

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2016] NZEmpC 161  
EMPC 57/2016**

IN THE MATTER OF      a challenge to the determination of the  
   Employment Relations Authority

BETWEEN                      NEW ZEALAND AIRLINE PILOTS'  
   ASSOCIATION INC  
   Plaintiff

AND                              AIR NEW ZEALAND LIMITED  
   Defendant

Hearing:                      31 August and 1 September 2016  
   (Heard at Auckland)

Appearances:                R Harrison QC and R McCabe, counsel for plaintiff  
   A Caisley and S Worthy, counsel for defendant

Judgment:                    1 December 2016

---

**JUDGMENT OF JUDGE CHRISTINA INGLIS**

---

[1] The New Zealand Airline Pilots Association (NZALPA) challenges a preliminary determination of the Employment Relations Authority (the Authority).<sup>1</sup> The challenge is pursued on a de novo basis. Two issues arise:

- (a) The correct interpretation of the parties' collective employment agreement (CEA).
- (b) Whether NZALPA is estopped from asserting its interpretation of the CEA in the particular circumstances.

[2] The dispute does not resolve a number of underlying personal grievances which NZALPA is pursuing on behalf of six pilots and which remain before the Authority.

---

<sup>1</sup> *New Zealand Airline Pilots Assn Inc v Air New Zealand Ltd* [2016] NZERA Auckland 34.

## The facts

[3] The global financial crisis hit in 2007. Air New Zealand was not immune to its impact. In 2009 alone the company suffered financial losses of around \$86million. Further significant losses were forecast. Unsurprisingly, fewer people were travelling by air during this time, particularly to and from international destinations. The outbreak of swine flu exacerbated the situation. All of this had the knock-on effect of reducing the need for international flights and, accordingly, the need for pilots on the airline's B767 fleet.

[4] A number of Air New Zealand staff lost their jobs, including around 100 cabin crew. Pilots avoided a similar fate. No pilot positions were made redundant. This was achieved via implementation of a range of measures. One measure, which was mooted at a relatively early stage, and which is at the heart of the present dispute, is known as "downtraining."

[5] Downtraining is the process by which pilots are moved to smaller aircraft. Downtraining is recognised in the CEA and can be seen as a corollary of the fact that pilots are employed as pilots, rather than to particular fleets within the company structure. While it is common ground that Air New Zealand may direct downtraining, the parties differ on when the power of direction can be utilised.

[6] It is apparent that the company worked closely with NZALPA from the outset in an effort to navigate through the fallout of the financial crisis. The situation became increasingly pressing, particularly in relation to the number of pilots flying B767s on long-haul flights. On 5 May 2009 Mr Gilmore, the then General Manager Operations, wrote to NZALPA advising that the company believed that a "potential redundancy situation" had arisen and that cl 11.5.2 of the CEA was applicable.<sup>2</sup> The situation was explained in one of Mr Gilmore's weekly updates to pilots as follows:<sup>3</sup>

---

<sup>2</sup> In particular, Mr Gilmore advised that the company would be seeking to apply the relevant manpower planning provisions (cl 11.5.2.2). This had earlier been foreshadowed to NZALPA, including during the course of a meeting with one of NZALPA's representatives (Mr Robinson) four days prior.

<sup>3</sup> Dated 8 May 2009.

The company has commenced discussion with the unions over our current manpower with regards to pilots. On some fleets/ranks we have a surplus of pilots and as the impact of the global recession (and latterly the Swine Flu) deepens, it is becoming apparent that with reduced flying we must look to take short term and longer term measures to address a potential redundancy situation.

To this end we have invoked the manpower provision (11.5) of the CEA with NZALPA and will follow a similar process [with others].

...

We will develop, in consultation with the unions, some initiatives to offer to pilots to achieve a managed reduction in surpluses and hopefully avoid job losses. Some of the ideas to date that have been thought of or implemented are:

- Using all your available leave...

...

- Down training

...

[7] As Mr Gilmore's correspondence made clear, the company was continuing to explore a range of options in an effort to stave off a redundancy situation. The correspondence also made two other matters clear. First, that activation of the cl 11.5 process was intended to sit alongside other initiatives. Second, that the company and NZALPA were working collaboratively in seeking to address the challenges that the global financial crisis had thrown up.

[8] It is convenient to set out cl 11.5 at this juncture. It provides that:

**11.5 MANPOWER PLANNING**

11.5.1 Where, for reasons of roster feasibility, it is necessary to reduce the lower limit of the incentive hour range to less than 60 hours, no pilot will receive less than the rate of pay for 60 incentive hours.

11.5.2 *Once a potential redundancy situation arises then:*

11.5.2.1 The Company will not operate any higher equipment category positions above a roster average of 75 incentive hours when any lower equipment category positions are projected to fall below a roster average of 60 incentive hours in three consecutive roster periods.

11.5.2.2 When any equipment category position operates or is projected to operate at less than a roster average of 60 incentive hours for

three consecutive roster periods *then the Company may take action(s) as follows:*

- (a) Allocate un-booked annual entitlement leave...
- (b) Allocate, at the Company's discretion but only after the expiry of at least 60 days notice to the individual pilot, backlog leave on an individual basis...
- (c) Offer Leave without pay...

