counsel for the Applicant
 Scott Worthy, counsel for the Respondent

Investigation: On the papers

Submissions and Other 20 September and 20 December 2023, 16 January,
Information Received: 7 February and 1 May 2024 from the Applicant
 20 November 2023, 8 February and 8 May 2024 from
 the Respondent

Date of Determination: 2 August 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] The respondent, Air New Zealand Limited (Air NZ), operates a domestic and international air service.

[2] The applicant, New Zealand Air Line Pilots Association Industrial Union of Workers Inc (NZALPA), is a registered union representing pilots operating aircraft for Air NZ's operation.

The pilots

[3] NZALPA lodged a statement of problem (SoP) on behalf of 59 pilots named in the schedule attached to the SoP. This group is referred to in this determination collectively as “the pilots”.

[4] Eight of the 59 pilots were originally employed by Freedom Air Limited, which on 26 June 2006 changed its name to Zeal 320 Limited (Zeal), before they moved to work for Air NZ. Both of these legal entities are referred to as “Freedom” in this determination for ease of reference. These pilots are referred to in this determination as “the Freedom pilots”.

[5] The remaining pilots listed in the schedule attached to the SoP are referred to in this determination as “the Air NZ Group pilots”.

Retirement leave entitlements

[6] Retirement leave is a scaling accumulation of leave based on length of continuous service applying from 15 years. The retirement leave entitlement is up to a maximum of 180 consecutive days after 35 years of service.

[7] It is a significant benefit based on a pilot retiring as a B777 captain with 35 years or more of continuous service. Unlike long service leave, retirement leave does not expire and is available at retirement age or earlier through employment terminations.

[8] The contractual retirement leave entitlements of pilots employed by Air NZ prior to 30 December 1999 differed from that of pilots who were employed by Air NZ on or after 30 December 1999.

[9] Pilots employed by Air NZ prior to 30 December 1999 had a contractual entitlement to retirement leave and up to 28 days’ long service leave. Pilots employed by Air NZ on or after 30 December 1999 were not entitled to retirement leave but were instead entitled to up to 70 days’ long service leave.

The dispute

[10] The current dispute, which this preliminary determination addresses, related to whether the pilots in this matter have a contractual entitlement to retirement leave entitlement even though they were not employed by Air NZ prior to 30 December 1999.

[11] Air NZ and NZALPA are parties to a collective agreement that came into force on 16 May 2021 and expired on 15 May 2024 (the 2021 CA). The parties have also been party to predecessor collective employment agreements at all relevant times.

[12] NZALPA sought compliance orders requiring Air NZ to comply with clause 16.7.1 of the 2021 CA, by providing the pilots with retirement leave entitlements. Clause 16.7.1 stated:

The Company will continue to maintain its retirement leave scheme in accordance with the following scale for those pilots employed prior to 30.12.99. Those employed prior to 30.12.99 will remain on the scale below unless they elect to switch to the alternative scheme outlined in 16.7.2 or 16.7.3 as applicable.

[13] Although none of the pilots were employed by Air NZ prior to 30 December 1999, NZALPA claimed they are entitled to retirement leave because:

- (a) The Freedom pilots were provided with it as an individual “additional term” when they accepted employment with Air NZ during the 2007 Freedom integration; and/or
- (b) Air NZ Group pilots received it as a result of the Service Recognition Policy that Air NZ had implemented on 23 September 2011.

[14] Air NZ said none of the pilots involved in these proceedings are eligible for retirement leave entitlements, which were contractually restricted/ringfenced to only those pilots who had actually been employed by it prior to 30 December 1999.

Preliminary determination

[15] As the first step in investigating this matter, the parties asked the Authority to issue a preliminary determination on the contractual right (if any) the 59 pilots in this matter have to the retirement leave entitlements in clause 16.7.1 of the 2021 CA.

The Authority’s investigation

[16] The parties agreed that the Authority should determine the preliminary issues ‘on the papers’. NZALPA also agreed to put its compliance order application on hold until after the preliminary issues and substantive unjustified disadvantage claims had been determined.

[17] The parties lodged an Agreed Statement of Facts, affidavit evidence and an agreed Joint Bundle of relevant documents. An amended Joint Bundle and supplementary documents were also provided to the Authority.

[18] NZALPA provided affidavits from three witnesses:

- (a) Dave Parkinson, who is one of the Air NZ Group pilots listed in the schedule to the SoP;
- (b) Justin Johnstone, who is one of the Freedom pilots listed in the schedule to the SoP; and
- (c) Neal Holt, who is one of the Air NZ Group pilots listed in the schedule to the SoP.

[19] Air NZ provided affidavits from three witnesses.

[20] The first witness was Klaus Blokker, who is currently the Chapter Lead (Enablement) in the Group Share Services Department but prior to that was Senior Manager Payroll and People Solutions and their Group Shared Services Functions. Mr Blokker has held various roles at Air NZ prior to these two roles, but of relevance to this matter is the period from 1 May 2006 until 7 March 2011 when he was the HR Manager for parts of the Air NZ Group Pilot and Cabin Crew Function.

[21] In particular, Mr Blokker was the HR Manager responsible for pilots and cabin crew employed by Freedom, later renamed Zeal, at the time of the development of the A320 Work Share Agreement, which involved pilots employed by Freedom and by Air NZ. He was also involved with the integration of the Freedom pilots into employment with Air NZ which occurred in 2007/2008.

[22] The second witness was Courtney Smith, Senior Peoples Specialist (Workplace Relations) who has been employed by Air NZ since May 2016. Her current role supports the pilot function. She has also held other roles for Air NZ including as a lawyer in the Employment Relations Team, now called Workplace Relations. From 2017-2018 her role was ER and Legal Consultant supporting the pilot function.

[23] The third witness was Colin Usherwood, who was employed by Air NZ from 2005 to 2016. At the time the Policy was introduced in 2011 he was the Manager Performance and Reward for the People Function at Air NZ. He prepared the Policy, which was approved by the Group General Manager for People and the wider executive

team for Air NZ at that time. He also provided costings and analysis to Air NZ regarding the cost the Policy would have on pilots' retirement entitlements.

[24] The parties also lodged written submissions, and subsequently provided additional information and documents. The issues to be determined were refined/refocused by agreement with the parties after the Authority had reviewed the parties' evidence and submissions.

[25] The parties also agreed that the presumption recorded in the Practice Direction issued by the Chief of the Authority on 1 February 2024, that costs should lie where they fall in proceedings that involved disputes about the application, operation or interpretation of a collective agreement, should apply to this matter.

Agreed material facts

[26] Prior to 2011 when an employee ended employment with one company in the Air NZ group and commenced employment with another new company in the Air NZ group, the employee's employment with the new company in the group commenced without recognition of the employee's employment service with the prior employer in the Air NZ group, for the purposes of service related benefits or privileges.

[27] For example, a Mount Cook Airline Limited employee who successfully applied for a position at Air NZ would resign from employment with Mount Cook Airline Limited and commence a fresh period of employment with Air NZ.

[28] That employee's service recognition for employment benefits would start over from the date the employee commenced their employment with Air NZ. This meant that the clock for service related benefits such as staff travel, long service leave and redundancy compensation effectively 'restarted' on the date the employee first became employed by Air NZ.

[29] That occurred because the two employing companies, and the other companies in the Air NZ group, were separate legal entities. Not all companies in the Air NZ group were always 100 percent owned by Air NZ and Air NZ acquired full ownership of different entities at different times.

[30] The material dates are as follows:

- (a) Mount Cook Airline Limited – full ownership on 30 June 1991;

- (b) Air Nelson Limited – full ownership on 14 December 1995;
- (c) Eagle Air Limited – full ownership on 31 January 1991.

[31] Other companies, such as Safe Air, Freedom Air, Altitude and TAE had always been 100 percent owned subsidiaries of Air NZ or became wholly owned prior to the change of employer for any current employee.

[32] Air NZ developed the Policy during 2011. Its purpose was to recognise employees' overall service more widely across the Air NZ group in relation to some service related benefits or privileges.

[33] The Policy was developed unilaterally by Air NZ, without consultation with employees or unions. The Policy was published on 23 September 2011, and was accompanied by guidelines and "FAQs". The Policy was followed up with a further memorandum from Air NZ on 16 November 2011.

[34] The Policy stated its purpose was to recognise prior service and qualifying circumstances when determining the following benefits and privileges:

- (a) Service recognition rewards;
- (b) Long service leave;
- (c) Staff travel privileges;
- (d) Redundancy entitlements.

[35] The qualifying circumstances related to the date that a company became 100 percent owned by Air NZ. If an employee changed employment between group companies after both companies were wholly owned by Air NZ, then the employee would qualify to have their total service recognised for certain benefits and privileges.

[36] For example, an employee ceasing to be employed by Mount Cook Airline Limited on 30 June 1995 (the date after Mount Cook Airline Limited was 100 percent owned by Air NZ) and then immediately starting employment with Air NZ, would qualify for service recognition under the Policy.

[37] While there were exchanges between Air NZ and NZALPA after the introduction of the Policy, there was no discussion, consultation or negotiation with NZALPA prior to the introduction of the Policy.

[38] Following the launch of the Policy, Air NZ informed employees that it had set up an email system where employees could provide details of their start dates and ask for their service to be recognised, if the employee met the qualifying circumstances. However, it was subsequently discovered that a number of pilots had not been correctly advised of their contractual entitlements.

[39] Air NZ identified there had been confusion in relation to how the Policy had been applied for pilots, which had occurred in three areas:

- (a) Annual leave – when qualifying service reached the 20 year milestone;
- (b) Sick leave – when qualifying service reached either the 12 months milestone or 15 years milestone; and
- (c) Retirement leave.

[40] The confusion in relation to the first two matters (annual leave and sick leave) was remedied in favour of pilots, with recognition of service in qualifying circumstances under the Policy.

[41] Certain pilots contacted the email address and provided their start dates along with requests about whether they had qualified to have their prior service with another employer within the Air NZ Group of companies recognised under the Policy.

[42] While the circumstances of certain pilots met the qualifying requirements for the purposes of the Policy, some of those pilots who were not employed by Air NZ prior to 30 December 1999 were advised that the application of the Policy to them meant they were now eligible for retirement leave under clause 16.7.1 of the applicable collective agreement. Accordingly, some pilots who were not employed by Air NZ prior to 30 December 1999 had a retirement leave balance recorded on their payslips.

[43] That was problematic because Air NZ said that pilots who were not actually employed by Air NZ prior 30 December 1999 were not eligible for retirement leave under clause 16.7.1 of the applicable collective agreement, because the Policy did not backdate an individual pilot's actual commencement date of employment with Air NZ.

[44] Some other pilots who were not employed by Air NZ prior to 30 December 1999 were advised the Policy, in qualifying circumstances, did not include eligibility for retirement leave under the applicable collective agreement, so they did not receive a retirement leave balance on their payslips.

[45] These errors resulted in pilots being given differing information about whether the Policy meant they had become entitled to retirement leave. Air NZ realised in 2018 that there had been an error in how the Policy had been applied to different pilots in relation to eligibility for retirement leave.

