

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 662
3283799

BETWEEN THE FEDERATION OF AIR
NEW ZEALAND PILOTS
INCORPORATED
Applicant

AND AIR NEW ZEALAND LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Tim Oldfield, counsel for the Applicant
Kevin Thompson, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 31 July and 7 August 2024 for the Applicant
31 July and 7 August 2024 for the Respondents

Date: 7 November 2024

DETERMINATION OF THE AUTHORITY

[1] The Federation of Air New Zealand Pilots Incorporated (Federation) has lodged an employment relationship problem with Air New Zealand Limited (Air NZ). The problem relates to a dispute over the interpretation, application, or operation of a now superseded collective agreement as it related to one of the Federation's members, Brendon Scaife.

[2] In order to assist the resolution of the Federation's problem, the parties, in discussion with the Authority, undertook to reach agreement on the relevant facts. The parties agreed on the following facts:¹

- a) The Federation is a registered trade union and Air NZ is a limited liability company.

¹ These have been edited to ensure the consistency and style.

- b) Mr Scaife is and was at all material times a member of the Applicant employed by the Respondent as a pilot, albeit Mr Scaife's employment was covered by different collective agreements depending on whether he was employed on the turboprop fleet and then on the jet fleet.
- c) Mr Scaife was formerly employed on the turboprop fleet, which flies regional domestic routes within New Zealand.
- d) From 11 April 2014 until 18 June 2023, he was employed by Eagle Airways, Air Nelson and subsequently Air New Zealand Regional Airline, all subsidiaries of Air NZ.
- e) There are separate collective agreements between the Federation and Air NZ covering the turboprop fleet and the jet fleet.
- f) The collective agreement between the Federation and Air NZ covering the turboprop fleet (the turboprop pilot collective agreement) covered Mr Scaife's employment up until 18 June 2023.
- g) The collective agreement between the Federation and Air NZ covering the jet fleet (the jet pilot collective agreement) is the subject of this dispute and its term is 16 May 2021 to 15 May 2024.
- h) A new jet pilot collective agreement has now been signed between the Federation and Air NZ for the period from 16 May 2024 to 15 May 2027, which includes an updated section 12.
- i) There is a separate collective agreement between the New Zealand Airline Pilots Association Industrial Union of Workers (NZALPA). and Air NZ covering the jet fleet.
- j) Air NZ created a system called the Regional Pilot Priority Process (RPPP), which is a system for transitioning turboprop pilots to the jet fleet, if a pilot wished to do so.
- k) In 2023, while still employed on the turboprop fleet, Mr Scaife placed a bid for the position of First Officer on an A320 aircraft (F20), in accordance with the RPPP. The bid by Mr Scaife was a formal offer for an advertised vacancy under the RPPP.
- l) The bid was placed under the RPPP because at the time he placed the bid Mr Scaife was not covered by the jet pilot collective agreement, but nonetheless Mr Scaife wished to move to the jet fleet.

- m) That bid was accepted by Air NZ and Mr Scaife was offered employment on the jet fleet on 3 May 2023 as an F20.
- n) On 19 June 2023 Mr Scaife commenced employment pursuant to the jet pilot collective agreement.
- o) He was initially employed as a Pilot Under Initial Training (PUIT) under cl 13.1.6 of the jet pilots' collective agreement and paid the PUIT rate.
- p) Mr Scaife's type specific training course for the A320 was due to start on 10 July 2023, which followed a pilot induction course and a jet pilot bridging course which had commenced on 19 June 2023. However, Mr Scaife could not attend that course because of a period of parental leave from 27 June to 10 July 2023, and continuation of his training course would necessarily be paused.
- q) Having been appointed to the F20 vacancy, Mr Scaife then placed a bid on 22 June 2023 for the position of Second Officer on the B777 aircraft (S7) for a course commencing on 4 September 2023.
- r) Mr Scaife was serving a lock on period at the time the training for the S7 vacancy was due to commence on 4 September 2023.
- s) Air NZ did not recognise that bid as valid and that bid is the subject of the parties' dispute.
- t) The Federation raised a dispute with Air NZ on 14 August 2023 and Air NZ responded with reasons for its position on 25 August 2023.
- u) A pilot more junior in seniority than Mr Scaife was appointed to the S7 course that Mr Scaife had bid for.
- v) Mr Scaife commenced his F20 training on 19 June 2023 and completed it on 18 October 2023.
- w) The Federation advised Air NZ that Mr Scaife was participating in the F20 course without prejudice to this dispute.
- x) After completing his type rating, Mr Scaife started receiving the F20 rate of pay from 14 August 2023.
- y) The S7 rate of pay is less than the F20 rate of pay.