11.5.2.3 *If, following the actions prescribed in 11.5.2.2, any Second Officer position operates or is projected to operate below an average of 45 incentive hours for three consecutive roster periods the Company will offer voluntary severance. Where voluntary severance is offered this will be in accordance with section 20.*

11.5.2.4 *If the measures contained in 11.5.2.2 and 11.5.2.3 are insufficient to reduce effective pilot numbers to a level which maintains the external operation at an average incentive hours at or above 60 hours per four week roster period then Compulsory Redundancy in accordance with section 19 will apply.*

(emphasis added)

Air New Zealand subsequently took steps to implement the process in cl 11.5.2.2(a) to (c), as it had said it would do. This gave rise to a dispute by NZALPA which was later settled at mediation.

[9] In August 2009 Air New Zealand progressed down a voluntary downtraining route, offering to transfer several B767 pilots to the A320 fleet for a limited period (until 31 March 2010). Mr Gilmore prepared a letter, which he provided to NZALPA in draft form for input and comment. The letter was finalised and sent to each of the pilots represented by NZALPA in these proceedings. Relevantly the letter made it clear that while it was hoped that voluntary downtraining would forestall any need to commence compulsory downtraining, cl 11.5.2.2 remained available to the company. It concluded with the advice that:

Should an insufficient number ... be achieved by the above process, then the voluntary change of fleet mechanism will be deemed to have failed and the provisions of the Air New Zealand Ltd/NZALPA CEA will be utilised and pilots directed in accordance with section 12.1.11.

A formal review of the efficacy of this voluntary change of fleet process will take place between the Company and NZALPA on or before the 29<sup>th</sup> of January 2010.

[10] Each of the six affected pilots subsequently volunteered to change fleets for this period, albeit somewhat reluctantly.

[11] A later letter confirming the arrangement reiterated that acceptance of voluntary downtraining would not preclude any pilot from being subjected to compulsory downtraining. The letter stated that:

If during the period of this agreement, down-training [from the B767 fleet] is deemed to be necessary, acceptance of this agreement will not exempt you from the down-training process....

[12] I pause to note that during the course of argument Mr Harrison QC, counsel for the plaintiff, submitted that the reference to downtraining in this correspondence was not to compulsory downtraining. I do not consider that the letter can reasonably be read in this way given the context and the clear juxtaposition with the voluntary downtraining arrangement which was in motion at the time. The reference to cl 12.1.11 in the earlier letter calling for expressions of interest for voluntary downtraining underscores the point. Clause 12.1.11 provides that:

Nothing contained in this section shall detract from the Company's right to direct a pilot to any position appropriate to his seniority that the Company considers suitable. However such sole discretion will not be indiscriminately used to override the exercise of seniority rights and the existence of valid bids.

[13] The reality is that NZALPA could not have been under any misapprehension that Air New Zealand was considering compulsory downtraining if the measures that were undertaken, including on a voluntary basis, were otherwise ineffective. It was made clear that an agreement to downtrain voluntarily would not prevent subsequent compulsory downtraining. Later correspondence, including a letter to NZALPA from Mr Gilmore of 25 August 2009, further emphasised the point. It noted that:

We have also changed the clause as to what will happen if this process fails, in other words we will direct pilots to the A320. We have made our position very clear on this and we see no reason to move off it. There is a surplus of 767 Captains and we need to address this.

[14] The following week (2 September 2009) Captain Mackie (Fleet Manager B767) wrote to a number of B767 pilots formally advising them of a move to the corresponding rank on the A320 fleet until 31 March 2010, to "reduce surpluses on

the B767 fleet.” Again, it was noted that if downtraining from the B767 fleet was deemed necessary during the currency of the agreement, pilots would *not* be exempt from the downtraining process.

[15] Mr Gilmore underscored the point in his weekly update to pilots of 4 September 2009, noting that the voluntary fleet change “forestalls the need to down train” and that:

... the company is hopeful that by the time this voluntary change to the A320 expires (31 March 2010) the markets have returned to “normal” and we can return the pilots back to the 767 and avoid down training indefinitely. I guess if we don’t see a bounce or the change in flying then we will have to address a permanent direction of pilots to the A320 from the C6 position.

[16] As it transpired, the voluntary process, and other initiatives, did not satisfactorily address the issues the company was facing. Air New Zealand decided to move to compulsory downtraining, as it had foreshadowed. Mr Gilmore and Captain Mackie met with NZALPA representatives (Mr Renwick and Mr Robinson) in the week beginning 18 January 2010. The purpose of the meeting was to discuss the company’s view that there remained excess “manpower” and that it was likely to move to compulsory downtraining.

[17] Captain Mackie said that during the course of the meeting there was no attempt by the union to dispute or challenge the company’s right to compulsorily downtrain, although there was an attempt by NZALPA representatives to persuade the company to delay the decision until other possible options for pilots had been identified. Captain Mackie’s evidence was that Mr Renwick requested a few days for the union to consider how best to communicate and present the decision to its members.

[18] There is a disagreement as to what occurred during the course of the meeting. None of the witnesses was able to be definitive about what had been said. That is perhaps unsurprising given that the meeting occurred some years ago. Ultimately the most helpful indications of the position emerge from the contemporaneous documentation and what can be drawn from it.