[46] Air NZ then informed pilots who had previously been told they would be eligible for retirement leave, even though the pilot was not employed by Air NZ prior to 30 December 1999, that there had been an error. They were told Air NZ had removed any retirement leave balances showing on their payslips for these pilots and replaced it with the corrected long service leave benefits they were entitled to instead. Pilots who were not entitled to retirement leave got more long service leave than those that were.

[47] The Policy was unilaterally amended by Air NZ in September 2018 to clarify that retirement leave, which only applied to jet pilots employed by Air NZ prior to 30 December 1999, was ringfenced to apply only to those pilots, and was not a benefit which could be conferred by the Policy on pilots who were employed by Air NZ on or after 30 December 1999.

Previous collective employment contract and collective agreements that were relevant to this matter

The 1999 Collective Employment Contract

[48] The Authority was not provided with a copy of the Jet Pilots' Collective Employment Contract dated 30 December 1999 (the 1999 CEC) that the parties had entered into. It was this 1999 CEC that first restricted retirement leave entitlements to pilots who were employed by Air NZ prior to 30 December 1999.

[49] This same restriction on eligibility retirement leave entitlements has continued through subsequent collective agreements up to and including the expired 2021 CA.

The Freedom Collective Agreement

[50] The Freedom Air NZALPA Pilots' Collective Agreement dated 14 May 2005, which ran from 14 May 2005 to 14 April 2008 (the Freedom CA), is relevant to this matter because it provided for a Group Opportunity Priority List (the GOP List), which was set out in clause 4.1.1.

[51] The GOP List determined priority rights of pilots in the situations set out in clause 4.1.2 of the Freedom CA, namely:

- (a) Initial employment and re-employment by Freedom;
- (b) Initial employment with Air NZ;
- (c) Allocation of Air NZ seniority positions;
- (d) Appointment to positions within Air NZ and any other of the Subsidiary Jet Operations (SJO), of which Freedom was the only one.

[52] The GOP List comprised sequentially all pilots employed by Freedom in New Zealand and in Jet Operations in Air NZ Subsidiary Operations.

[53] Clause 4.1.1.1 of the Freedom CA required pilots to be added to the GOP List sequentially, “on employment by Air New Zealand Limited, or by any Air New Zealand Subsidiary Jet Operation.” Clause 4.1.1.2 dealt with priority (seniority) of pilots who were added to the GOP List on the same day.

[54] Part 15 of the Freedom CA dealt with seniority. The GOP List was Schedule 1 in the Freedom CA. The Seniority List was attached to the Freedom CA as Schedule 2.

[55] Clause 15.2 recorded that pilots employed after the Freedom CA came into effect “shall be added to the [Seniority] List on commencement of employment.” The remainder of clause 15.2 and the other clauses through to 15.7 all dealt with various seniority issues.

[56] Schedules 1 and 2 of the Freedom CA provided that Freedom pilots employed at, or prior to 12 July 2002, “had some preferential rights in relation to appointments” with Air NZ over other pilots employed after 12 July 2002.

[57] Clause 3.5 of the Freedom CA dealt with “service recognition” upon movement between Air NZ and Freedom. Length of service for Freedom pilots moving to Air NZ was deemed to have started on the earliest date they joined the GOP List (Schedule 1) or the Seniority List (Schedule 2).

[58] Pilots moving from Air NZ to Freedom had their length of service with Freedom deemed to have started on the date they joined the GOP List, with further provisions in Appendix 2 recording when it would take effect for Air NZ pilots.

[59] NZALPA's witness Mr Parkinson moved to Air NZ on 8 February 2000, so he was not part of the 2007 Freedom and Air NZ integration process.

The 2005 Collective Agreement

[60] The NZALPA and Air NZ Pilots' Collective Employment Agreement dated 5 August 2005, which was in effect from 15 January 2005 to 14 January 2008, (the 2005 CA) dealt with retirement leave in clause 16.6.1 and long service leave in clause 16.6.2.

[61] Clause 16.6.1 and 16.6.2.1 maintained the current retirement and long service leave scheme for pilots employed prior to 30 December 1999, unless they had elected to switch to the alternative scheme in clauses 16.6.2.2 or 16.6.2.3, as applicable.

[62] Pilots who were employed prior to 30 December 1999, and who had up to 15 years' service, were entitled to retirement leave as per the scale set out in clause 16.6.1 of the 2005 CA. They were also given the option of either:

- (a) Maintaining their current retirement leave (clause 16.6.1) and long service leave (16.6.2.1) entitlements; or
- (b) Discontinuing their retirement leave entitlements (by being paid out, or freezing them) with no further accrual, and instead then receiving only the long service leave entitlements in clause 16.6.2.2 or 16.6.2.3 of the 2005 CA.

[63] These clauses demonstrated Air NZ's intention to phase out retirement leave entitlements.

The 2010 Collective Agreement

[64] The NZALPA and Air NZ Pilots' Collective Employment Agreement dated 6 August 2010, which ran from 9 September 2010 until 8 March 2012, (the 2010 CA) continued to maintain the same retirement leave entitlements (see clause 16.7.1) and long service scheme (see clause 16.7.2.1) for pilots employed prior to 30 December 1999.

[65] Just like the 2005 CA, the pilots who were employed prior to 30 December 1999 were given the opportunity to elect to switch to an alternative scheme. If they did so, then they would receive long service leave entitlements only, as specified in clauses 16.7.2.2 and 16.7.2.3 of the 2010 CA, but no further retirement leave entitlements.

[66] Clause 16.7.2.5 of the 2010 CA recorded that pilots employed after 30 December 1999 were entitled to long service leave only, and had no entitlement to retirement leave.

The 2021 CA

[67] The material clauses in the 2021 CA are clauses 16.7.1 which deals with retirement leave and 16.7.2 which deals with long service leave.

[68] Clause 16.7.1 of the 2021 CA provides that after 15 years of continuous service, pilots employed prior to 30 December 1999, who have not switched to ‘the alternative long service leave scheme’ set out in the relevant collective agreement, are entitled to retirement leave in accordance with the scale set out in clause 16.7.1.

[69] Clause 16.7.2 provides that after 15 years of continuous service, pilots employed prior to 30 December 1999, who have not switched to ‘the alternative long service leave scheme’, are entitled to the long service leave recorded in clause 16.7.2.1 of the 2021 CA.

[70] Clauses 16.7.2.2 and 16.7.2.3 of the 2021 CA set out the alternative long service leave entitlements that a pilot employed prior to 30 December 1999 may elect to switch to, provided they give up their previous retirement leave and long service leave entitlements.

[71] That election (or “switch”) required the pilot to choose to either be paid out, or freeze, their retirement leave entitlements, which would then no longer continue to accrue. In which case, the pilot’s previous retirement leave and long service leave entitlements were replaced by the one of the alternative long service leave entitlements they had elected to switch to.

[72] Pilots employed prior to 30 December 1999, who selected ‘the alternative scheme’, had to expressly choose the specific long service entitlements set out in either clause 16.7.2.2 or clause 16.7.2.3 of the 2021 CA, which were slightly different.

[73] Clause 16.7.2.4 of the 2021 CA provided that long service leave is not applied retrospectively for pilots who have elected to switch to a new long service leave entitlement, which had required them to have forgone their future contractual retirement leave entitlements.

[74] A pilot who was employed before 30 December 1999 who had not selected “the alternative scheme” continued to receive their same contractual retirement leave entitlement (as set out in clause 16.7.1) and long service leave entitlement (as set out in clause 16.7.2.1) in the 2021 CA.

[75] Clause 16.7.2.5 of the 2021 CA provided that pilots who were employed by Air NZ after 30 December 1999 are entitled to long service leave only (with the duration of it being set out in that clause) and have “no entitlement for retirement leave.”

[76] Clause 16.7.3 dealt with retirement leave and long service leave entitlements in the event an Air NZ pilot was appointed to a position in a Subsidiary Jet Operation (SJO). At the material times, Freedom was the only SJO an Air NZ pilot could be employed by. A process is set out in clause 16.7.3 of the 2021 CA for the Air NZ pilot to retain, and continue to accrue, those entitlements in specific circumstances.

Relevant background

Freedom Air Limited and Zeal 320 Limited

[77] Freedom was a low-cost airline that operated from 8 December 1995 as part of the Air NZ group.

[78] Freedom generally flew routes between New Zealand and Australia, although at times it also flew routes to Fiji. Freedom had its own Air Operator’s Certificate (AOC) and therefore a separate management structure from Air NZ. Freedom had its own collective agreement between NZALPA and Air NZ for Freedom pilots. NZALPA represented pilots employed by Freedom and by Air NZ.

[79] Pilots and cabin crew were employed by Freedom in its capacity as a separate legal entity from Air NZ. Their employment arrangements were different from the employment arrangements between Air NZ and its pilots and cabin crew. That reflected the low cost carrier nature of Freedom’s business, with the result that pilots generally considered it more attractive to be employed by Air NZ.

[80] Freedom’s last branded flight occurred in March 2008 (at that time the entity was called Zeal) although Freedom as a legal entity continued to “operate” A320 aircraft on its AOC until March 2009.

The Group Opportunity Priority List

[81] The GOP List was created in 2002, as a first step towards creating closer employment opportunities between Air NZ and Freedom pilots. The GOP List enabled pilots employed by an SJO (such as Freedom) to have access to jobs at Air NZ and vice-versa.

[82] No Freedom pilot could have joined the GOP List prior to 30 December 1999, because it was not created until 2002.

[83] The GOP List was a combined seniority list kept by both Air NZ and Freedom of the pilots employed by each company. The pilots of each company had a place on a single seniority list that was used for calculating a variety of things, including rights to entitlements such as group staff travel.

[84] The GOP List involved taking the Air NZ Seniority List, which only listed pilots employed by Air NZ, and adding to the bottom of that list all pilots in order of seniority employed by any SJO. The combined list was then called “the GOP List”.

[85] A pilot’s ability to bid for pilot vacancies was ranked according to their position on the GOP List. The higher the position on the GOP List, the higher the ranking for a vacancy, so the higher the chance the pilot had of getting the job.

Shift of Freedom pilots to the Airbus 320

[86] In 2005 Air NZ determined that Freedom would shift from flying the Boeing family of aircraft to flying the Airbus A320 (the A320). At the time Air NZ also used the A320 to fly most of the same routes Freedom flew, with the primary difference being the fare structure.

2005 Agreement in Principle

[87] On 23 December 2005 Air NZ, Freedom and NZALPA entered into an “Agreement in Principle” (AiP) to govern the sharing of work on the A320 airplane.

[88] The AiP provided for Freedom and Air NZ pilots to remain on their respective collective agreements while sharing their A320 work, operating all pilots, all ports, all routes, but not operating together.

[89] The AiP addressed rostering practices by way of a six month roster trial. The pilots' security of employment concerns were addressed by providing (among other things) that pilots' career progression remained unchanged. The AiP stated:

Service with Air NZ Limited will be recognised for SJ [meaning Freedom] pilots as having effect from the date of joining the GOP List at the time the SJ pilots ratify the variation.

Service within Freedom will be recognised for Air NZ pilots as having effect from the date of joining the GOP List at the time that they voted positively in relation to the rostering trial.

Short Haul Proposal

[90] On 5 April 2006 a decision was made that Freedom and Air NZ branded services for the Tasman and Pacific Island flights would be operated by Freedom. As a result of that decision, Freedom would progressively increase its A320 fleet and it would operate expanded Pacific Island and Tasman routes.