The Authority's investigation

[3] It was agreed with the parties this matter would be heard “on the papers”. In addition to the agreed facts and the parties’ submissions, several relevant documents were also focused upon, including the collective agreement. While I have not referred in this determination to all submissions advanced by the parties, I record I have fully considered all material provided by them.

Issue for determination

[4] After discussion with the parties, the issue identified for investigation and determination by the Authority was whether Mr Scaife’s bid for a B777 second officer position was a valid standing bid? In order to fully answer that issue, there are several ancillary matters which require consideration, and these are outlined and addressed below.

Principles for interpreting a collective agreement

[5] The principles of contractual interpretation are well established.² The Supreme Court has found these apply to agreements entered into under the Employment Relations Act 2000.³ There was no dispute between the parties about this. However, the Federation said that the Authority should have regard ‘to the special features of collective agreements and the relationships under which they were formed’.⁴

[6] Having regard to the “special features” of collective agreements, it is important to recognise that such an agreement is the result of collective bargaining. Collective bargaining is far from an exact process and is undertaken, for the most part, by a non-legally ad hoc committee comprising representatives of the employer(s) and union(s). Collective bargaining often takes place over long periods, punctuated by periods of inactivity, and sometimes within difficult industrial contexts. The agreement that results from collective bargaining is often the result of pragmatic rather than precise, and often concise, drafting. It is not uncommon, therefore, for collective agreements to contain anomalies, inconsistencies or, even, novel forms of drafting arising out of concession and compromise by the parties.

² *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd*

³ *New Zealand Airline Pilots Association v Air New Zealand Limited* [2017] NZSC 111, The Court of Appeal found similarly in *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trades Union* [2010] NZCA 317

⁴ Citing *Le Gros v Fonterra Co-operative Group Limited* [2023] NZEmpC 193.

[7] Air NZ succinctly summarised the correct approach to be taken to construing collective agreements as “the interpretation exercise can involve consideration of a wide range of factors to provide context so as to understand what the parties actually intended their agreement to mean, viewed objectively”.

[8] For completeness, in undertaking this agreement construal exercise it is not for the Authority to substitute its own view for that of the parties.⁵

Relevant provisions of the collective agreement

[9] The relevant contested provision of the jet pilot collective agreement is cl 12, with particular reference to the following subparts thereof:

12.7.8 Lock ons

.....

12.7.8.4 A lock-on period will not prevent lodging a bid for another equipment type or position but any bid lodged during a lock-on period will be invalid. A lock-on will not prevent the Company directing a pilot to any vacancy.

12.8 Bypass

12.8.1 A Bypass situation arises when a pilot with a valid standing bid for a promotion in rank or equipment category transfer is denied that promotion or equipment category transfer in favour of a more junior pilot, with the following exceptions:

If a pilot—being the most senior pilot with a valid standing bid for a promotion in rank or equipment category transfer—is bypassed for that position for any reason other than:

- (a) lack of appropriate licence;
- (b) failure to reach the required standard of technical or flight proficiency;
- (c) unsuitability for command or added responsibility;
- (d) their own request;
- (e) illness and or injury;
- (f) they are still serving a lock-on period at the time training for the advertised vacancy is due to commence;
- (g) the junior pilot is a management pilot appointed in accordance with clause 12.3.12;
- (h) the junior pilot is an instructor appointed in accordance with clause 12.5.5;
- (i) In circumstances covered by 12.8.3. then they shall be paid bypass pay.