[19] It is evident that a further meeting took place between Mr Gilmore and NZALPA representatives. Following that meeting Captain Mackie telephoned each of the pilots who had previously agreed to voluntarily downtrain. He did this to give them a heads-up in advance of a letter each of them was about to receive. The effect of the letter was to confirm the decision to direct compulsory downtraining.

[20] The letter (dated 5 February 2010) advised that the efforts undertaken during the previous 12 months to militate against the need for downtraining off the B767 fleet had not been successful and that to alleviate the surplus situation the company was directing the pilots from the B767 to the A320 position, pursuant to cl 12.1.11 of the CEA. This effectively meant that the B767 pilots who had voluntarily agreed to transfer to the A320 fleet were now being subject to a direction to remain in that fleet. It is apparent that they were selected because they were the lowest on the seniority ranks. Compulsory downtraining had implications for their salary, as the letter made clear.<sup>4</sup> Voluntary downtraining had no such implications.

[21] Captain Mackie's evidence was that each of the pilots he spoke to was disappointed but resigned to the prospect of compulsory downtraining. His evidence is broadly consistent with handwritten notes made during the course of the telephone conversations. Captain Mackie also gave evidence that he had spoken to Mr Renwick on 30 January 2010. He said that Mr Renwick was aware that he had been making calls to pilots and that:

... basically [Mr Renwick] assured me that both he and Tim Robinson had confirmed to pilots who had called them, that NZALPA was aware of what was occurring and had discussed matters with the company and agreed that the company was in a surplus staff situation and was therefore proceeding with downtraining in accordance with the collective agreement. He also assured me that he had re-iterated to the pilots that downtraining to 747 first officer or to 777 ... was not a viable option.

[22] Again, an email sent by Captain Mackie to Mr Gilmore the same day is broadly consistent with Captain Mackie's evidence. In this regard the email referred to the conversation with Mr Renwick, to advice that Mr Renwick and Mr Robinson had already fielded some telephone calls from pilots, and to an assurance that they

---

<sup>4</sup> They were to remain on their current salary until 5 May 2010, namely three months from the date of the letter, and then revert to the pay rate for a A320 captain.

were “very much taking the agreed line and supporting to them that the 744 was not an option unless the positions were available. They are sticking to 12.1.11 as agreed... I am very comfortable with his rational and sensible approach to this.”

[23] NZALPA wrote back on behalf of the affected pilots on 9 February 2010 advising that each of them wished to be reinstated on the B767 roster on completion of the term of the original (voluntary downtraining) agreement, namely 31 March 2010. The reasons underlying this request were not spelt out.

[24] Mr Gilmore replied the next day advising that the company would be proceeding with the direction, noting that it had demonstrated a surplus of B767 rank pilots and, despite efforts to reduce/eliminate the surplus, downtraining was necessary as the last resort. He also noted that each of the affected pilots had been given notification of compulsory downtraining.

[25] The position was referred to in a NZALPA newsletter of 18 February 2010. In it Mr Renwick reiterated concerns about economic growth, made it clear that “we are in a potential redundancy situation”, and advised (under the heading “Voluntary Fleet Change C76”) that:

The voluntary fleet change situation was reviewed early in January [2010] as provided for in the Voluntary Fleet Change agreement.

As per the agreement, we have instructed the Company that the affected pilots wish to be placed back on the C76 fleet rank. The Company have provided manpower data showing a continuing surplus of C76 personnel and have subsequently advised us that six of the seven voluntary down-trainees are to be permanently directed onto the A320.

We are seeking a more detailed legal opinion regarding the implications of directed down-training while we are in a potential redundancy situation.

[26] While Mr Gilmore accepted that he may well have informally received a copy of the newsletter, NZALPA’s position was not communicated directly to the company at the time. It would, however, have been plain from the earlier 9 February correspondence that NZALPA was not on board with compulsory downtraining, even if it had previously made it clear that it was. Mr Gilmore’s strong response, reiterating the company’s view that it had the power to undertake such a step and had gone through the requisite process to do so, reflects that he understood this.

[27] On 19 February 2010 NZALPA wrote to Mr Gilmore raising an employment relationship problem concerning the:

... proposed involuntary and permanent direction of ... B767 Captains currently flying the A320 (temporarily and under the provisions of a voluntary fleet change agreement).

...

It is NZALPA's position that Air New Zealand is obliged to reinstate those pilots to the B767 roster on the completion of the terms of their agreement on 31 March 2010.

[28] NZALPA wrote to Air New Zealand again on 19 March 2010 advising that it had not had a clear response to its earlier letter requesting that the affected pilots be returned to their former fleet. This, it was said, was in accord with Air New Zealand's earlier letter of agreement which formed the basis for their original voluntary transfer. NZALPA concluded by advising its view that the company was not entitled to downtrain the affected pilots permanently, with cl 11.5 having been "enacted" in the way it was. The underlying basis for this view was not articulated, although it appears from minutes of a meeting that the legal opinion referred to in NZALPA's 18 February newsletter had by this stage been obtained.<sup>5</sup>

[29] Mr Gilmore responded to NZALPA's 19 March letter on 23 March 2010, advising that there had been discussions "at the time" about voluntary downtraining. The letter also advised that the affected pilots were required to fly on the A320 fleet because they had been directed to do so in accordance with cl 12.1.11 and had been given reasonable notice of this via the early February letter. Mr Gilmore noted that he saw no conflict between cl 11.5 and downtraining, and invited NZALPA to set out the arguments in support of its advised position. He concluded by noting that the direction would be taking effect on 1 April 2010, in accordance with the company's "correspondence and discussion".<sup>6</sup>

---

<sup>5</sup> Extracts from the minutes also record that the consensus was that the company "should remove 11.5.2 from the table or complete the process within s 11" and that the legal opinion would be "presented to the company this week." As it transpired the opinion was not provided to the company within the week. Nor has it subsequently been provided.