The A320 Work Share Agreement

[91] As more A320 aircraft were ordered and came into operation, it was unclear by 2005 whether these A320 aircraft would be operated by Air NZ or Freedom.

[92] As a result, the parties agreed a Work Share Agreement (WSA) in 2006 which enabled A320 work to be shared between Air NZ and Freedom, as per variations that were made to the relevant collective agreements.

[93] The AOCs for these entities were amalgamated, so that all A320 aircraft were moved to the Freedom AOC. The Freedom and Air NZ brands continued to operate as separate companies, with both sharing the A320 work so there was no longer any route overlap between the two brands. The WSA operated for approximately two years.

[94] The WSA avoided any loss of job security/prospects for pilots employed by either company. The WSA recognised length of service for a pilot based on the date the pilot joined the GOP List. The WSA required variations to be made to the relevant collective agreements because of express contractual terms that applied to seniority and appointments (among other things) that were based on a pilot's start date of employment.

Variations made to the relevant collective agreements in 2006

[95] The GOP List required changes to be made to the 2005 CA and the Freedom CA in 2006, in order for length of service as a pilot within Air NZ to be recognised as starting from a date other than when the pilot had actually started working for Air NZ.

[96] The changes the parties agreed on 6 March 2006 were made by way of written, ratified, variations made to the applicable collective agreements which reflected the changes the parties had agreed.

[97] The Authority noted that same process did not occur for the changes to the commencement date that NZALPA claimed occurred for the pilots in this matter, but which Air NZ disputed had occurred.

[98] Clause 3.19 of the 2005 CA, as updated by the variation dated 6 March 2006, referred to the GOP List. The second paragraph of clause 3.19 made it clear that the start date had changed by operation of that clause, which stated:

SERVICE RECOGNITION UPON MOVEMENT BETWEEN THE COMPANY AND FREEDOM AIR LIMITED

For pilots who move from the company [Air NZ] to Freedom Air Limited their length of service as a pilot within Freedom Air Limited will be deemed to have started on the date they joined the GOP List. This provision will take effect for company pilots from the date that company A320 pilots vote in favour of two or more of the trialled modifications to their flight and duty time provisions as detailed in appendix 2.

For pilots who move from Freedom Air Limited to the company [Air NZ] the length of service as a pilot within the company [Air NZ] will be deemed to have started on the earliest of the date they joined the GOP List or the date they joined the company [Air NZ] seniority list.

[99] Clause 3.5 of the Freedom CA included a substantially similar contract variation. It stated:

SERVICE RECOGNITION UPON MOVEMENT BETWEEN THE COMPANY AND FREEDOM AIR LIMITED

For pilots who move from the Company [Freedom] to Air New Zealand Ltd their length of service as a pilot within Air New Zealand Ltd will be deemed to have started on the earliest of the date they joined the GOP List. (This provision will take effect for Air New Zealand Ltd pilots from the date that Air New Zealand A320 pilots vote in favour of two or more of the trialled modifications to their flight and duty time provisions as detailed in Appendix 2 of the Air NZ CEA.

[100] These contractual variations made it clear that a pilot's start date was an important contractual term, because any changes to it had to be addressed by way of a

variation in the applicable collective agreements. It was not a term of employment that could be unilaterally changed via an email, Policy or HR/payroll communication.

Integration of Freedom and Air NZ

[101] In early 2007 Air NZ decided to withdraw the Freedom brand from the market, largely because the WSA had not achieved the efficiencies that had been sought.

[102] The parties engaged in an intensive negotiation exercise which ultimately saw Freedom pilots offered employment with Air NZ, and the separate Freedom airline brand disappear around March 2009.

[103] To facilitate the integration of Freedom pilots into Air NZ an integration package was offered to each Freedom pilot individually. The integration arrangements were complex and included specific offers regarding salary protection, choice of position, transition dates etc, which were all as set out in the individual pilots' employment offer letters.

[104] In broad terms, the integration offered Freedom pilots a degree of choice about how their decision to accept employment with Air NZ would impact them and in particular, what specific contractual entitlements they would have after the integration. The offer provided income protection for up to six years, but Freedom pilots lost the positions/rank they held as Freedom pilots, such as the captain positions.

[105] For the purposes of these proceedings, this integration included dealing with the ability of Freedom pilots to "bid" for roles in Air NZ, in accordance with the GOP List and Air NZ Seniority List order. Mr Johnstone's affidavit set out his employment history in terms of moving from Freedom to Air NZ.

[106] The Freedom pilots in this matter did move to Air NZ as part of the 2007 integration process. Their length of service as a pilot within Air NZ was therefore deemed to have started on the earlier of either the date they joined the GOP List or the date they joined the Air NZ Seniority List, in accordance with the second paragraph of clause 3.19 of the 2005 CA.

[107] As an example, Justin Johnstone was employed by Air NZ on 25 March 2008, but his service was deemed to have started "[...] on the earliest of the date [he] joined the GOP List or the date [he] joined the [Air NZ] Seniority List." However, that only

occurred by operation of a specific contractual term which stated that his start date would be changed, which was recorded in the 2005 CA.

[108] This reflected that a change to the terms of the applicable collective agreement had been required for length of service as a pilot within Air NZ to be recognised as starting from a date other than the date when the pilot actually started working for Air NZ. That was significant in terms of NZALPA's arguments that the pilots in this matter had their start dates changed, other than by operation of contract.

Background to retirement leave entitlement in the pilots' 1999 collective employment contract

[109] Retirement leave was originally a benefit available across the entire Air NZ workforce, as set out in the Personnel Manual from 1989. As a policy it was discontinued in the 1990s for everyone but pilots. Because it has been included in their contract as a term, retirement leave could not be unilaterally removed from pilots.

[110] Air NZ therefore renegotiated the pilots' entitlement to retirement leave. Air NZ did that by agreeing with NZALPA to ringfence the pilots' retirement leave entitlement to only those pilots who were employed prior to 30 December 1999. That restriction on eligibility ensured that the group of pilots entitled to retirement leave would decrease over time as the pilots who were employed prior to that date retired.

[111] That agreement is reflected in clause 16.7.1 of the 2021 CA which provides retirement leave entitlements "for those pilots employed prior to 30 December 1999", unless they elected to switch to the alternative scheme recorded in clauses 16.7.2 or 16.7.3 (as applicable) of the 2021 CA.

[112] Air NZ said it subsequently never had any interest in re-introducing eligibility for retirement leave entitlements for pilots employed after 30 December 1999, as that would have been inconsistent with its desire to remove or limit retirement leave across the company.

Overview of the claims

[113] There was a dispute between the parties about the interpretation, application, or operation of the Policy Air NZ promulgated in September 2011. Air NZ said the Policy did not backdate the date upon which a pilot's employment with Air NZ had commenced, while NZALPA claimed it had.

[114] Air NZ said the Policy is not, and never has been, part of the terms and conditions of employment for the pilots. It did not confer retirement leave entitlements on pilots who were not contractually eligible for them, because they had not been employed by Air NZ prior to 30 December 1999.

[115] Pilots employed by Air NZ prior to 30 December 1999 and who had a qualifying period of employment (for the purposes of the Policy) with another company in the Air NZ group before being employed by Air NZ were eligible to have their overall length of service recognised for the purposes of clause 16.7.1 of the 2021 CA.

[116] Those pilots had met the contractual eligibility criteria, because they were employed by Air NZ prior to 30 December 1999. All those pilots have received the retirement leave entitlements, that they became eligible to due to the Policy, so none of those pilots are participants these proceedings.

NZALPA's claims

[117] NZALPA claimed that, as part of Air NZ's absorption of the Freedom pilots into its operations in 2007, Air NZ offered the Freedom pilots the same retirement leave benefits as the pilots who had been employed by Air NZ prior to 30 December 1999 had. NZALPA said these retirement benefit entitlements were terms and conditions "additional" to those in the 2005 CA.

[118] NZALPA also claimed that in or around 2011 - 2012 Air NZ extended those same retirement leave entitlements, as "additional" terms and conditions of the applicable collective agreement, to the Air NZ Group pilots, making them entitled to the same retirement benefits as the pilots employed by Air NZ prior to 30 December 1999 had.

[119] NZALPA claimed Air NZ had unjustifiably disadvantaged the pilots in or around July 2018, and again in or about June 2020, by unilaterally terminating their retirement leave entitlements. NZALPA said that occurred when Air NZ advised the pilots that they were not entitled to retirement leave, so the retirement leave balances on their payslips had been removed and replaced with the correct long service leave entitlement.

[120] NZALPA's compliance order required Air NZ to comply with clause 16.7.1 in the 2021 CA, by providing retirement leave benefits to all pilots in this matter who had group service dates prior to 30 December 1999.

Air NZ's response

[121] Air NZ said the parties' 1999 CEC had created a ringfenced, closed, and "frozen in time", group of pilots who were eligible for retirement leave provided the pilot was employed by Air NZ prior to 30 December 1999. Air NZ said nothing that had occurred subsequently had changed that express contractual restriction on the eligibility of pilots who were entitled to retirement leave.

[122] Air NZ said that a closed 'retirement leave' group was agreed in exchange for the parties agreeing to additional long service leave for both the pilots in the closed group and also different long service leave for pilots who were employed by Air NZ after 30 December 1999.

[123] Air NZ disputed it had offered any of the Freedom pilots retirement leave entitlements in 2007. To do so would have been contrary to the express restriction on eligibility that was recorded in the 2005 CA.

[124] Air NZ said the terms and conditions of the Freedom pilots did not include eligibility to retirement leave, because none of them had been employed by Air NZ prior to 30 December 1999.

[125] Freedom pilots were entitled to have their overall service recognised for the purposes of service based entitlements and privileges, such as redundancy calculations. However, that did not change the express contractual requirement that restricted retirement leave entitlements to only pilots who were employed prior to 30 December 1999.

[126] The Air NZ Group pilots were not entitled to retirement leave because none of them had been employed by Air NZ prior to 30 December 1999. However, in qualifying circumstances, they were eligible to have their overall service recognised under the Policy, for the purposes of service based entitlements and privileges. However, that eligibility under the Policy did not change their contractual right to retirement leave entitlements.

[127] As a result of audits of the Policy in 2018 and 2020, Air NZ identified that some errors had occurred in the implementation of it. These errors included (but were not limited to) advice to some (but not all) pilots that they were eligible for retirement leave, when they were not. The errors were corrected in 2018 and 2020.

Issues

[128] The parties agreed that the following preliminary issues are to be determined:

- (a) Did the ‘individual offer of employment letters’ Air NZ sent to Freedom pilots in 2007 create a contractual entitlement to retirement leave?
- (b) Did the Service Recognition Policy Air NZ implemented in September 2011 create or record a contractual entitlement to retirement leave for the pilots named in the schedule attached to the SoP?

Issue 1 - Did the individual offer of employment letters Air NZ sent to Freedom pilots in 2007 create a contractual entitlement to retirement leave?

The individual offer letter

[129] The 2007 Freedom pilots’ integration process proceeded as a “technical redundancy” situation where the new offer of employment was to be sufficiently similar to the existing terms to avoid triggering redundancy compensation.