12.8.2 A pilot may be bypassed for a maximum period of 9 months, immediately after which the promotion in rank or equipment category transfer will be facilitated by the Company for that bypassed position, unless the pilot agrees otherwise.

⁵ Above n 3 at [77]

[10] In addition, Air New Zealand referred, for context, to counterpart provisions in its collective agreement with the other pilots' union, NZALPA.

Submissions of the parties

The Federation

[11] The Federation said this was a “slightly unusual” because it arose out of a situation where Mr Scaife, appointed to the jet fleet from the turboprop fleet, had pre-existing seniority under the RPPP rather than starting from the beginning.

[12] It was said the dispute was also a narrow one because the collective agreement has now been amended and “lock-on” process now applies “from initial appointment” (new clause 12.7.8.1). Essentially, the amended clause now aligns with the collective agreement between Air NZ and NZALPA. There is still a live issue, however, because under the 2021 – 2024 collective agreement, Mr Scaife had a valid bid for the S7 position in place and is now past the point where Air NZ should have “facilitated” his transfer to that position.

[13] The Federation said Mr Scaife made his bid for a S7 position on 22 June 2023. The collective agreement refers to “valid bid” or “valid standing bids” in various parts of cl 12 of the collective agreement. However, these terms are not defined in the collective agreement.

[14] The Federation said the collective agreement says bids are “invalid” in the following circumstances:

- a) failure to provide contact details for advisories or to return from leave to commence a course invalidates a bid: cl 12.7.4; and
- b) a “lock-on” period does not prevent lodging another bid for an equipment type or position, but any bid lodged during a lock-on period is invalid. And a lock-on will not prevent Air NZ directing a pilot to any vacancy: cl 12.7.8.4.

[15] The Federation submitted that reading the collective agreement “as a whole”, it follows that if a bid is not invalid under one of these two clauses, it is valid.

[16] The Federation submitted that cl 12.7.4 of the collective agreement did not apply to Mr Scaife's bid and the critical issue is whether he was locked on when he made his bid on 22 June 2023. The Federation said a lock-on is defined in cl 12.7.8 as “a period of time following a change of rank, equipment category transfer or appointment to a Check or Instructor position during which a pilot is frozen in that new rank, equipment category or position” and in

accordance with cl 12.7.8.2 is for a period of “24 months from the date of commencement of training for the relevant position”.

[17] The Federation submitted Mr Scaife was not locked on at the time he made his bid on 22 June 2023 because:

- a) Air NZ’s appointment letter said his lock-on period would commence on 10 July 2023 and end on 9 July 2025;
- b) Air NZ confirmed this again in correspondence dated 25 August 2023 and at para 2.21 of the Statement in Reply lodged in the Authority;
- c) 10 July 2023 was the date he would commence his F20 training course;
- d) he was undertaking a jet pilot bridging course and pilot induction course from 19 June 2023
- e) At the time he made the bid he was “PUIT” and had not commenced training for the relevant position within the meaning of cl 12.7.8.2.

[18] The Federation said if Mr Scaife was not locked on when he made the bid, the bid was valid, and he was denied the equipment category transfer he had a standing bid for in favour of a more junior pilot – which, in turn, created a “bypass” situation under cl 12.8.1.

[19] However, the Federation said Mr Scaife was not entitled to “bypass pay” because he would still be serving a lock-on at the time training for the S7 vacancy was due to commence. Although, a bypass situation still arose; the bypass being the appointment of a more junior pilot.

[20] The Federation said under cl 12.8.2 of the collective agreement, the maximum period of the bypass was 9 months immediately after which Air NZ should have facilitated Mr Scaife’s equipment category transfer to S7 from 4 June 2024, being the date 9 months from the start of the S7 training course.