<sup>6</sup> The letter also noted that the reference to three months' notice related only to the point at which the pilots' salary reduced to the A320 captain's rate because in the event of an involuntary election to the A320 position the "down training to that equipment category would have already occurred." It was noted that while the situation did not sit easily within the circumstances envisaged by cl 13.2.5, with the intention of maintaining the "spirit" of cl 13.2.5 (which ensures

[30] NZALPA did not take up Air New Zealand's invitation to explain the basis for the cl 11.5/downtraining conflict argument it had flagged. It is possible that this is because NZALPA was itself unclear about the position, as meeting notes of April 2010 (describing the issue as "complex and uncertain from a legal perspective") seem to suggest.

[31] Shortly afterwards (on 15 April 2010) Mr Gilmore wrote to Mr Robinson advising that despite a difficult year, Air New Zealand had managed to maintain employment of all of its pilots, by "utilising the necessary clauses within the CEA, through consultation with its union groups and through using leave (be that paid or leave without pay)." He confirmed that the potential for redundancy had now subsided and accordingly cl 11.5.2.2 no longer applied.<sup>7</sup>

[32] It follows that compulsory downtraining occurred for a period of 14 days, over six years ago, namely from 1 April to 15 April 2010.

### **Approach to interpretation**

[33] The interpretative exercise is directed at establishing the meaning the parties to the agreement intended the words in dispute to bear.<sup>8</sup> The starting point is an assessment of the natural and ordinary meaning of the words themselves. That is generally gleaned from the language of the provision.<sup>9</sup> Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context.<sup>10</sup> If the words are ambiguous the inquiry will similarly move to an assessment of relevant facts and circumstance.<sup>11</sup> This part of the process is directed at ascertaining the meaning of the words when read contextually.

---

that pilots have three months' of pay at the higher rate before a reduction), the company agreed that if any directing of pilots occurred then three months' notice of pay at the higher rate would remain.

<sup>7</sup> The application of cl 11.5.2.2 would be lifted subject to one proviso – namely that NZALPA confirm that pilots who had had leave allocated to them under cl 11.5.2.2 but had not yet used it, proceed to use that leave as allocated in the roster.

<sup>8</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

<sup>9</sup> *Air New Zealand Ltd v New Zealand Airline Pilots Association* [2016] NZCA 131, [2016] 2 NZLR 829 at [40] (currently on appeal to the Supreme Court).

<sup>10</sup> *Vector Gas* at [24]; *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [13]-[14], [36].

<sup>11</sup> *Vector Gas* at [59] per McGrath J.

[34] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made.<sup>12</sup> It follows that dislodgment of an apparently plain and ordinary meaning may occur when such a meaning would lead to a nonsensical result, whether because it defies commercial (or employment relations) common sense or otherwise.<sup>13</sup> Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.<sup>14</sup>

[35] An objective approach is required.<sup>15</sup> Evidence of pre- or post-contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear.<sup>16</sup> Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.<sup>17</sup>

[36] As recently observed in *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd*:<sup>18</sup>

Collective agreements are not contracts, at least in the traditional sense of the word. Nor are they "commercial" in the sense of regulating the relationship of seller and purchaser of goods or services in commerce. Collective agreements ... represent the development of a particular employment relationship between an employer and a union over a long period, which is confirmed and altered from time to time in collective instruments which must and do expire and are renegotiated. So, not only must the Court consider the relevant context in which the parties agreed originally to [the relevant provision], but regard must also be had to its adoption and re-

---

<sup>12</sup> *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

<sup>13</sup> *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [18], [29].

<sup>14</sup> *Vector Gas* at [25], [34] per Tipping J.

<sup>15</sup> At [21].

<sup>16</sup> At [31].

<sup>17</sup> At [14].

<sup>18</sup> *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd* [2014] NZEmpC 168 at [14]. (This was appealed in *Air New Zealand Ltd v New Zealand Airline Pilots' Association Inc* [2016] NZCA 131. Although the appeal was allowed, the Court of Appeal confirmed that the Employment Court had accurately stated the contractual interpretation principles).

adoption in successor collective agreements which have been settled in evolving circumstances.

## Analysis

[37] Section 2 of the CEA, “Area and Incidence of Duty”, sets out the essential basis on which pilots are employed. It provides that:

The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot whether in New Zealand or any other part of the world where the Company may from time to time be operating, or to or from which the Company may require aircraft to be flown, and shall perform such other duties in the air and on the ground relating to his employment as a pilot as the Company may reasonably require.