[130] Air NZ recognised total service at Freedom and Air NZ for all service related entitlements and privileges such as staff travel, redundancy compensation and long service anniversaries. That meant a Freedom pilot did not need to start from zero years to achieve those benefits again when they joined Air NZ.

[131] That meant the pilots’ combined service length at both companies was recognised, as stated in the “Recognition of Service” clause in their individual offer letters.

[132] The “Timing and Transition” heading in the individual offer letters stated:

The commencement of your employment with Air NZ will be on the date of the first available course for you which is applicable to the position into which you are appointed. Air New Zealand will give you as much notice as possible of the course date at which time you will need to resign from your employment with [Freedom] and confirm to us that you have done so. (Emphasis added)

[133] The pilot’s start date with Air NZ was there as per the bolded extract above.

[134] For the Freedom pilots who accepted the integration offer, their individual offer letter explained that because they were NZALPA members their work would fall within the coverage of the applicable Air NZ and NZALPA collective agreement. This meant the Freedom pilots would become bound by those terms and conditions of employment.

[135] The relevant NZALPA and Air NZ collective agreement was the 2005 CA, which contained the 30 December 1999 cut-off date for retirement leave eligibility. The Freedom pilots were aware of that when they accepted their individual offers of employment from Air NZ in 2007.

NZALPA's position

[136] The Freedom pilots claimed that regardless of whether a retirement leave entitlement balance had been displayed on their payslips or not, they had all accepted the offer to move to Air NZ on the understanding that their service would be recognised for all service related rewards (such as retirement leave).

[137] The Freedom pilots therefore claimed that entitlement to retirement leave was a key term they had relied on when accepting the offers of employment arising from the 2007 integration.

[138] NZALPA submitted the 2007 individual offer letter Air NZ sent to Freedom pilots was “an enhancement” of the 2005 CA terms, because it provided retirement leave entitlements to the Freedom pilots who accepted the offer.

[139] NZALPA argued the wording of the “Recognition of service” statement in the individual offer letter was a contractual term, because the letters were signed and the letters were described as “offering additional terms and conditions which would be individually applicable to you, and which are in addition to the CEA.”

[140] The statement NZALPA relied on said:

RECOGNITION OF SERVICE

All service related entitlements and privileges (including staff travel privileges) shall be provided to you acknowledging your total service with both Zeal 320 Limited (formerly Freedom Air) and Air New Zealand Limited, as qualifying service.

[141] NZALPA said the words “All service based entitlements and privileges (including staff travel privileges)” meant all entitlements that are calculated on the basis of length of service. It further said the words “acknowledging your total service with

both Zeal 320 Limited (formerly Freedom Air) and Air New Zealand as qualifying service” meant the date the pilot joined Freedom, unless there was a break in service.

[142] NZALPA therefore said that Air NZ had contradicted the wording in the individual offer letters by calculating retirement leave based on length of service with Air NZ. NZALPA submitted the individual offer letter “trumped” the applicable collective agreement, because it provided an individual exception.

[143] NZALPA submitted the “trumping” occurred in one of the following ways:

- (a) The offer letter was “an additional term” over and above the 2005 CA, which provided an individual exception to the cut-off date for retirement leave entitlements;
- (b) The offer letter was read alongside the collective agreement, so its terms “becomes other than the plain and ordinary meaning”, thereby granting Freedom pilots retirement leave entitlements;
- (c) The offer letter gave the Freedom pilots “a legitimate and enforceable expectation” they had been given retirement leave entitlements.

[144] NZALPA also claimed that Freedom pilots secured the right to retirement leave entitlements during negotiations about the integration. It relied on a handwritten notation recorded in the handwritten notes that had been made by an unidentified person, who was present at the bargaining on behalf of NZALPA, to establish such an agreement had been reached.

[145] NZALPA claimed that the “Draft Heads of Agreement” document the parties entered into during bargaining over the integration process had included retirement leave entitlements, even though that was not expressly stated. NZALPA submitted it was to be implied into the reference made to “all service based entitlements and privileges” which would be affected by the change in service recognition date.

[146] NZALPA said the Authority should read the “Recognition of service” statement in the individual offer letters to say:

All service related entitlements and privileges (including **[delete - staff travel privileges] retirement leave**) shall be provided to you acknowledging your total service with both Zeal 320 Limited (formerly Freedom Air) and Air New Zealand Limited, as qualifying service.

[147] NZALPA's proposed changes are noted in bold above, which showed how it wanted the Authority to read/apply the existing text. These were significant changes NZALPA proposed, which was surprising because it had considerable input into the terms of the offer letters during the extensive negotiations that occurred during the integration process. There was no evidence NZALPA had proposed this form of wording be used at that time.

[148] NZALPA further said the "spirit" of clause 16.7 in the 2005 CA required Air NZ to calculate the length of continuous service for Freedom pilots from the date they commenced employment with Freedom, not from the date they commenced employment with Air NZ.

Air NZ's position

[149] Air NZ said that there was no offer ever made of enhanced terms or retirement leave entitlements and that there was no mutual agreement to provide retirement leave as a contractual term to any pilot "in addition" to the terms in the applicable collective agreement.

[150] Air NZ maintained that retirement leave entitlements were ringfenced in the 1999 CEC to only those pilots who were employed by it prior to 30 December 1999. That eligibility cut-off date excluded all of the pilots in this matter, because none of them had been employed prior to 30 December 1999.

[151] Air NZ said the terms and conditions of employment by Air NZ for the Freedom pilots did not include eligibility for retirement leave, because they had not been employed prior to 30 December 1999. The Freedom pilots were entitled to have their overall service recognised for service based entitlements and privileges, such as redundancy calculations, but not retirement leave which was a contractual entitlement.

[152] Air NZ disputed that any of the Freedom Air pilots who had not been employed prior to 30 December 1999 were offered retirement leave entitlements as a term or condition of their change in employment from Freedom to Air NZ at the end of 2007.

[153] Air NZ denied that in 2007 it had negotiated or agreed with NZALPA, during negotiations about the integration, to apply backdated employment commencement dates for the Freedom pilots who accepted its offer of employment. Specifically, there

was no agreement to override the terms of the 2005 CA, which clearly set out the retirement leave eligibility cut-off date.

[154] Air NZ said the individual offer letters made it clear the commencement of employment was at a future date, it was not backdated as NZALPA alleged. The offer had recorded that the start date was linked to attendance at a course the pilot had not yet undertaken, but which they were required to do in future. No Freedom pilot had commenced the referenced course before late 2007, at the earliest.

[155] Air NZ said it did not agree to backdate the commencement of employment Freedom pilots had with Air NZ to the date that an individual pilot had commenced employment with Freedom, as that would have been highly irregular and in conflict with the 2005 CA. Backdating the Freedom pilots' start date would also be backdating their entry on the Seniority List, which is the date a pilot commences employment with Air NZ.

[156] It would therefore have required a variation to the 2005 CA which set out the rules for seniority, in the same way that the WSA had required a variation to the collective agreements that were in place at that time when it changed a pilot's start date. However, that did not occur when the Freedom pilots were integrated into Air NZ.

Relevant law

[157] To determine whether the 2007 individual offer letters to Freedom pilots granted them retirement leave entitlements, which were enforceable as an additional contractual term, required interpretation of their individual offer letters.

[158] The Supreme Court in *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* confirmed that the interpretation principles relating to contracts also applied to employment agreements.¹ These key principles were set out by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Limited*:²

[T]he 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

¹ *New Zealand Airline Pilots Inc v Air New Zealand Limited* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [74] – [78].

² *Firm PI 1 Ltd v Zurich Australian Insurance Limited* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] – [63].

parties in the situation in which they were in at the time of the contract.”³ This objective meaning is taken to be that which the parties intended.⁴ While there was no conceptual limit on what can be regarded as ‘background’, it has to be background that a reasonable person would regard as relevant.⁵ Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

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.⁶

[...]

While context is a necessary element of the interpretative process and the focus is on interpreting the document rather than the particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be powerful, albeit not conclusive, indicator of what the parties meant.

[159] These principles have been applied most recently by the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.⁷

[160] This required the Authority to establish the objective meaning of the 2007 offer of employment letter, which is taken to be the meaning the parties intended, with the words used needing to be interpreted in light of the relevant background and context which was known at the time.

[161] The Employment Court in *Le Gros v Fonterra Cooperative Group Ltd* addressed principles of contractual interpretation within the employment context.⁸ The Supreme Court’s approach in *Bathurst* was confirmed, with the Employment Court further noting that the relational aspects of the employment environment, the statutory background and “employment relations” common sense all formed part of the relevant context to be considered when interpreting employment documentation.⁹

³ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912.

⁴ *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, at [16].

⁵ *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, at [39].

⁶ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZLR 444, at [4] (SC).

⁷ *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43] – [49].

⁸ *Le Gros v Fonterra Cooperative Group Ltd* [2023] NZEmpC 193.

⁹ Above n8.

The Freedom pilots' evidence

[162] NZALPA relied on Mr Johnstone's affidavit evidence to support its claim that Air NZ's offer letter had given Freedom pilots an "additional" contractual retirement leave entitlements.

[163] Mr Johnstone believed an update NZALPA had sent the Freedom pilots; template letters Air NZ had sent the Freedom pilots in March 2007; bargaining notes from an unidentified NZALPA negotiator and a Draft Heads of Agreement document proved that the Freedom pilots had been given a contractual entitlement to retirement leave in 2007. The Authority's findings on this evidence follows.

(a) The NZALPA update

[164] Mr Johnstone referred to an undated update NZALPA had sent to Freedom pilots in "early 2007". The NZALPA update recorded that an integration process was underway which would result in an integration package being offered to Freedom pilots on an individual basis.

[165] A broad overview of the provisions to be included stated "Freedom pilots will have their service recognised for the purposes of Air New Zealand Group service related benefits." That did not override the express contractual restriction on retirement leave eligibility in any of the applicable collective agreements.

[166] Retirement leave as a specific contractual entitlement (at that time) only appeared in the Jet Pilots collective agreements. It did not apply to any other employee, so it was not a group service related benefit.

(b) The March 2007 template letter

[167] Mr Johnstone also referred to Freedom pilots being offered the option of going on leave without pay for a period of up to three years. He relied on a letter dated 28 March 2007 that stated:

6. On your return to active employment with Air New Zealand service will be considered to be continuous throughout the period of your release for the calculation of service entitlements such as retirement leave, long service leave and privilege travel concessions.

[168] This letter did not backdate the Freedom pilots' start date with Air NZ. Nor did it create a retirement leave entitlement and it was not relevant to the retirement leave entitlements in issue in this matter. The letter was issued months before the integration

process, which did not start until later in 2007. It was also superseded by the actual individualised offer letters that were sent to Freedom pilots at the end of 2007.

[169] Although the March 2007 letter Mr Johnstone cited had referred to “retirement leave”, no Freedom pilot was entitled to retirement leave entitlements as at March 2007 so referring to that entitlement must have been an error.

[170] The Authority’s view about that was supported by the fact that the March 2007 letter was a cut and paste from an Air NZ template, so the reference to “retirement leave” was likely simply an error by Freedom that occurred because it failed to delete the reference to “retirement leave” from the letter template it used.

[171] The words Mr Johnstone relied on in the letter had still not created a new contractual retirement leave entitlement. It simply provided for continuous service to be recognised for those pilots who elected to take leave without pay as part of the integration process.