[21] The Federation submitted as the more senior pilot, Mr Scaife was entitled to be appointed to the S7 vacancy in preference to the more junior pilot, who would still have a valid bid in place and would only miss out because Mr Scaife was more senior. And had Air NZ followed its’ interpretation Mr Scaife would have been appointed to the S7 course and the next most senior pilot who bid for the F20 course would have been offered that course in his place. The Federation then went on to submit that once the pilot starts training for the relevant position, they are “locked on”. However, if they bid (as Mr Scaife did) before the lock on starts their bid

is valid and they should be permitted to start the course they bid for provided they hold appropriate seniority or be bypassed in the alternative and even if they have already bid for and accepted a course the next most senior pilot could just slot into that course.

[22] In summary, the Federation submitted its interpretation accords with the text and context of the collective agreement and did not create any unjust result nor one that cannot have been in the contemplation of the parties when they entered into the agreement.

Air NZ in reply

[23] Air NZ said the Federation's preferred interpretation would permit the following to occur: having agreed to an appointment to a F20 vacancy, and while still serving an agreed 24 month lock on period at the time training for an S7 vacancy was due to commence, Mr Scaife should be permitted to walk away from his commitment to the F20 position by lodging a bid for the S7 vacancy and be released from his lock on after a reduced period of nine months.

[24] Air New Zealand said the absurdities that resulted from the Federation's interpretation included:

- a) A pilot (including Mr Scaife) could disregard their commitment to the offer and acceptance of a bid and thereby undermine the sanctity of contract; and
- b) A pilot could withdraw from a training course moments before it was due to commence, undermining the training programme, leaving the pilot "inoperable" because they would be rostered to training and not flying duties, and in Mr Scaife's case leaving him untrained as a jet pilot yet still expecting to be paid.

[25] There is no logic to support the Federation's submission that if a bid is not "invalid" under section 12.7.4 or section 12.7.8.4, then the bid must be valid. Those clauses are just two examples of when a bid will be invalid. Air NZ said it was beyond contemplation that a bid lodged moments before a training course started (but after the pilot and the company had already entered a contractual commitment for another position) that it would be a "valid" bid. And more so in Mr Scaife's case, as a newly hired pilot with no jet qualifications.

[26] Air NZ said it accepted Mr Scaife was treated as not "locked-on" at the time he lodged his S7 bid but this is not a critical issue, and he must accept the consequences of his action in bidding for and accepting an F20 position which would see him definitely locked on from 10

July 2023. Without the agreement of Air NZ to release Mr Scaife from that commitment (which was not given), Mr Scaife cannot avoid that consequence.

[27] Air NZ contended a bypass situation did not arise in this case under cl 12.8.1. because if any of the exceptions in section 12.8.1(a) - (f) apply, there is no bypass situation and also no eligibility to bypass pay. Therefore cl 12.8.2 has no work to do.

Air NZ's primary position

[28] Air NZ submitted that, having made a bid for an F20 vacancy which was accepted by Air NZ by way of appointment as an F20, Mr Scaife was bound by that contractual commitment and the agreed 24 month lock on. And Mr Scaife's subsequent bid for a different vacancy without being released by Air NZ from the contractual commitment was an "invalid" bid.

[29] In any event, Air NZ said at the time the S7 course commenced Mr Scaife was still serving a 24 month lock on to the F20 position and was, therefore, not "bypassed" and/or was not eligible for bypass pay and an early release of the lock on did not arise.

[30] Air NZ submitted, as "important context", it would be "unthinkable" that it had agreed to a situation whereby a member of the Federation (Mr Scaife) could be released from a 24 month lock on after 9 months when an NZALPA member would be required to serve the full 24 months.

[31] Air NZ said Mr Scaife's intended course of action raises the obvious practical question: what was it to do with Mr Scaife from 19 June 2003 until the S7 course commenced on 4 September 2023 given he did not hold jet pilot qualifications and the only qualification which could be achieved from 19 June 2023 was that of an F20? In addition, Air NZ would have been left with an F20 vacancy on a course that had already commenced and that it would have been unable to backfill.