[38] As is made clear, pilots are employed as pilots simpliciter. The provision also makes it clear that the company has a discretionary power to direct pilots as to which aircraft they are to fly. All of this was explained by the Labour Court in relation to an earlier iteration of the provision (in materially identical terms) in *New Zealand Air Line Pilots’ IUOW v Air New Zealand Ltd*. There the following pertinent observations were made:<sup>19</sup>

The broad issue is whether the company, not being happy with paying Mr Talbot DC-8 salary while he does not fly, can transfer him to another aircraft by some means against his wishes? In summary, the company wishes Mr Talbot’s services as a pilot flying aircraft to continue. The DC-8 is not now flying and its future is uncertain. There is a need for Mr Talbot’s services on other aircraft. He has declined to accept retraining on B747 and B767 aircraft. The company want to appoint him to a higher equipment category. It considers it has a right to require him to accept appointment to and retraining for the higher equipment category and therefore a right to require him to apply for an appropriate course and position.

We think the essence of Mr Talbot’s contract of service is based on section 2 of the award, i.e. that *he is employed to fly the company’s aircraft as directed. That is what section 2 means.* That is his obligation. The company is able to give him any directions which would enable him to fly. There is no separate subsequent or different contract restricted to the flying of any particular aircraft category.

Questions on redundancy do not arise. Mr Talbot’s job as a pilot has not disappeared. His services are required. His duties are not superfluous to the requirements of his employer. The position on a particular equipment category has become, at least for time being, superfluous. There is no present suggestion that this leads to termination of Mr Talbot’s employment. His position as a pilot engaged to fly the company’s aircraft is not superfluous.

---

<sup>19</sup> *New Zealand Airline Pilots’ IUOW v Air New Zealand Ltd* [1988] NZILR 789 (LC) at 790-791.

We note several items in the award which refer to the employer's powers. Section 12.6.7.0 refers to an officer transferred to non-flying duties. Section 12.2.1.0 refers to promotion at the company's discretion but allows seniority to be an important factor although without restricting the exercise of the discretion. ...

...

We consider that the company has considerable prerogatives in deploying its pilots to its best advantage. That prerogative means that the company can require Mr Talbot to apply for a promotion or a change of equipment category and to appoint him in terms of the award to the appropriate position in clear terms, ... In other words, the company can, in the end, require Mr Talbot to fly aircraft for which he is licenced or for which he can be retrained. If this were now done in clear circumstances, Mr Talbot would be bound to accept. If he refused, he would not be redundant but may be liable for dismissal. *He is not entitled to adopt a stance which prevents the company using his services as a pilot since this is the essential nature of his contract.*

(emphasis added)

[39] The broad discretionary power of direction implicit in s 2 has also been referred to in subsequent judgments, including *Air New Zealand v Rush*<sup>20</sup> and *McAlister v Air New Zealand*.<sup>21</sup> Both related to actions taken by the company in respect of pilots who had turned 60 years of age and so the factual context of these decisions is quite different. However, in *Air New Zealand Ltd v Rush* the Chief Judge relevantly observed that: “[the company] was aware that what, in the *Smith* case, had been s 2 of the expired collective employment contract continued to apply to Mr Rush's case: pilots were pilots and their employment was not restricted to any particular rank or equipment category.”<sup>22</sup>

[40] The Chief Judge went on to place a gloss on the power to direct, saying that:<sup>23</sup>

I do not find Air New Zealand to have been in breach of its contract ... by not directing [Mr Rush], probably against his will and certainly against his preferences, to take up duties as a pilot at any rank or any equipment category for which it might have had a vacancy. It is one thing that s 2 of the collective contract that governed Mr Rush's employment permitted the company to direct its pilots to “serve the Company in the capacity of pilot

---

<sup>20</sup> *Air New Zealand v Rush* [2003] 2 ERNZ 344.

<sup>21</sup> *McAlister v Air New Zealand* [2006] ERNZ 979.

<sup>22</sup> *Rush* at [36]. The reference to *Smith* is to *Smith v Air New Zealand Ltd* [2000] 2 ERNZ 376 (EmpC).

<sup>23</sup> At [44].

whether in New Zealand or any other part of the world where the Company's aircraft may require to be flown, and ... perform such other duties in the air and on the ground relating to his employment as a pilot as the Company may reasonably require." *But the qualifier of the very broad power of direction is reasonableness. That must, in turn, be interpreted in light of all other relevant provisions of the collective contract including, for the purposes of this case, the rank and type bidding system.* Whilst I agree that the company as employer was obliged to treat Mr Rush fairly and reasonably by informing him fully and in a timely manner of all the options available to avoid his dismissal by reason of his age, *this did not extend to justifying its actions only by directing him to operate other aircraft types and/or at first or second officer rank irrespective of his wishes. That would not have been reasonable in all of the circumstances.* The primary plank of Mr McCabe's argument on behalf of Mr Rush does not avail him.

(emphasis added)

[41] The "reasonableness" gloss appears to underlie the analysis subsequently adopted by Judge Shaw in *McAlister*, a claim involving the issue as to whether in offering other pilot roles to Mr McAlister Air New Zealand was obliged to have regard to his position of flight instructor.<sup>24</sup> Judge Shaw observed that:

[70] The heading to s 2 is a guide to its construction. It is about area and incidents of duty. It concerns where and how pilots of all grades or rank are to perform the duties required on them by Air New Zealand. It does not govern the grades and positions of each pilot. This is determined by their appointment to these positions based on their qualification.