(c) Bargaining notes relating to the integration

[172] Mr Johnstone’s evidence that notes dated 10 September 2007, taken by an unidentified NZALPA negotiator, established that NZALPA had successfully negotiated a right to retirement leave for Freedom pilots was not accepted by the Authority. It was heresay, that was too far removed even in light of the Authority’s wide jurisdiction to consider all relevant evidence.

[173] The notes relied on contained a box that said “Right to Retirement Leave choice, etc. and for those employed prior to 30.12.99 cl 16.6”. To the right of that box was a “?” which had an “X” across it and a small handwritten tick beside it.

[174] The reference to “cl 16.6” was to that clause in the 2005 CA. This ringfenced the pilots who were entitled to retirement leave, by excluding all “unborn” pilots who were yet to be employed by Air NZ as at 30 December 1999. In other words, the group was closed as a group on 30 December 1999. Clause 16.6 did not allow any other pilots into that sealed group.

[175] Clause 16.6 in the 2005 CA is the same as clause 16.7.1 of the 2021 CA, with the references to the “alternative scheme outlined in 16.6.2 or 16.6.3” in the 2005 being recorded as “16.7.2 or 16.7.3” in the 2021 CA. That minor difference simply reflected the change to the clause numbering in the respective collective agreements.

[176] The notation relied on by NZALPA was highly ambiguous, and did not establish that the parties had agreed Freedom pilots would become entitled to retirement leave. The notes also pre-dated the individual offer letters, which superseded whatever had been discussed during the integration negotiations.

[177] It was not established that the notation meant what NZALPA claimed it did. Even if it had (which was not accepted by the Authority), the subjective intention of one person, or their negotiating stance at that time, does not form part of the contextual background the Authority can take not account.

[178] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* stated “There is of course an important qualification that any material which is simply declarative of the subjective intentions of one party must be disregarded.”¹⁰ The notation relied on by NZALPA was therefore not relevant to the Authority’s interpretation of the individual offer letters the Freedom pilots received.

(d) Draft Heads of Agreement document

[179] Mr Johnstone also relied on a “Confidential Draft for Discussion without prejudice Draft Heads of Agreement” document (privilege was waived by the parties) that NZALPA distributed on or around 5 October 2007. This stated:

Recognition of Service

In relation to employment with Air New Zealand, all service based entitlements and privileges shall be provided to pilots acknowledging his/her total service with both Freedom Air and Air New Zealand Limited jet fleets (and for staff travel purposes within the Air New Zealand Group) as qualifying service.

Freedom Air captains moving to a position in Air New Zealand as First or Second Officer shall continue accruing command seniority while in those positions and such time will be recognised for all relevant purposes, including pay scales, on regaining a command.

[180] This did not mention retirement leave entitlements. This draft confidential discussion document did not create a contractual right to retirement leave. It was merely an indication of what the parties had been addressing at that particular time during the integration negotiations. The fact it was labelled a “Draft” indicated it did not record a finalised position.

¹⁰ *Vector Gas Ltd v Bay of Plenty Energy Ltd* above n6, at [19] and [20].

[181] Any discussions that occurred in October 2007 were superseded by the wording used in the individual offer letters which were sent out to Freedom pilots subsequent to the Draft Heads of Agreement document being created.

Relevance of clauses in the 2005 CA and the Freedom CA

[182] An examination of relevant clauses in the collective agreements that applied at the time of the integration negotiations supports Air NZ's position.

[183] Clause 3.19 in the 2005 CA and clause 3.5 of the Freedom CA both dealt with recognition of service upon movement by pilots between Air NZ and Freedom. In both collective agreements Schedule 1 was the GOP List and Schedule 2 was the Seniority List.

[184] Clauses 3.19 and 3.5 in the applicable collective agreements provided that length of service as a pilot within Air NZ for Freedom pilots who moved to Air NZ would be deemed to have started on the earliest of the date they joined the GOP List or the Air NZ Seniority List.

[185] This reflected that a change to the terms of the contract was required for length of service as a pilot within Air NZ to be recognised as starting from a date other than when the pilot actually started working for Air NZ.

The GOP List and the Seniority List

[186] No Freedom pilot could have joined the GOP List before 30 December 1999, because it did not exist until 2002. The "service recognition" clause in the 2005 CA therefore did not backdate the Freedom pilots' commencement date prior to 30 December 1999.

[187] The A320 WSA did not come into effect until 6 March 2006. The WSA recognised length of service as a pilot based on the date the pilot joined the GOP List. The WSA and the Freedom and Air NZ integration process that occurred after the decision had been made in 2007 to end the Freedom brand were different processes.

[188] As a result of the integration process in 2007, all Freedom pilots had to go to the bottom of the Seniority List, save for any pilots already employed by Air NZ after the Freedom pilot went on the GOP List.

[189] Due to the complexity of the seniority system, the dominant rights of Air NZ pilots to all Air NZ vacancies came at a cost to Freedom pilots in relation to positions they could achieve at Air NZ. That is, all pilot positions which were Freedom positions had to be vacated by Freedom pilots as a result of the integration as they would become Air NZ positions.

[190] Under the 2005 CA the positions needed to be advertised as Air NZ vacancies and appointments were made on seniority. That prioritised existing Air NZ pilots because they were more senior on the Seniority List, and the GOP List, than the transferring Freedom pilots.

[191] For example, an A320 captain at Freedom would not have had the seniority on the GOP List/Seniority List for an A320 captain position at Air NZ, and would have to have accepted a lower position.

Salary protection

[192] Because a Freedom pilot accepting employment by Air NZ would be moving to a lower position and therefore a lower pay grade, Air NZ agreed to protect their incomes for six years and/or to allow an extended period of leave without pay during which time the Freedom pilot could work for another airline. This was set out as “Additional terms” in the individual offer letters to Freedom pilots.

[193] However, the letter did not refer to, record or create a new contractual entitlement to retirement leave. None of the Freedom pilots were entitled to retirement leave under the Freedom CA, as that was an entitlement that was restricted, so only appeared in the 2005 CA.

Was the pilots’ commencement of employment date backdated?

[194] The offer letter recorded the commencement date of employment with Air NZ would be the date the pilot completed a future course, as set out in paragraph [132] of this determination.

[195] Mr Johnstone’s situation is an example of how this worked in practice. He commenced his course training as a B777 Second Officer at Air NZ on or around 28 March 2008. His group start date for service recognition benefits was 16 November 1999. His date of appointment with Air NZ was 7 February 2000.

[196] Mr Johnstone's effective date of appointment with Air NZ had changed by operation of clause 3.19 of the 2005 CA, from being his actual start date of 28 March 2008 to the date 7 February 2000, which reflected the earliest of the date he had joined the GOP List or Air NZ Seniority List.

[197] It was never agreed, or reflected in any of the documentation, that the employment of Freedom pilots by Air NZ would be backdated to a date prior to 30 December 1999. To the contrary, they were expressly informed there could be no such backdating.

[198] The NZALPA magazine dated 9 October 2007 addressed "Pilot Integration". It recorded:

We cannot fix the seniority/GOP List to back-date all pilots to our Freedom start date without a variant to the Air NZ CEA. This affects most Captains and 2 First Officers. (Emphasis added)

[199] That reference made it clear that backdating of the Freedom pilots' start date with Air NZ had been considered, but was not going to be changed, and could not in fact be changed without a contract variation being entered into, as had occurred with the 6 March 2006 variations to the 2005 CA and Freedom CA.

[200] Backdating the employment start date would also be backdating the entry on to the Seniority List, which is the date that a pilot commences employment with Air NZ. That would have required a variation to the 2005 CA which sets out the rules for seniority, as had occurred when the WSA was put in place.

[201] That there was no backdating was borne out by the words in the individual offer letters, which stated under the heading "Timing and transition" that the commencement of employment would occur on a future date. None of the Freedom pilots who transitioned to Air NZ commenced a course until late 2007 at the earliest. The reference to a future course made it clear that the pilot's start date was in the future, so could not have been backdated.

Did the individual offer letter create a "legitimate expectation" that the Freedom pilots would become entitled to retirement leave?

[202] NZALPA's claim that the individual offer letters had created an enforceable "legitimate expectation" that the Freedom pilots would become eligible for retirement leave entitlements did not withstand scrutiny.

[203] The individual offer letters to Freedom pilots made it clear that if they accepted the offer then they would be “*bound by the terms and conditions of the CEA.*” That referred to the 2005 CA, because the work the Freedom pilots would be employed to do fell within the coverage of that collective agreement. The Freedom pilots therefore knew that before accepting the offer of employment by Air NZ.

[204] The material term in the 2005 CA regarding the retirement leave entitlements that would apply to the Freedom pilots who accepted Air NZ’s offer stated:

The Company will continue to maintain its retirement leave scheme in accordance with the following scale for those pilots employed prior to 30.12.1999.

[205] That clear express restriction meant the only Freedom pilots who would be entitled to retirement leave were those who had been employed by Air NZ prior to 30 December 1999. Therefore none of the Freedom pilots in this matter qualified for retirement leave entitlements. Freedom pilots were not entitled to retirement leave under the Freedom CA, and the earliest any of the Freedom pilots started work with Air NZ was December 2007.

[206] Air NZ’s individual offers of employment to the Freedom pilots were conditional, because the integration required acceptance by “practically all” pilots to whom offers had been made. The offer would become unconditional once Air NZ, at its sole discretion, had advised all pilots of that in writing. At which point the conditional offer, and the pilot’s acceptance of it, would become unconditional with the proposed commencement date being as per the “Timing and transition” clause in the offer letter.

[207] The offer letter set out the individual terms that would apply, in addition to those in the 2005 CA. The same “Recognition of service” and “Timing and transition” wording was used in all of the individual offer letters.

[208] Freedom pilots were employed by Air NZ effectively as new employees, under the 2005 CA, which included the March 2006 variation that resulted from the WSA, but with time limited protection for existing salaries. The only part of the offer that was “additional” to the 2005 CA terms and conditions was their salary protection.

[209] The purpose of the individual offer letters was to offer Freedom pilots individualised “additional terms” over and above what the applicable collective agreement provided. The letters stated:

Further, we are offering additional terms and conditions which would be individually applicable to you and which are in addition to the CEA and are as set out in this letter which also contains details of the position available to you.

[210] However, none of the offer letters recorded an entitlement to retirement leave. None of the offer letters backdated the Freedom pilot’s commencement date of employment with Air NZ. Those were significant omissions that fundamentally undermined NZALPA’s position.

[211] The failure to refer to retirement leave entitlements in the Freedom Pilots’ individual offer letters proved they had not been provided with retirement leave entitlements as an “additional term” to the 2005 CA terms, because the letters had recorded all of the individual additional terms.

[212] Accordingly, NZALPA’s submission that the wording of the individual offer letters had created an additional term, which gave the Freedom pilots retirement leave entitlements they did not otherwise have under the 2005 CA, did not succeed.

Can a contractual right to retirement leave be implied into the individual offer letter?

[213] Because the offer letters did not contain an express retirement leave entitlement, if, as NZALPA claimed, it did exist then it would need to be implied into the individual offer letters. However, the wording used in the offer letters was insufficient to have met the legal requirements for such a term to be implied.