[32] In summary then, and in support of the first ground advanced by the Respondent, Mr Scaife's bid for S7 was invalid because he had a contractual commitment to commence as F20 and be subject to a 24 month lock on, so could not be considered for the S7 vacancy.

Air NZ's secondary position

[33] Air NZ submitted that if Mr Scaife had a valid bid, which it denied, there was no bypass situation in respect of him and thereby rendering the same result.

[34] Air NZ said no bypass situation arose for Mr Scaife because:

- a) the circumstances in cl 12.8.1(a)-(i) are the circumstances in which bypass pay is not payable;
- b) Mr Scaife's situation is caught by (f) and he has acknowledged he was serving a lock on at the time training for the S7 vacancy was due to commence;
- c) those same exceptions must be the same exceptions referred to in section 12.8.1 where the third line of the opening paragraph refers to "... with the following exceptions...", when referring to whether a bypass situation arises. If subparagraphs (a) – (i) are not the exceptions referred to, then what are those exceptions?; and
- d) Mr Scaife's situation was caught by the exception in 12.8.1 (f), and this was accepted by him, his was neither a bypass situation nor was he entitled to bypass pay.

[35] Further, Air NZ said the Federations' interpretation produces absurd and dangerous outcomes which cannot ever have been intended. For example, a pilot who is not appointed to a vacancy because of cl 12.8.1 (b) (failure to reach the required standard of technical or flight proficiency), (c) (unsuitability for command or added responsibility) and (e) (illness and/or injury) while not entitled to bypass pay, must nonetheless be facilitated to the position after nine months.

[36] Air NZ submitted this "clearly cannot be right" and the only interpretation available is that the parties intended the list of exceptions in cl 12.8.1(a) - (i) to be not only disentitling of bypass pay but not a bypass situation in the first place and these are the exceptions to a bypass situation referred to in cl 12.8.1 and therefore there is no right to be facilitated to a position after 9 months.

[37] Finally, Air NZ said even if Mr Scaife had a valid standing bid for the S7 vacancy, which it denied, he was not bypassed and is therefore not entitled to be facilitated to an S7 position after a period of 9 months.

The Federation in reply

[38] The Federation submitted the collective agreements between NZALPA and Air NZ are different, they arise out of different employment relationships, and it was not "unthinkable" that the parties agreed to different arrangements. There is different wording used and different

arrangements have been agreed. And different concessions have been made by Federation in exchange for different advantages relative to NZALPA, which has been the subject of litigation and is well known to the parties.⁶ An example of outcomes based on different concessions was said to be that the (superseded) collective agreement said that bids lodged during a lock on period were not valid. That was disadvantageous compared to the NZALPA collective agreement, but it was what the parties had agreed.

[39] The Federation said if Mr Scaife's bid for the S7 course had been accepted as valid he would not necessarily have been required to start the F20 course and would not have been locked on from the commencement of that F20 course because he would have never started the training, the next most senior pilot would have been appointed to the F20 course and, in any event, the consequences are not as dramatic as Air NZ suggested.

[40] The Federation submitted that a pilot also could agree to an "extended bypass" or cl 12.8.4 gave the parties an ability to review the reason for the bypass if the circumstances in cl 12.8.1(b), (c) or (e) applied. The Federation went to observe the pilot in question would likely agree to an extended bypass rather than be potentially liable for termination of employment or disciplinary action for failing to hold the appropriate licence, technical or flight proficiency or unsuitability for command or medical incapacity.

The correct interpretation

[41] In reaching a conclusion about the correct interpretation, I have carefully considered the submissions of the parties, examined the relevant provisions of the collective agreement and adopted the principles of interpretation outlined above.

[42] Mr Scaife came within the coverage of the jet collective agreement on and from 19 June 2023 by virtue of his appointment as a "jet pilot" following an offer and acceptance process which resulted in an executed contract of employment on 3 May 2023. When Mr Scaife became covered by the jet pilot collective agreement, he was paid the PUIT rate in accordance with cl 13.1.6. This rate of pay was applicable until he passed the "type rating" (in other words, until he passed the A320 jet pilot training course).

[43] Mr Scaife's initial "standing bid" for an F20 position, which was accepted by Air NZ hence his transition of the jet pilot collective agreement, was made under the RPPP. The

⁶ See, *NZALPA v Air New Zealand Ltd* [2017] NZSC 111 at [2] and [11].

purpose of RPPP is to allow pilots within the Air NZ group of companies to progress to different types of aircraft (referred to as an “equipment category”); presumably attracting different pay, experiences, and status.

[44] As part of the contractual arrangements for his appointment as a jet pilot, and consistent with the jet pilot collective agreement, Mr Scaife agreed to “lock-on” period of 24 months on the A320 aircraft. That period is 10 July 2023 to 9 July 2025. A lock-on is the period of time a pilot is “frozen” in a new rank, equipment category or position: cl 12.7.8.1.⁷

[45] Within 3 days of coming within the coverage of the jet pilot collective agreement, Mr Scaife placed a bid for a S7 position. This bid occurred within a broader context of Mr Scaife being unable, at or about that time, to undertake the requisite F20 training programme because the timing of which overlapped with a short period of parental leave.

[46] Clause 12.7 of the jet pilot collective agreement sets out the “standing bid system” which is says covers “promotion, equipment category transfer or standards positions”. As Mr Scaife was now bound by the jet pilot collective agreement, this provision applied to him. He could not have placed his S7 bid under the RPPP because that was only open to Turboprop pilots of which he was no longer one.

[47] Much was made by the parties about “valid” and “invalid” bids. Certainly, it is a requirement that a bid be *valid* for it to be capable of acceptance by Air NZ and cl 12.7 sets out the various procedural requirements for what are, in effect, valid standing bids. I do accept, however, Air NZ’s submission that while the wording in the collective agreement specifically refers to a “valid bid”, a bid could also be “invalid”, including in the circumstances set out in cl 12.7.

[48] However, the critical feature of cl 12.7, and one which goes to the heart of this matter, is that cl 12.7.1 relevantly provides that a bid “is based on the principle that a pilot’s standing bid represents an offer which the Company may either accept or decline”. In other words, Air NZ does not have to accept a valid bid, which I take to be one that meets all requisite procedural requirements, because it has been treated by the parties as an “offer”. Having regard to the jet pilot collective agreement the only time it seems Air NZ would be required to *accept*

⁷ Offer of employment and appointment to A320 First Officer course both dated 3 May 2023

(“facilitate” is the term used in cl 12.8.2) a valid bid is if certain pre-conditions have been met including the pilot being “bypassed” for a maximum of nine months: cl 12.8.3.

[49] While I accept the Federation’s submission that Mr Scaife was not “locked-on” at the time he lodged his S7 bid and could make, therefore, a “valid” (further) bid, this did not guarantee Mr Scaife the S7 position. And, in this regard, I accept Air NZ’s submission that as Mr Scaife made a bid (offer) for an F20 vacancy, which was accepted by Air NZ by way of appointment as an F20, he was bound by the resultant contractual arrangements including a 24-month lock on period (which also coincided with the S7 training course). Mr Scaife’s subsequent bid for a different vacancy, which would have required his employer to discharge him from his contractual commitments, was not accepted by Air NZ (noting that Air NZ referred to this bid as being “invalid”, which is, ultimately, to the same effect).

Result

[50] I find that while Mr Scaife did have a valid standing bid for an S7 position Air NZ was under no obligation to accept it, which it did not, and it was within its rights under the jet pilot collective agreement to take this approach. Consequent of this finding, it is not necessary to further determine, as sought by the Federation, whether Mr Scaife had been “bypassed” by Air NZ under cl 12.8.1 of the same collective agreement.

Costs

[51] The Authority’s practice direction provides certain matters will generally not be subject to the daily tariff including disputes about the application, interpretation, or operation of a collective agreement. In cases of this type, the presumption is that parties bear their own costs.⁸ Accordingly, this is a matter where costs should lie where they fall.

Andrew Dallas
Chief of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1