[71] I hold that while Air New Zealand has the right under s 2 to direct its pilots to perform in specific locations and according to their rosters, it does not entitle Air New Zealand to disregard the specific positions held by each pilot in order unilaterally to shift a pilot between grades effectively demoting them from the positions to which they have been appointed.

[72] In the light of the cases and on the plain meaning of s 2 of the agreement I find that, while the basis of Mr McAlister's employment was as a pilot, he had long been promoted to hold the grade of a standards pilot holding the qualification of a flight instructor. By age 60 his pilot's role had been enhanced to a very senior position. He held a specific position of flight instructor based on his qualifications, experience, and expertise. The extra qualification held by Mr McAlister entitled him not only to an increase in his salary but to certain rights to preferential treatment in relation to rostering such as not being required to carry out on-call duties.

[42] As I have said, there is no dispute that the company has the power to direct pilots to particular aircraft by way of downtraining. The essence of NZALPA's case

---

<sup>24</sup> The later history of this case does not impact on the present discussion. See *Air New Zealand Ltd v McAlister* [2008] NZCA 264, [2008] ERNZ 401; *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2009] ERNZ 410.

is that, having identified a potential redundancy situation to which cl 11.5.2 applied, Air New Zealand could not then seek to compulsorily downtrain. Rather Air New Zealand was locked into the cl 11.5.2 process to the exclusion of anything else, absent agreement to the contrary. If the situation could not be resolved under cl 11.5.2.2 or cl 11.5.2.3, the redundancy provisions in s 19 (entitled “Pilot Surplus and Redundancy”) would be triggered. Alternatively, and as Mr Robinson agreed in evidence, if the process under cl 11.5.2 was lifted the company could then direct downtraining. What it could not do was direct downtraining while the cl 11.5.2 process was on foot.

[43] Air New Zealand submits that there is nothing in either cl 11.5.2 or cl 12.1.11 (which it says the power to direct emanates from) to suggest that they are mutually exclusive. Activation of one does not mean the suspension of the other. Such an approach would, it submitted, defy the underlying purposes of these provisions (namely to avoid redundancy if possible).

[44] As the CEA makes plain, Air New Zealand cannot purport to trigger the redundancy process unless the steps in cl 11.5.5.2 and cl 11.5.5.3 have been satisfied. That is made crystal clear by the combined effect of cl 19.1.1: “... attention is drawn to the *requirement to implement the provisions of 11.5 in certain circumstances prior to initiating these provisions*”; cl 19.3.1: “The Company shall not select any pilots to be declared redundant, nor direct pilots to take a position with a jet subsidiary, *until the procedures for dealing with voluntary severances have concluded*”; and cl 19.3.2: “*After concluding the procedures for dealing with voluntary severance and before declaring any pilots employed by the Company redundant the Company shall...*”.

[45] The first point is that at the relevant time Air New Zealand was not selecting pilots for redundancy. Rather it was seeking to *avoid* redundancy. Section 19 was never engaged. That is because the company’s actions, in concert with NZALPA, meant that such a step was avoided.

[46] The second point is that cl 11.5.2 provides that once a redundancy situation arises and any equipment category position operates or is projected to operate at less

than a roster average of 60 incentive hours for three consecutive roster periods, the company “may” take certain action, including allocating unbooked annual leave. So, while the steps set out in cl 11.5.2.2 are drafted in a way which may appear to be prescriptive, they are preceded by use of the permissive word “may”.

[47] The third point is that cl 11.5.2.2 does not expressly exclude the utilisation of alternative mechanisms to address a so-called “manpower” issue and a potential (as opposed to actual) redundancy situation. Most particularly it does not contain an express limitation or exclusion of any other rights or options the company might have, or which the parties might agree to, for managing a surplus staff situation. The evident purpose of cl 11.5.2 is to give the company additional powers it would not otherwise have in circumstances involving a potential redundancy situation, rather than to undermine the powers it otherwise has. The non-exclusive nature of the process in cl 11.5.2 is reflected in, for example, cl 3.12. It provides that in the event of a pilot surplus that may result in redundancy, secondments (which the company is required to “actively endeavour” to arrange) shall be one of the methods of reducing the surplus.

[48] The wording of cl 12 is also notable. It deals with pilot seniority, and the way in which pilots are to be listed (according to the date on which they were employed) and the implications of where they stand in the list. Clause 12.1.11 expressly reserves the company’s right to direct a pilot to a position (in its “sole discretion”), noting that: “Nothing contained in this [seniority] section shall detract from the Company’s right to direct a pilot to any position appropriate to his seniority that the Company considers suitable.”

[49] Clause 12.1.12 provides that measures taken to address an inevitable retrenchment or reduction in rank/equipment category, are to be undertaken in reverse order of seniority commencing with the most junior pilot. But it says nothing about downtraining being limited to such circumstances and cl 12.11.1, which does expressly refer to the company’s power to direct to other positions, makes it clear that it is a broad discretionary power subject to two restrictions. First, that it is not to be “indiscriminately” used to override the exercise of seniority rights and the existence of valid bids. Second, if the Company is directing pilots to more

than one fleet, pilots shall be offered a choice between fleets where such choice exists. There is no third expressed limitation on the Company's discretionary power to downtrain, namely where a potential redundancy situation has been advised in terms of cl 11.5.2, or that downtraining is only available when cl 19.3 ("Selection Criteria of Redundant Pilots") is engaged. Further, such an interpretation would be inconsistent with the plaintiff's acceptance that Air New Zealand could have exercised its power to direct downtraining but for the fact that the cl 11.5.2 process had been activated.