[214] The Court of Appeal in *Attorney-General v NZ Post Primary Teachers’ Association*¹¹ adopted the criteria for implied terms the Privy Council set out in *BP Refinery (Westernport) Pty Ltd v Shire Hastings*.¹² That required the implied term to not contradict any express term of the contract and also to be:

- (a) Reasonable and equitable;

¹¹ *Attorney-General v NZ Post Primary Teachers’ Association* [1992] 2 NZLR 209.

¹² *BP Refinery (Westernport) Pty Ltd v Shire Hastings* (1977) 52 ALJR 20.

- (b) Necessary to give business efficacy to the contract, meaning no term will be implied if the contract is effective without it;
- (c) So obvious that “it goes without saying”; and
- (d) Capable of clear expression.

[215] None of these requirements for an implied term can be met in this case. In particular, implying a retirement leave entitlement into the Freedom pilots’ individualised offer letters;

- (a) Contradicted the express term in the 2005 CA about retirement leave, that recorded retirement leave entitlements were restricted to pilots who were employed by Air NZ prior to 30 December 1999;
- (b) Was contrary to the GOP List in Schedule 1 and to the Seniority List in Schedule 2 of the 2005 CA, which were express contractual terms that could only be varied by agreement;
- (c) Contradicted the express term in the offer letter that, if accepted, recorded there was a future commencement date with Air NZ (based on attendance at a training course), not a backdated commencement date prior to 30 December 1999;
- (d) Was unreasonable and would also be inequitable, as the parties had specifically turned their minds to which additional terms would be offered and retirement leave entitlements was not one of them. The key additional term that was offered was the grandfathering of pilots’ pay until 2013;
- (e) Contradicted the plain, clear and unambiguous meaning of the words used in the individual offer letters. The additional terms in the individual offer letters are easy to understand, so can and should be given their plain meaning. There was no need to imply a retirement leave entitlement that was not recorded in the offer letter, because the offer was effective without that implied entitlement;
- (f) Was not so obvious “it goes without saying”. To the contrary. The retirement leave entitlement NZALPA wanted implied into the offer letter would require other changes to have been made to the offer letter,

effectively redrafting it to create a retirement leave entitlement that did not exist. For example;

- (i) retirement leave was an express contractual entitlement that only applied to a small category of employees, it was not a service based entitlement that applied to everyone; and
 - (ii) an implied retirement leave entitlement would also have required the commencement date in the offer letters to be decoupled from their future course attendance and instead backdated for the Freedom pilots who accepted the offer, which had not occurred;
- (g) Contradicted the specific advice given to the Freedom pilots by NZALPA in its 9 October 2007 magazine that “we cannot back-date all pilots to our Freedom start date without a variation to the Air NZ CEA.” No such variation was negotiated or agreed;
- (h) Was incapable of clear expression, unless express terms had been varied. If retirement leave entitlements were to be implied as an additional term, then the express contractual terms that addressed retirement leave entitlements, the GOP List, the Seniority List and the date on which each Freedom pilot who accepted the offer had commenced employment with Air NZ would also all need to be changed; and
- (i) Was not necessary to give business efficacy to the contract (meaning the terms and conditions of the employment relationship Air NZ had with each Freedom pilot who accepted the offer).

Is there merit in NZALPA’s “additional term” argument?

[216] The “additional terms” provided to the Freedom pilots in the individual offer letters did not include an entitlement to retirement leave for any Freedom pilot who was not employed by Air NZ prior to 30 December 1999.

[217] Recognition of service, as provided for in the individual offer letters, did not grant access to retirement leave to pilots who did not meet the eligibility criteria (by reference to the cut-off date) for retirement leave in the 2005 CA.

[218] Nor can the retirement leave entitlement be incorporated into the individual offer letters by inference, in order to make it an express term of the Freedom pilots’ employment by Air NZ.

[219] It would be unreasonable to infer from the circumstances that the parties must have intended that the restricted contractual retirement leave entitlement was to be passed on to the Freedom pilots as an additional term, when it was not mentioned in the individual offer letters which were intended to set out all of the additional terms each pilot would have.

[220] There was also no credible evidence that the parties had ever agreed to give the Freedom pilots retirement leave entitlements. They did not already have that entitlement prior to commencing employment with Air NZ, so it was not an entitlement they were being required to give up.

[221] The unidentified NZALPA negotiator's notes were not evidence of any such agreement having been reached. Mr Johnstone who provided these notes had no personal involvement in the creation of them. He was also unable to provide any material context for the notes.

[222] Mr Johnstone did not attend the negotiations, so was not in a position to be able to say what was or was not discussed. Mr Blokker's evidence that there was no negotiation and no agreement on the retirement leave point was preferred, because he had personal knowledge of what was discussed during the integration negotiations in 2007.

[223] The negotiator's cryptic note about retirement leave was ambiguous. It did not record what had actually been discussed, or any particular outcome. The note could be read as a confirmation that retirement leave entitlements were as per clause 16.6 in the 2005 CA, and therefore restricted as Air NZ said they were.

Did the parties act consistently with the Freedom pilots having a contractual entitlement to retirement leave?

[224] It was significant that NZALPA did not act consistently with a mutual agreement having been reached to give retirement leave entitlements to Freedom pilots, who did not already have a contractual right to retirement leave.

[225] Pilots who have already retired who according to NZALPA's position had a contractual right to retirement leave did not claim it.

[226] Air NZ said that when the integration in 2007 occurred it gave a summary of all benefits to former Freedom pilots, which did not make any reference to eligibility for

retirement leave. If retirement leave had been agreed as an additional terms, the Authority would have expected NZALPA to have raised such a serious omission. However, it did not do so until fifteen years later.

[227] NZALPA also did not inform or advise the Freedom pilots in any of its communications that they had been granted a new retirement leave entitlement. That would have been a significant new benefit for them (had it been agreed), so NZALPA could have reasonably been expected to have mentioned it as being a significant win for them.

[228] Quite the contrary. NZALPA's communication to the pilots had made it clear that the start dates for Freedom pilots could not be backdated without varying the 2005 CA. Clause 23 of the 2005 CA required all variations to be in writing, signed by the parties and ratified by NZALPA's members. That did not occur.

[229] NZALPA had considerable input into the wording of the offer letters, so it was also significant it had not asked for a supposedly new contractual entitlement to retirement leave to be expressly recorded, had it believed such an entitlement was being granted.

[230] It would have been critical for NZALPA to have ensured that any new retirement leave entitlement it had negotiated (and achieved) for the Freedom pilots was recorded as an additional term in the individualised offer letters, because they were not entitled to retirement leave in accordance with the 2005 CA. That omission undermined its position.

Outcome – issue 1

[231] Air NZ made a strategic decision in the 1990s to discontinue providing retirement leave to its employees if it was not contractually obligated to do so. It also decided to significantly limit the retirement leave entitlements offered to pilots, who were the only employees who were contractually entitled to it.

[232] The retirement leave entitlement would therefore expire over time, as the pilots retired. For Air NZ to then in 2007 offer retirement leave to the Freedom pilots who were not entitled to it under the Freedom CA, would not have made sense.

[233] The evidence did not establish that Air NZ had induced the Freedom pilots to accept its offers of employment in 2007 because they had been offered a newly created

retirement leave entitlement. No such offer had been made. The individual offer letters did not create and record an entitlement to retirement leave for the Freedom pilots. Accordingly, NZALPA's various claims about that did not succeed.

Issue 2 - Did the Service Recognition Policy Air NZ implemented in September 2011 create or record a contractual entitlement to retirement leave for the pilots named in the schedule attached to the SoP?

Background to the Service Recognition Policy

[234] The aim of the Policy was to alleviate the unfairness employees felt in having to start over again when changing employers, by enabling overall service within the Air NZ Group to be recognised for the purposes of certain benefits and privileges.

[235] The Policy was unilaterally introduced by Air NZ, without consultation with employees or with Unions. The Policy was not proposed as any form of amendment or addition to the terms and conditions of employment for employees, and was not subject to any negotiation or exchange of consideration. It applied to all Air NZ employees, not just pilots.

[236] The Policy treated the total qualifying period of employment within the Air NZ Group as "recognised service" for certain future service related benefits, subject to the conditions set out in the Policy.

[237] The qualifying circumstances related to the date the subsidiary company became 100 percent owned by Air NZ and to continuous service requirements. If an employee changed employment between group companies after both companies were wholly owned by Air NZ, the employee would be entitled to have their prior service recognised for certain benefits and privileges, provided they had met the specified qualifying criteria.

Implementation of the Policy

[238] On 23 September 2011 an internal communication titled "Service Recognition – Rewarding Employees' Contribution to the Wider Group" (the Policy) was sent to Air NZ group employees by the Group General Manager TechOps and People. The Policy was accompanied by Guidelines and FAQs. It was also followed up with a further memorandum issued by Air NZ on 16 November 2011.

The FAQs

[239] The Policy was accompanied by a set of FAQs along with a flowchart demonstrating how the entitlement would work. The FAQs defined “continuous service” and listed the dates that Air NZ subsidiaries had become wholly owned by Air NZ.

[240] One of the questions in the FAQ was “If I transfer from a subsidiary to Air New Zealand what will my service start date be?” The answer stated:

If you transfer from a subsidiary to Air New Zealand then provided the subsidiary is 100% owned at the date of transfer and your service is deemed to be continuous (refer FAQ 4), the service with the subsidiary will be recognised.

[241] In the FAQ under the question “What benefits or privileges will my service be recognised for?” the following benefits were recorded:

- Staff travel;
- Long service leave;
- Service recognition awards; and
- Redundancy entitlements.

[242] No mention was made of retirement leave. At that time the only employees who were contractually entitled to retirement leave were the pilots who had been employed by Air NZ prior to 30 December 1999. This entitlement was recorded in the 2021 CA.

[243] Under the question “Are there any benefits or privileges where service with my previous employer that will not be recognised?” The answer stated:

Service with your previous employer will not be recognised for any service related benefits that relate to tenure based salary increases or promotion on seniority. These benefits are unique to an employee/employer relationship and therefore are based on service with that employer only.

[244] At that date, the service related benefit in the employee/employer relationship for the purposes of these proceedings was the retirement leave entitlements that were in the 2010 CA. Retirement leave was a unique benefit because only the pilots who were employed by Air NZ and to 30 December 1999 were eligible for it. No other employees received retirement leave benefits.

[245] Under the question “Does this mean, when I transfer, and provided my service is continuous, I take all of my service-related benefits and privileges with me?” The answer stated:

No, and this is an important point to make. When you transfer your prior service will be recognised by your new employer, but your benefits will become the benefits provided by your new employer. Benefits or privileges from your previous employer are not carried across. It is important therefore before accepting any position that you read the offer of employment carefully and understand any changes in the benefits and privileges that will apply to you.

[246] For the purposes of this claim the benefit was the retirement leave entitlement in clause 16.7.1 of the 2010 CA, so that clause sets out what (if any) benefit a pilot will receive. That answer to the question in the FAQ made it clear the Policy was not creating new legal entitlements where they did not previously exist.

[247] The FAQ also stated that:

Unfortunately entitlements will not be back-dated, but you will be eligible to receive future service-related awards as they become due on your anniversary dates. This policy sets out how service is to be recognised going forward, but is not intended to award benefits retrospectively.