[50] What is now cl 12.1.11 (previously cl 12.1.10, which was in substantially the same terms<sup>25</sup>) was discussed in *Gubb v Air New Zealand*. While cl 11.5.2 was not relevant to the analysis in *Gubb*, the Court's observations about the scope of the power in cl 12.1.11 are instructive:<sup>26</sup>

... the company did not exercise its discretion under clause 12.1.10 indiscriminately to over-ride the exercise of seniority rights. Indeed I find that it acted in a discriminating, reasoned and balanced way. ...

*I accept the [Company's] position that the election made was open to it to have made in a discriminating way to bring about the least disruption to the work and lives of its pilots generally. It was, by utilising the plaintiffs' present B767 experience and the temporary superfluity of B747-200 First Officers, the most commercially expedient decision. That is not to say, as the plaintiffs submitted, that the [Company] put commercial expediency ahead of its contractual obligations. Rather, I conclude, commercial expediency was able to be accommodated within those expectations as I have interpreted them. (emphasis added)*

[51] As *Gubb* and earlier judgments confirm, the company may direct pilots as to which aircraft they work on, provided it exercises its discretion reasonably and in compliance with its contractual obligations.

[52] The power to direct pilots to positions is also reflected in other provisions of the CEA. As I have said, it is implicit in s 2. It is also reflected in other provisions, including cl 3.7, which deals with orders to pilots regarding, amongst other things,

---

<sup>25</sup> "Nothing contained in this section shall detract from the Company's right to direct a pilot to any position appropriate to his seniority that the Company considers suitable. However such sole discretion will not be indiscriminately used to over-ride the exercise of seniority rights and the existence of valid bids. When directed to a position a pilot's bid rights from the position which he vacated will continue to apply." (set out in *Gubb* at 4).

<sup>26</sup> *Gubb v Air New Zealand Ltd* EC Auckland, AEC 93/97, 2 September 1997, at 14-15.

allocation to aircraft type. The power is explicitly referred to in cl 13.2.5 (“Pay on Down Training”). Clause 13.2.5 provides that wherever involuntary downtraining of pilots to a lower-paid equipment category occurs, three months’ notice of the downtraining will be given. This appears to be directed at providing the affected pilot with time to order his/her affairs. It will be evident from the chronology of events traversed above that the three-month period of notice of involuntary downtraining was given in the present case. During the period of voluntary downtraining each pilot’s pay remained the same. This changed when the downtraining converted to an involuntary basis.

[53] It may be noted that cl 11 contains no exclusion of the sort found in cl 12 (“nothing in this section shall detract from the Company’s right to direct a pilot to any position...”). On one analysis this might be taken to suggest (although it was not advanced in argument) that the process steps in cl 11 *were* intended to detract from the right to downtrain. However, the fact that the parties acknowledged the company’s underlying right to downtrain within the agreement, carved out various exceptions to it but omitted any such carve-out in relation to the activation of cl 11.5.2 itself, strongly suggests that the defendant’s interpretation is correct. It seems highly likely that had the parties intended to render the Company’s power to downtrain inoperative in such circumstances they would have said so in their agreement.

[54] Further, recognition of the ongoing nature of the company’s power to direct pilots to positions in cl 12.1.11<sup>27</sup> is at odds with NZALPA’s suggested ‘stop-start application’ interpretation, namely that it ceases to apply once a potential redundancy position arises and the company begins exercising rights it is granted by cl 11.5.2.2, but reactivates once any action under cl 11.5.2.2 is lifted or comes to an end. It also sits awkwardly with the basis on which pilots are employed and the evident rationale for downtraining.

[55] While Mr Harrison made the point that it should not be assumed that redundancy would have been an unwelcome outcome for pilots, given the

---

<sup>27</sup> “Nothing contained in this section shall detract from the company’s right to direct a pilot to any position appropriate to his seniority that the company considers suitable. However such sole discretion will not be indiscriminately used...”

entitlements provided for under the agreement and the re-employment provisions in cl 19.7, I do not think that the agreement can be read in any other way than consistently with an underlying objective of avoiding redundancies if possible. That underlying objective is reflected in a number of provisions, including s 7 (“Security of Employment”). It is only with the benefit of hindsight that redundancy may, in economic terms at least, have presented a favourable outcome for the affected pilots in the present case. I agree with Mr Caisley’s submission that it defies employment relations common sense to interpret cl 11.5.2 in a way which strips the company of the ability to keep pilots employed.

[56] It is necessary to read the provisions in a way that makes sense. There is no express reference to downtraining as an option under cl 11.5.2. However, I agree with Mr Caisley’s submission that cl 11.5.2.3 contains a strong indication that the company can and will exercise its discretion to downtrain when cl 11.5.2 is invoked. This emerges when cl 11 is read with the seniority provisions contained within the agreement. They make it clear that the parties have agreed on a sifting-down process, exposing those at the bottom of the seniority list to the greatest degree of risk and, conversely, those at the top to the greatest degree of protection. This underlying policy intention is reflected in cl 11.5.2.3, which provides that if, following the acts prescribed in cl 11.5.2.2, any Second Officer position operates or is projected to operate below an average of 45 incentive hours for three consecutive roster periods, the company will offer voluntary severance. It is tolerably clear that any such offer is to be directed to Second Officers, not First Officers or Captains.