[248] This signalled the entitlement to retirement leave would not be backdated for the pilots who did not qualify for it.

[249] The FAQ stated that “the Policy did not apply retrospectively.” In other words, the Policy did not retrospectively confer a contractual entitlement to retirement leave on pilots who were not employed by Air NZ prior to 30 December 1999.

Service Recognition Guidelines

[250] The Policy was accompanied by Service Recognition Guidelines (the Guidelines). The “Implementation of Service Recognition Policy” section in the Guidelines stated (among other things):

Your prior service will be recognised by your current employer, but any benefits or privileges will be as provided by your current employer at the time you join your new employer. For the avoidance of doubt, any benefits or privileges provided [by] your previous employer do not transfer as of right to your new employer.

[...]

This policy sets out how service is to be recognised going forward and **it is not intended to apply or award benefits retrospectively**. (emphasis added)

An underpinning principle is there should be no “double dipping”. Where an employee has already received a benefit or award to recognised service, the interpretation of this policy shall not confer an additional benefit.

NZALPA’s view of the Policy

[251] NZALPA claimed the Policy:

- (a) Was a reiteration of the retirement leave entitlements that Freedom pilots had already been given as an “additional term” in their 2007 offer letters;
- (b) Gave the Air NZ Group pilots retirement leave and long service leave as an “additional term” to the applicable collective agreement.

[252] NZALPA said that the Policy meant that the time pilots had spent working for Freedom would be treated as if they had been working for Air NZ. It therefore gave all of the pilots access to retirement leave under the 2010 CA, which would not otherwise have been available to them, but for the change in continuous service duration.

Air NZ’s view of the Policy

[253] Air NZ pointed out that the stated purpose of the Policy was to recognise employees’ service more widely, it was not to create new contractual entitlements that did not previous exist.

[254] Air NZ said the Policy did not change or back-date employment start dates for any employees, including pilots. Air NZ unilaterally amended the Policy in 2018 to make that clear.

[255] Retirement leave was not covered by the Policy, because eligibility was dependent on the pilot actually being employed by Air NZ prior to 30 December 1999, as required by the express provision to that effect in the applicable collective agreements.

[256] Air NZ disputed NZALPA’s assertion that it used policies or group-wide communications to create or expand contractual entitlements. It pointed out that contractual entitlements were recorded in an employment agreement, which was binding on the parties, so could only be changed by agreement.

[257] Air NZ said that contrasted with the policies or standards it issued unilaterally, which are not contractual entitlements but are benefits that Air NZ had the right to change or reduce, at its discretion.

Was the Policy contractually binding?

[258] The Employment Court in *Cuttriss v Carter Holt Harvey Limited* accepted the general proposition that unless a policy document was incorporated by reference in the applicable employment agreement, then it would not be expressly binding.¹³

[259] The Court in *Cuttriss* also acknowledged that while matters contained in policy manuals could form the basis of lawful and reasonable instructions which governed workplace practices, this did not automatically raise them to the status of contractual terms in the absence of an express or implied incorporation of the policies into the applicable employment agreement.¹⁴

[260] The Policy was not referred to in the applicable collective agreements. It was also not incorporated by reference to an express clause to that effect. The parties could have expressly incorporated it into the collective agreement that came into effect on 16 May 2021, but did not do so.

[261] The failure to incorporate the Policy into employment agreements meant it was not expressly binding. The Policy did not become a contractual term simply because it had been documented or because it was detailed. The Policy was not part of the employment bargain any of the pilots in this matter made with Air NZ when they accepted employment.

[262] There was also no express or implied incorporation of Air NZ policies into the relevant collective agreements. The Policy was introduced at Air NZ's own volition without discussion or consultation with employees or unions. It could be unilaterally varied by Air NZ, and was amended in 2018.

[263] The Policy amendment excluded the approach NZALPA has advocated. It was therefore known before the parties entered into the 2021 CA that retirement leave was restricted to the pilots who were actually employed by Air NZ prior to 30 December 1999.

¹³ *Cuttriss v Carter Holt Harvey Ltd* [2007] ERNZ 233.

¹⁴ Above n13, at [42].

Did communications about the Policy create a new contractual entitlement?

[264] NZALPA claimed that Air NZ's email communications with the pilots about the Policy had created "additional terms and conditions of employment" for them.

[265] NZALPA submitted that the Policy became an additional term and condition of the pilots' employment when they emailed Air NZ to confirm a change to their service recognition date.

[266] NZALPA said that by backdating the service recognition date of the affected pilots, Air NZ's "agreement to do so was part of the formation of the additional terms and conditions." NZALPA therefore said the pilots were entitled to rely on that backdating as a contractual term of their employment.

[267] The problem with NZALPA's argument is that no express or specific offer of eligibility for retirement leave entitlements and/or to backdate the pilots' actual start date with Air NZ was ever made to the pilots. In the absence of any such offer, there was nothing capable of acceptance.

[268] NZALPA's submission that Air NZ's request that pilots email HR to get their service recognition date was an offer to give those pilots a contractual retirement leave entitlement they did not already have was without merit. No such offer was expressly made and it cannot reasonably be implied from the totality of the communications.

[269] Pilots had to get their service with a qualifying subsidiary recognised for the purposes of calculating future benefits that were expressly identified in the Policy. That was necessary regardless of whether or not the pilot was entitled to retirement leave under the 2010 CA.

[270] Air NZ's request that pilots register their service recognition date with HR was not an offer of contractual retirement leave entitlements that was capable of being accepted by them. A general email inquiry by pilots to HR about their service recognition date was also not capable of creating a new contractually binding term of their employment.

[271] The usual contract formation elements of offer, acceptance, certainty of terms, intention to create legal relations and consideration were all missing from the communications the Authority has reviewed.

[272] The request for pilots to contact HR about their service recognition date was simply an administrative matter. It was necessary to ensure the correct date was recorded in the payroll system that would have enabled the pilots to have received service recognition related benefits under the Policy. It was nothing like the comprehensive offer and acceptance process that occurred during the Freedom integration in 2007. NZALPA and the pilots must have known that.

Did the pilots have a “legitimate expectation” that the Policy was contractual?

[273] NZALPA put forward a convoluted argument it had based on “the doctrine of legitimate expectation”, which had been developed within an administrative law context.

[274] The basis of NZALPA’s legitimate expectation submission was grounded in two judicial review cases which were not directly relevant to the employment law context, and which cannot form the basis for enforcement of the alleged contractual right NZALPA was pursuing for the pilots.

[275] NZALPA’s position appeared to be that the pilots had a legitimate expectation that Air NZ would interpret the Policy as having backdated their actual start date with Air NZ for the purposes of assessing their retirement leave eligibility. However, that argument did not withstand factual scrutiny.

[276] The Policy was not an implied term, an additional term, or an example of custom and practice being recorded in writing. The pilots in this matter could not have had a reasonable or legitimate expectation that the Policy and/or the associated communications Air NZ had about it had created a new contractual right to retirement leave that the pilots were not previously eligible for.

[277] There was no commitment, promise, settled practice or policy that provided for the backdating of a pilot’s commencement date with Air NZ for the purposes of obtaining eligibility to retirement leave entitlements.

[278] The Policy did not backdate benefits, as it had specifically stated that it did not “apply or award benefits retrospectively”. The pilots knew that by reading the Policy. In such circumstances the pilots’ expectation could not be said to be legitimate or reasonable.

[279] A legitimate expectation could also not reasonably arise where the claimed expectation (extension of retirement leave to a new category of pilots) was inconsistent with the clear and express terms of the 2010 CA.

[280] Air NZ never represented to, or advised, the pilots that the Policy had created new contractual entitlements that superseded express contractual terms in the collective agreement.

[281] The Policy also recorded that benefits or privileges were “as provided by your current employer.” That put the pilots on notice that any retirement leave was as per clause 16.7.1 in the 2010 CA. The evidence fell short of establishing that the Freedom pilots had relied on the alleged new contractual entitlement to retirement leave when accepting Air NZ’s offers of employment in 2007.

Did the Policy apply to retirement leave entitlements?

[282] There was no mention of retirement leave in the Policy or its associated documentation.

[283] A small closed off group of pilots, who were employed by Air NZ prior to 30 December 1999, were the only employees who had a contractual entitlement to retirement leave. NZALPA knew that.

[284] The Policy did not create a new right to retirement leave entitlements for pilots employed by a subsidiary company, but who were not actually employed by Air NZ prior to 30 December 1999. The Policy did not override that express cut-off date specified in the 2010 CA or in any subsequent collective agreements which contained the same restriction on eligibility.

[285] The Policy did apply to retirement leave entitlements, but only if the pilot had actually been employed by Air NZ prior to 30 December 1999. Those pilots met the qualification date recorded in clauses 16.7.1 of the 2010 CA and 2021 CA, while those pilots who were employed by Air NZ after that cut-off date did not.

Did the recording of a retirement leave balance on a payslip create or record a contractual right to retirement leave?

[286] Air NZ said that the only reason some pilots who were not employed by it prior to 30 December 1999 had retirement leave balances shown on their payslips was due to

a misinterpretation/misapplication of the Policy. That error was initially discovered in 2018 and further errors were discovered in 2020, which had since been corrected.

[287] The mere fact that a pilot saw a retirement leave balance on their payslip was not capable of creating a new contractual entitlement to retirement leave benefits, for which they were not otherwise eligible.

[288] The recording of a leave balance on a pay slip was simply an administrative/payroll matter. It did not meet the contract variation requirements set out in clause 23 of the 2010 CA. Nor was it capable of amounting to an “additional term” of employment, as NZALPA claimed.

[289] Although Air NZ accepted that its actions in crediting retirement leave to ineligible pilots caused some confusion, that mistake did not mean that the Policy created, introduced or implemented a new contractual term that overrode the express contractual term in clause 16.7.1 of the 2010 CA.

Practical problems with NZALPA’s interpretation of the Policy

[290] NZALPA advised the Freedom pilots in a newsletter dated 9 October 2007 that the commencement date of their employment could not be backdated to their Freedom start date without a variation to the Freedom CA.

[291] Nothing happened to change that position between the date of NZALPA’s advice about that and the implementation of the Policy. The legitimacy of that advice was evident from the variation to the 2005 CA and Freedom CA that occurred in April 2006 regarding the WSA.

[292] That same advice NZALPA gave Freedom pilots in 2007 would obviously also apply to any backdating of the commencement date of employment by a Policy, meaning it could not occur without a written variation to the 2010 CA.

[293] There was never any decision made to void or vary that contractual cut-off date for retirement leave eligibility recorded in the 2010 CA or subsequent collective agreements the parties entered into. Had the Policy been intended to apply in the way NZALPA claimed it did, then that was a significant matter that the parties would have had to have addressed.

[294] The backdating of employment start dates would create unnecessary difficulty in assessing the pilots' seniority for promotion and salary. That would affect not only the 59 pilots involved in this matter, but the overall relativity of seniority as between pilots, meaning it would therefore affect the employment of all other pilots.

Did the Policy vary the contractual restriction on eligibility for retirement leave?

[295] Air NZ said there was never any intent to undo what had been agreed in the 1999 collective contract and subsequent collective agreements which contained the same restriction on retirement leave eligibility because they expressly restricted eligibility to retirement leave entitlement to those employed prior to 30 December 1999.