[57] As Mr Caisley pointed out, if downtraining was not permissible then an ongoing surplus situation could exist in any rank. It would make little sense, either from a commercial or a broader employment perspective, to provide for voluntary redundancies amongst Second Officers, but not in circumstances involving a surplus of First Officers or Captains. Rather, the clear intention of the provisions when read in context appears to be that ongoing surplus situations amongst Captains and First Officers are to be dealt with by way of downtraining so that any ongoing surplus manifest itself below, in the Second Officer rank. This is consistent with the evident purpose of maintaining employment and minimising redundancies. And it is consistent with the cascading impact of the seniority system which lies at the heart of

the CEA and which is pivotal to an understanding of the provisions at issue. Indeed it is also reflected in NZALPA's communications at the time, which made it clear that those in the junior ranks were most at risk.

[58] This leads me to the following conclusions. The company has an acknowledged discretionary right to downtrain. The company must exercise its discretion reasonably and in compliance with its contractual obligations. Recourse to downtraining to manage an application of pilot resource in appropriate circumstances is not precluded by an activation of the process in cl 11.5. Clause 11.5.2 does not require, when read in isolation or in context, that once it is set in motion the steps set out in that provision must be followed to the exclusion of others.

[59] I conclude that the plaintiff's challenge must fail.

### **Estoppel?**

[60] Given the conclusion I have reached, I do not need to deal with the defendant's alternative argument. However, I touch on it briefly.

[61] On Air New Zealand's case it was not until 19 March 2010 that NZALPA informed it that its position was that the company could not rely on cl 12.1.11 to direct pilots to downtrain. A statement of problem was filed with the Authority on 7 April 2010. The company says that in 2009–2010 it was lulled into a false sense of security by the plaintiff, who created or encouraged a belief or expectation that it was entitled to compulsorily downtrain pilots.

[62] Counsel were in agreement as to the legal test that applies. They disagreed as to what outcome would result from an application of the law in the particular circumstances.

[63] The relevant principles can be summarised as follows. A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged; the party relying on the estoppel must establish that the belief or expectation has

been reasonably relied on by the party alleging the estoppel; detriment will be suffered if the belief or expectation is departed from; and it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.<sup>28</sup>

[64] As I understood it, the cornerstone of the defendant's case is that the plaintiff omitted to raise the cl 11.5.2 issue with it during the course of consultations over voluntary and compulsory downtraining. By its omission, it led Air New Zealand to believe that it was comfortable with the proposal and that NZALPA did not consider that Air New Zealand was prevented from such a course. It is further said that Air New Zealand reasonably acted on that belief by proceeding with compulsory downtraining and it will suffer financial detriment if the company's reasonable expectation is departed from.

[65] If Air New Zealand is right, NZALPA cannot rely on cl 11.5.2 in advancing an argument in these proceedings about the correct interpretation and application of the CEA. Such a result would seem inherently problematic, particularly where the statute expressly preserves the right for parties to bring disagreements about interpretative issues to the Authority and the Court for determination.

[66] But Air New Zealand faces more fundamental difficulties on the facts. There is a disjoint between the alleged representation (that NZALPA agreed that compulsory downtraining was available to the company) and reliance on that alleged representation given the applicable timeframes. That is because on any analysis the company was aware that NZALPA took issue with the company's ability to compulsorily downtrain before the directive took effect on 1 April 2010, albeit that it did not know (because NZALPA had not told it) the reasons for that position. In this regard NZALPA had written to Air New Zealand on 19 February 2010 making it clear that it considered that each of the affected pilots should be reinstated to the B767 roster on completion of voluntary downtraining on 31 March 2010. This correspondence went unanswered by Air New Zealand until 23 March, and it was not until NZALPA had sent a follow-up letter (reiterating its view that the company

---

<sup>28</sup> See *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] NZLR 567 at [44]; *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43 at [75]-[76].

was not entitled to compulsorily downtrain pilots, and this time making specific reference to the fact that cl 11.5 might present a stumbling block) that Air New Zealand responded.

[67] It can safely be inferred from Mr Gilmore's belated response (of 23 March 2010, so eight days *prior* to the direction taking effect) that he was well aware that NZALPA took issue with the company's ability to proceed with the direction, but that he did not agree that it had grounds for doing so. While he invited NZALPA to set out the basis on which it asserted there was a problem, he also made it very clear that the direction would be taking effect on 1 April 2010. That is what then occurred.

[68] Even if the first three requirements for establishing an estoppel could be successfully navigated, there would be additional difficulties in pursuing an argument as to unconscionability in light of the particular circumstances, the way in which events unfolded and the timeframes involved.

## **Conclusion**

[69] The plaintiff's challenge is dismissed.

[70] Costs are reserved. If there is any issue as to costs memoranda may be filed, with the defendant filing and serving any memorandum together with any supporting material within 30 days of the date of this judgment; the plaintiff within a further 20 days; and anything strictly in reply within a further 10 days.

Christina Inglis  
Judge

Judgment signed at 2 pm on 1 December 2016