[296] In *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Limited*, the Employment Court, in rejecting a claim that a policy amounted to a unilateral variation of contract, stated:¹⁵

In law there is no such thing as a unilateral variation of contract. A variation is the further contract between the same parties whereby they agree to make some changes to their rights and obligations as previously expressed, whether by way of addition, subtraction, or modification.

[297] Although the Policy explained that prior service would be recognised with respect to entitlements an employee has at their new or current employer, the terms of the entitlement are those which the employee has in the employment agreement with their employer.

[298] That is recognised by the wording in the Policy that states "The employee's prior service will be recognised by the employer, but the employee's benefits will become the benefits provided by the new employer."

[299] As a result of this wording, an employee remains bound by the terms of their employment with the new employer (including any rules or limitations on any benefit), albeit service will be recognised in calculating the extent of that benefit.

[300] For example, the retirement leave benefit was conditional on 15 years' service. The Policy allowed an eligible employee to count their previous qualifying service with another employer in the group towards those 15 years, but the employee had to be

¹⁵*NZEPMU Inc v Air New Zealand Limited* [2004] 1 ERNZ 614 at [176].

eligible for retirement leave in the first place under the current employment agreement they had with their employer.

[301] The Policy did not say anything about, and could not eliminate, the limitation on eligibility to pilots who had 15 years' service or any other applicable condition or limitation, including that employment with Air NZ had to have actually commenced prior to 30 December 1999, in order for a pilot to be eligible for retirement leave entitlements.

[302] Section 54 of the Act required all collective agreements to include a variation clause. If a new contractual entitlement to retirement leave was to have been created, then the parties could and should have entered into a written variation. The failure to do so indicated there was no mutual intention to change retirement leave entitlements from what was expressly recorded in the 2010 CA or subsequent collective agreements.

[303] Variations to the collective agreement had to be agreed in writing by the parties and required ratification by the NZALPA members covered by the collective agreement. That did not occur. A unilateral variation of the collective agreement was not possible.

[304] The Policy was not a variation to the 2010 CA. Nor did the invitation to pilots to contact HR to get their service recognition date amount to a contract variation to the 2010 CA. The communications that occurred about the Policy, and arising from it, did not meet the specific requirements of clause 23 of the 2010 CA, which dealt with how variations were to occur.

[305] The Policy did not vary the eligibility restrictions on retirement leave entitlements that were expressly recorded in the 2010 CA and in subsequent collective agreements. The clear wording in clause 16.7.1 of the 2010 CA still applied to the pilots, even after the Policy was implemented.

Can the Authority read words into the 2021 CA and Policy that are not already there?

[306] NZALPA's position required the Authority to read in additional wording to clause 16.7.1 of the 2021 CA and into the Policy that were not there. See paragraph [146] of this determination for the words NZALPA said should be read into the documents by the Authority.

[307] That indicated NZALPA knew these documents could not be read consistently with its interpretation, without significant changes being made to the wording that had actually been used in the 2021 CA and Policy.

[308] Section 163 of the Act prevented the Authority from varying a collective agreement or any term in it, as effectively advocated for by NZALPA.

[309] The wording of the retirement leave clauses in the 2010 CA and 2021 CA is clear and easily understood on the face of it, without any additional wording being required for the contractual term to make sense. It cannot be changed the way NZALPA argued it should be.

Did the Gus Gilmour email create or record a new contractual entitlement to retirement leave?

[310] NZALPA relied on an email dated 13 February 2012 that Gus Gilmour, Air NZ's GM Operations, sent to Tim Robinson, NZALPA's Industrial Director. Mr Gilmour's email stated "the company does recognise retirement leave **as it relates to the continuous service** aspect of the service recognition policy." (emphasis added)

[311] The words emphasised by the Authority indicated that the recognition Mr Gilmour referred to was likely limited to the continuous service aspect of the Policy, as that made the most logical sense. Significantly, the email did not record that a new contractual entitlement had been created or that the Policy had overridden the express contractual cut-off date for eligibility for retirement leave recorded in the 2010 CA.

[312] NZALPA claimed that Mr Gilmour's email created and/or recorded an enforceable right to retirement leave entitlements for the pilots in this matter.

[313] NZALPA submitted that Mr Gilmour's email proved Air NZ had recognised that the Policy had backdated the pilots' commencement date with Air NZ, because it had recognised the continuous service the pilots in this matter had with other employers in the Air NZ Group, "thereby predating their employment start date to prior to 30 December 1999."

[314] That submission was not accepted. An ambiguous email cannot override the express restriction on retirement leave entitlements that was recorded in the applicable collective agreements.

[315] The 13 February 2012 email can also be read consistently with Mr Gilmour recording that the Policy would enable those pilots who were employed by Air NZ prior to the cut-off date of 30 December 1999 (so were contractually entitled to retirement leave) to count their previous qualifying service with other employers in the Air NZ Group towards the 15 years' service threshold they had to meet before they qualified for retirement leave entitlements.

[316] That is the more likely position, based on the email Mr Usherwood sent to Mr Gilmour on 15 September 2011, which recorded the Policy's impact analysis on pilots' retirement leave. The costings of the Policy were calculated by Air NZ based on the closed group of pilots who were contractually entitled to retirement leave.

[317] Mr Usherwood's 15 September 2011 email was sent to Mr Gilmour before the Policy was implemented on 23 September 2011. Because of Mr Usherwood's 15 September 2011 email, Mr Gilmour knew the number of pilots who would have their retirement leave entitlement affected by the Policy. He also knew the actual costings of retirement leave for pilots who were employed by Air NZ prior to 30 December 1999, who would have their retirement leave entitlement affected by the Policy.

[318] Accordingly, the email NZALPA sought to rely on that was dated 13 February 2012 had been read with the knowledge that when he sent it, Mr Gilmour understood that a specified number of pilots who were contractually eligible for retirement leave (meaning they met the 30 December 1999 cut-off date) would be affected by the Policy.

[319] There was nothing in the 15 September 2011 email about pilots who did not meet the contractual cut-off date also becoming entitled to retirement leave as a result of the implementation of the Policy. Nor was that expressly stated in Mr Gilmour's email dated 13 February 2012 to NZALPA's Industrial Director.

[320] It was unlikely Mr Gilmour had been referring in his 13 February 2012 email to giving a new contractual retirement leave entitlement to pilots who were not employed by Air NZ prior to 30 December 1999. Mr Gilmour was aware that Air NZ had not costed that, or identified how many pilots would have been involved, as it had done for the pilots employed by Air NZ prior to that cut-off date.

[321] It was also inherently unlikely Mr Gilmour would make a representation extending retirement leave entitlements without that having been costed by Air NZ.

[322] Furthermore, as a matter of law, Mr Gilmour's email in itself could not create a new contractual entitlement for pilots who were not already eligible for retirement leave under the 2010 CA.

NZALPA did not act consistently with the Policy having created a new contractual entitlement

[323] If NZALPA believed the Policy had unilaterally given pilots a new contractual right to retirement leave they did not already have, then it would likely have advertised that as a significant new benefit.

[324] The fact NZALPA did not do so, supports the Authority's view that NZALPA knew that the only pilots who were contractually entitled to retirement leave were those who were actually employed by Air NZ prior to 30 December 1999.

[325] Air NZ said that until the Policy was introduced, no former Freedom pilot had ever raised a query around retirement leave, yet some had retired and would have been eligible based on NZALPA's current arguments.

Outcome – issue 2

[326] Air NZ's evidence was accepted, that there was no intention by it to undo what had been agreed about the 30 December 1999 cut-off date, which was intended to close the group of pilots who were contractually entitled to retirement leave. The detailed analysis and costing in Mr Usherwood's emailed dated 15 September 2011 reflected that position.

[327] If the Policy had intended to confer new contractual retirement leave entitlements on all pilots, then the number of pilots it applied to would be, as Air NZ said, "exponentially greater than [number redacted], as would the cost".

[328] Pilots employed by Air NZ prior to 30 December 1999, who also had prior service with a qualifying subsidiary company, had their service with the subsidiary company recognised for the purposes of meeting the eligibility to retirement leave criteria set out in the applicable clause in the 2010 CA.

[329] The Policy did not extend eligibility to retirement leave entitlements to other pilots, because it did not backdate their commencement of employment date with Air NZ.

[330] There was no backdating of the start date under the Policy, because to have done so would have created difficulty in a range of areas for pilots, such as salary, salary steps and seniority positions.

[331] None of those critical issues were addressed by the Policy, the parties, or by Air NZ and the pilots. That lent considerable weight to Air NZ's position that the Policy did not backdate start dates for the pilots.

[332] At the time the Policy was implemented the applicable collective agreement was the 2010 CA, where clause 16.7.1 provided that retirement leave entitlements were maintained "for those pilots employed prior to 30.12.99." Therefore in order to have a contractual entitlement to retirement leave the pilot had to have actually been employed by Air NZ prior to the cut-off date of 30 December 1999.

[333] That was not changed in the subsequent collective agreements.

[334] The Policy did not re-confer a new retirement leave entitlement on any pilots, because it had not been conferred to Freedom pilots in the first place. Also the Policy did not come into effect until 2011, so it could not have applied when the integration of the Freedom pilots into Air NZ occurred in 2007.

[335] Air NZ has a range of policies, which it can change from time to time. It can create, change or remove a policy at its discretion, because a policy is not a term or condition of employment. The various policies NZALPA's witnesses cited did not change that legal reality.

[336] The complete absence of any discussion, consultation, or negotiation with NZALPA (or any of its members) prior to Air NZ's introduction of the Policy undermined NZALPA's claim that the Policy introduced a new contractual entitlement to retirement leave for all pilots. NZALPA also did not act consistently with the Policy having created or recorded a new contractual entitlement for pilots to retirement leave entitlements.

[337] The Policy was not a contractual term of the pilots' employment so it could be, and was, unilaterally changed by Air NZ. Nor did the Policy create or record a new contractual entitlement to retirement leave for pilots who were not entitled to it under the 2010 CA and/or 2021 CA.

Summary

[338] The Freedom pilots had not been provided with retirement leave as an additional term of their employment. The Authority did not accept that the Freedom pilots had been induced to accept Air NZ's offer of employment, resulting from the 2007 integration, by an offer of retirement leave entitlements.

[339] The Policy did not say what NZALPA claimed it did. It did not backdate the pilots' start dates, and it did not create retrospective contractually enforceable retirement leave entitlements. The Policy did not expand retirement leave entitlements to the pilots involved in this matter.

[340] Access to retirement leave was limited to the ring-fenced population of Air NZ Jet pilots employed by it prior to 30 December 1999. Retirement leave was grand-parented for these pilots by the 1999 CEC, and in all subsequent Jet Pilot collective agreements, including the recently expired 2021 CA. The Policy did not change that.

[341] The Policy recognised group service when calculating retirement leave benefits for those pilots who were contractually entitled to them. It did not extend retirement leave entitlements to a whole new category of pilots who were not employed by Air NZ prior to 30 December 1999.

[342] Accordingly, NZALPA's claims that the pilots in this matter had contractual retirement leave entitlements did not succeed.

Costs

[343] The parties agreed that costs should lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority