

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 127  
5428638

BETWEEN                      RAJESH SABAPATHY  
Applicant  
  
AND                              JETSTAR AIRWAYS LIMITED  
Respondent

Member of Authority:        Christine Hickey  
  
Representatives:              Richard Maze, Counsel for Applicant  
Michael O'Brien and Tessie von Dadelszen, Counsel for  
Respondent  
  
Investigation Meeting:        17 June 2014 in Christchurch  
  
Submissions Received:        13 July and 28 July from the Applicant  
18 July from the Respondent  
  
Determination:                25 August 2014

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**DETERMINATION OF THE AUTHORITY**

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**A.        Rajesh Sabapathy's claims are dismissed. He is not entitled to payments under a pilot bonus scheme or to a relocation reimbursement allowance.**

**Employment relationship problem**

[1]        In March 2009 Rajesh Sabapathy was interviewed for a role as a First Officer flying Airbus A320s and was later offered a position as a part of Jetstar's newly established business in New Zealand. He accepted that offer and after some necessary training began work with Jetstar on 15 June 2009.

[2] Mr Sabapathy moved to Christchurch where he worked for over three years. He is on unpaid leave from Jetstar Airways Limited (Jetstar) in New Zealand and now works in Australia for Jetstar Airways Pty Limited.

### **The claims**

[3] Mr Sabapathy's claims are that Jetstar breached his individual employment agreement (IEA) in two ways. The first alleged breach is that Jetstar failed to pay him a \$10,000 tax free reimbursement allowance. By way of remedy he seeks \$10,000 plus interest from 15 June 2009.

[4] The second alleged breach is that Jetstar failed to pay him bonuses in his first three years of employment in accordance with an enhanced bonus scheme he says formed part of his IEA. By way of remedy Mr Sabapathy claims \$30,000 being the full bonus pool available. Alternatively he claims:

- (a) \$10,000 plus interest from 15 June 2010; and
- (b) \$7,500 plus interest from 15 June 2011; and
- (c) \$5,000 plus interest from 15 June 2012; and
- (d) An order that Jetstar exercise its discretion in relation to the remainder of the pool (which was \$10,000 each time the bonus became due) and provide him reasons for the exercise of its discretion.

[5] Mr Sabapathy originally claimed that he was an employee of Jetstar when he was undergoing training and should have been paid \$7,500 between 4 May 2009 and 14 June 2009. However, that claim was withdrawn.

[6] A claim that Jetstar had charged a premium for his employment contrary to ss.11 and 12 of the Wages Protection Act 1983 was not pursued at the investigation meeting or in submissions so I do not deal with it. Mr Sabapathy also claims legal costs.

[7] Jetstar says that it does not owe Mr Sabapathy any of the payments he is seeking because he is not contractually entitled to them. Jetstar says that Mr Sabapathy willingly agreed to relinquish the payments he now seeks on the basis that Jetstar paid the cost of the endorsement training he needed before he could commence employment. Jetstar denies that Mr Sabapathy entered the 18 June 2009 agreement under duress but says that if he did he

subsequently affirmed the agreement and cannot now resile from it. Alternatively, Jetstar submits that Mr Sabapathy is estopped from claiming the remedies he seeks.

### **Issues**

[8] The fundamental issue the Authority needs to determine is what the contractual agreement was between Mr Sabapathy and Jetstar and in particular, whether the 18 June 2009 letter constitutes an enforceable part of his IEA. There are some subsidiary issues to be considered:

- (a) What were the terms of Mr Sabapathy's IEA before the NZ start-up letter of 16 April 2009 was initialled by him?
- (b) What were the terms of Mr Sabapathy's IEA after the NZ start-up letter was initialled?
- (c) Did the Training Bond Agreement (TBA) vary the terms of Mr Sabapathy's IEA, or was it a new and separate contract? As part of determining this issue I need to consider whether there was a need for fresh consideration from Jetstar.
- (d) Did Mr Sabapathy sign the TBA under duress making the agreement voidable?
- (e) If so, did his subsequent behaviour affirm the agreement meaning that it is enforceable?
- (f) Is Mr Sabapathy estopped from claiming the benefits of the reimbursement allowance and the enhanced pilot bonus scheme?

### **Factual background to Mr Sabapathy's claims**

[9] In 2000 Mr Sabapathy gained his commercial pilot's licence. In 2006 he went to the USA, undertook training and gained an endorsement allowing him to fly Airbus A320s. He did that so he would be eligible to fly for an airline based in Macau, China. He worked for that airline for three months, although he did not do any flying, before the airline went out of business. He stayed in Singapore for a while hoping that the company would recover but ultimately had to return to Australia. He says that the lost job opportunity cost him between

AUS \$40,000 and \$50,000. In 2008 he worked as a pilot for a charter company in Australia but left hoping for a better job.

[10] In March 2009 Mr Sabapathy went to Melbourne for a simulator check flight and two interviews with Jetstar. He told Jetstar that although he preferred to stay in Australia he would consider a job offer in New Zealand and if he went to New Zealand he would prefer his base to be Christchurch.

[11] Although Mr Sabapathy had gained an endorsement for A320s in the USA he did not have any flying hours since then in an A320 and so did not have the required current endorsement to fly A320s in Australia or New Zealand.

### **Chronology of contractual documentation**

[12] The parties disagree on the contractual status of various documents provided by Jetstar and signed by Mr Sabapathy. In setting out the chronology I do not adopt the descriptions attached to the documents by the parties as being definitive of their contractual status.

#### *Individual employment agreement and letter of offer*

[13] On 16 April 2009 Jetstar<sup>1</sup> signed an IEA for Mr Sabapathy that it had dated 16 March 2009 on the cover page. The IEA was sent to Mr Sabapathy with a letter, also dated 16 April 2009, offering him employment with Jetstar as a First Officer flying A320 aircraft.

[14] Clause 15 of the IEA provided for a bond scheme. If Jetstar paid for the cost of a pilot gaining an endorsement Jetstar *may require the Pilot to enter into a training bond agreement*. Clause 15 is not a training bond agreement in and of itself but it sets out some of the conditions that Jetstar would offer if a training bond agreement was required:

**15.2** [TBA] ... *will specify the actual training costs to the Company.*

**15.3** *The bond agreement will provide as follows:*

a) *In exchange for the substantial benefit of the Company paying the training costs, the Pilot will remain employed with the Company for 2 years from the commencement of the endorsement training ... (the relevant period) so that the Company receives a reasonable return on its investment in the training costs,*

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<sup>1</sup> By Mark Dal Pra, GGM Operations.

- b) *If the Pilot ceases employment with the Company for any reason with the relevant period ... the Pilot will repay a proportion of the training costs that is commensurate with the proportion of the relevant period that has not elapsed (repayment). This amount shall be calculated on a linear reducing basis per calendar month,*
- c) *The Pilot will make the repayment within 12 months of their employment ending, or such period as agreed.*

**15.4** *The training costs shall not be repayable in the situation where the Pilot terminates his/her employment due to loss of licence on medical grounds or where the Pilot's position is made redundant by the Company.*

[15] Clause 20.4 of the IEA outlined a discretionary bonus that *may be made* by Jetstar, in the first three years of service. None of those bonuses were guaranteed.

[16] The letter of offer contains the following relevant paragraphs:

***Conditions***

*Subject to your acceptance of the terms and conditions outlined in the enclosed Individual Employment Agreement, and your completion of the conditions set out in this letter and the attached Agreement, your employment will commence on 15 June 2009 ('Commencement Date') or such other date as agreed between yourself and the Company in writing.*

*This offer of employment and your subsequent employment is conditional upon and subject to the following fundamental conditions:*

- *you obtaining a Security Clearance/Police Check;*
- *you being issued and maintaining a valid Aviation Security Identification Card (ASIC) or other such Identification Card as may be required by the Company or relevant legislation;*
- *you passing all Company pilot recruitment assessments including simulator assessment; and*
- ***you holding the appropriate aircraft endorsement to which this offer relates prior to your commencement with the Company*** (my emphasis added).

*Any failure to satisfy and/or maintain these security and qualification requirements will constitute a failure by you to meet a fundamental condition of your employment and may result in this offer being withdrawn, or your employment being terminated.*

...

*There are other conditions contained in your Individual Employment Agreement, which also bind you. Please read these carefully.*

...

### **Information**

Your employment pack is enclosed with this letter. The pack includes:

- Some further details regarding your employment Jetstar Airways Limited (New Zealand);
- Your Individual Employment Agreement with Jetstar Airways Limited (New Zealand);

...

Your employment with us will be on the terms set out in this offer and the Individual Employment Agreement. Your employment will commence subject to your acceptance of this offer and your ability to satisfy our security requirements and other conditions outlined in this letter. The terms and conditions set out in this letter and the Individual Employment Agreement replace any prior written and oral representations made to you and discussions with you about your employment. These terms and conditions will continue to apply to any other positions you may hold with Jetstar Airways Limited unless otherwise amended in writing.

### **Discretionary Benefits**

...

Other discretionary benefits may also apply to you. All discretionary benefits may be varied, suspended or withdrawn at any time at the discretion of the Company.

...

### **Reimbursement Allowance**

Upon commencement of employment the Company will pay to you the sum of \$NZ10,000 (gross) being for reimbursement of expenses relating to relocation, recruitment costs (including simulators, medical examinations, testing and training) associated with your appointment to the position.

It is a condition of this payment that you agree that:

- If you leave your employment, for any reason, within two years of your Commencement Date, you will repay that sum. The amount owing will be prorated to account for the amount of time you have worked for us (for example, if you leave in 1 year, only half the amount is payable).
- You consent to Jetstar Airways Limited deducting the outstanding amount from your final pay (including holiday pay);

- *You will make a payment direct to Jetstar Airways Limited to cover any shortfall, within one month of your employment ending.*

[17] Mr Sabapathy was asked to sign both copies of the attached IEA and the letter of offer and to return one copy of each to Jetstar as his method of accepting *this conditional offer*. He signed and initialled every page of the IEA and the letter of offer on 22 April 2009 and returned the documents to Jetstar.

[18] Once he had done so he and Jetstar had entered into a contract the terms of which included clause 15 (potential future training bond to be entered into for a period of 2 years and for actual training costs to the company), clause 20 (discretionary pilot bonus scheme) of the IEA and the reimbursement allowance outlined in the letter of offer.

*NZ start-up proposals letter*

[19] A further letter dated 16 April 2009 was sent to Mr Sabapathy at the same time as the IEA and the letter of offer. It was headed *Proposed Enhancement of Pilot Bonus* although it contains two proposals. The letter contains the following relevant paragraphs:

*As you will have seen, clause 20.4 of your IEA includes an annual Pilot Bonus. I am pleased to advise that Jetstar Airways Limited is offering to enhance the pilot bonus arrangements, in recognition of your role in the start-up of our New Zealand operations.*

*This enhancement is subject to you accepting our recent offer of employment, and you commencing in the role of **First Officer** by no later than 15 June 2009.*

*Subject to your acceptance, the company intends to vary clause 20.4 by replacing the previous arrangement with the following table, which features an increased annual bonus pool and a guaranteed bonus portion:*

<b>Category</b>	<b>Completion of Yr 1</b>	<b>Completion of Yr 2</b>	<b>Completion of Yr 3</b>
<b>Captain</b>	...	...	...
<b>First Officer</b>	<b>Total Bonus Pool</b> \$10,000 <b>Guaranteed/Retention Component</b> 100% <b>Variable/Performance Component</b> 0%	<b>Total Bonus Pool</b> \$10,000 <b>Guaranteed/Retention Component</b> 75% <b>Variable/Performance Component</b> 25%	<b>Total Bonus Pool</b> \$10,000 <b>Guaranteed/Retention Component</b> 50% <b>Variable/Performance Component</b> 50%

**Guaranteed/Retention Component** – *This portion of your bonus will be guaranteed and paid in the next pay period on or after your*

*anniversary date subject to you remaining employed by Jetstar Airways Limited at that date.*

***Variable/Performance Component*** - *This portion of your bonus will be determined in accordance with Company Policy and will include consideration of your individual performance and the Company's performance for the period.*

*All other terms and conditions of your employment as outlined in your IEA and your letter of offer including any reimbursement allowance as outlined in your letter of offer remain unchanged.*

### ***Opportunity for Company Funded Endorsement***

*The Company is also prepared to fund the cost of your actual initial A320 endorsement fee on the following conditions:*

- *You agree to enter into a binding training bond agreement to re-pay the cost of the A320 endorsement in the event that you leave the company within a period of three (3) years, pro-rated for completed years of service;*
- *You forego the entitlement to an annual bonus as outlined herein and in clause 20.4 of the IEA;*
- *You agree that you will not be entitled to any reimbursement allowance as contained in your letter of offer;*
- *You agree that you will meet any costs associated with obtaining the endorsement over and above the actual initial A320 endorsement fee (including but not limited to transportation, accommodation and meals);*
- *Your offer of employment remains contingent upon successful completion of the A320 endorsement and that employment will not commence under the IEA until after successful completion of the A320 endorsement; and*
- *If you fail the A320 endorsement you will be responsible for payment to Company of the full cost of the actual initial A320 endorsement fee within one month of failure.*

*If you wish to take up this offer of a Company Funded Endorsement please contact Mikaela Robertson ... and a revised offer pack will be sent to you.*

*If you have any questions about the Individual Employment Agreement or this enhanced bonus structure please contact Jetstar Airways Manager Pilot Recruitment, Captain Allen Clark ...*

*We look forward your acceptance of your offer of employment with Jetstar Airways Limited and your commencement with us.*

[20] Renee Saibi, Jetstar's current employee relations adviser, gave evidence that the letter was part of a special bonus offered to employees involved in the start-up of the New Zealand operation. Mr Sabapathy understood that to be its purpose too. I refer to it as the NZ start-up letter.

[21] Mr Sabapathy initialled each page of the NZ start-up letter and returned it with the letter of offer and the IEA on 22 April 2009. The final three paragraphs of the *Proposed Enhancement of Pilot Bonus* proposal were on the top of the same page on which the *Opportunity for Company Funded Endorsement* proposal was outlined.

[22] Mr Sabapathy contacted Captain Allen Clark and asked if he could take advantage of Jetstar funding his A320 endorsement and still be paid the reimbursement allowance to cover his move to New Zealand. Captain Clark replied, after consulting the human resources manager, that Jetstar would not fund his endorsement training as well as pay the reimbursement allowance. Instead, Captain Clark offered to give Mr Sabapathy a letter proving his employment with Jetstar in case Mr Sabapathy wished to obtain a loan to assist with the cost of relocation to New Zealand. Mr Sabapathy did not take Captain Clark up on that offer.

[23] Mr Sabapathy did not contact Ms Robertson to ask for a revised offer pack but made it clear to Jetstar, through his contact with Captain Clark, that he wanted Jetstar to fund the necessary training to allow him to attain the necessary A320 in time for him to start his employment on 15 June 2009.

[24] Jetstar arranged for Mr Sabapathy and another pilot to attend A320 endorsement training with its preferred provider, Alteon, in Melbourne. Jetstar booked the training for Mr Sabapathy and another pilot on 20 April 2009; two days before Mr Sabapathy signed the documents which constituted his IEA. It is unclear whether Mr Sabapathy had already told Captain Clark that he wanted Jetstar to fund his endorsement training.

[25] Mr Sabapathy attended the training which began on 4 May and successfully completed it gaining a current A320 endorsement on 9 June 2009.

*Training Bond Agreement*

[26] On 15 June 2009 Mr Sabapathy began his employment with Jetstar having completed the conditions precedent set out in the letter of offer. He was required to undertake some line training in Melbourne before his shift to Christchurch in about August 2009.

[27] On 18 June 2009, while undertaking that training, Mr Sabapathy received a telephone call from Leah Golias who then worked in the Jetstar Human Resources Department. She told him that he had to sign an important document which she had sent him at home by courier that day. Mr Sabapathy explained that he was at work and would not be home until after 5pm when he would read the letter then and telephone her to discuss it.

[28] Mr Sabapathy found the following letter, waiting for him:

***Re: Training Bond Agreement: First Officer***

*You have indicated you wish to take up the offer of a Company funded A320 endorsement as outlined in the letter to you dated 16 April 2009. As such you are required to enter into a Training Bond Agreement.*

*Should you have any questions regarding the below terms and conditions prior to signing this agreement, please contact Leah Golias ...*

***Please note that you are entitled to obtain independent advice about the contents of this agreement, prior to signing it*** (my emphasis added).

*Please find the terms and conditions of the Training Bond Agreement outlined below.*

1. *You agree that in return for the Company funding your initial A320 endorsement training costs, at a fixed cost of NZ\$40,000, you will comply with the terms set out in this Agreement.*

*The fixed cost is intended to be a fair estimate of your anticipated initial A320 endorsement training costs.*

*The actual training costs for obtaining your initial A320 endorsement may differ from that fixed cost estimate. You agree to repay the fixed cost of NZ\$40,000 regardless of the actual training costs of your initial A320 endorsement. If those endorsement training costs exceed NZ\$40,000, then the Company will meet them. If those costs are less than NZ\$40,000 then you still agree to pay the full estimated cost, with the Company retaining the difference as a facilitation fee.*

2. *You agree that if your employment with the Company ends for any reason within a period of three years of the*

*date of your employment commencing, you agree to re-pay the NZ\$40,000 fixed cost of the endorsement pro-rated for completed years of service.*

a. *The amounts payable are as below:*

<b><i>Length of Service (Completed Years)</i></b>	<b><i>Amount Payable</i></b>
<i>Zero</i>	<i>\$40,000</i>
<i>1</i>	<i>\$26,667</i>
<i>2</i>	<i>\$13,333</i>
<i>3</i>	<i>0 \$</i>

b. *You irrevocably agree that the Company may deduct this sum, or a proportion thereof, from any final payments to you, including holiday pay.*

c. *You irrevocably agree to make the applicable payment to the Company, less any amounts deducted from your final pay, including holiday pay, within 14 days of your last day of employment.*

d. *In some circumstances, the Company may consider whether a reduction in, or waiver of, the amount payable under this policy is appropriate.*

*Employees who wish the Company to consider whether a reduction of waiver or the amount payable is appropriate, must raise that with their relevant manager or HR representative prior to their last day of employment. There is no entitlement to a reduction in waiver – any reduction or waiver will be at the Company's sole discretion.*

3. *You further agree that you will meet any costs associated with obtaining the endorsement over and above the actual initial A320 endorsement fee (including but not limited to transportation, accommodation and meals).*

4. *If you fail the A320 endorsement, or do not successfully complete it for any reason, you will be responsible for the payment to the Company of the full cost of the initial A320 endorsement fee of NZ\$40,000 within one month of that failure or non-completion.*

*If you fail to meet this payment in full at that time, you agree that you will continue to owe the outstanding amount to the Company and have a binding and enforceable legal obligation to repay it, until such time as it has been repaid in full. You further agree that you will be liable for the Company's costs in recovering any outstanding payment.*

5. *You agree to the altered arrangements regarding any initial reimbursement allowance and Pilot Bonus as outlined in our letter to you dated 16 April 2009. In particular you will not be entitled to:*

- a. *The annual bonus referred to in clause 20.4 of your Individual Employment Agreement and our letter dated 16 April 2009.*
- b. *Any reimbursement allowance contained in the letter of offer.*

*Please return as soon as possible ...*

***I, Rajesh Sabapathy, acknowledge that I have read, understood and accepted the provisions of this Training Bond Agreement. In accepting this, I confirm that I have been provided with the opportunity to take independent advice*** (emphasis in the original).

[29] Mr Sabapathy says Ms Golias told him he had to sign and return that letter that day but when he raised his difficulty in doing so, given that lateness of the hour, she agreed that he could return it the following day before he started work. Mr Sabapathy says that Ms Golias said he should have been sent the TBA sooner.<sup>2</sup> Mr Sabapathy signed and returned the agreement the following day. He did so without seeking any independent advice.

### **Determination**

[30] Mr Sabapathy says that although he signed the TBA letter he should not be bound by it. He makes a number of arguments about why he should be paid the enhanced pilot bonus scheme and the reimbursement allowance. His underlying premise is that it was unfair of Jetstar to require him to be bonded as well as to forgo the bonus scheme and reimbursement for relocation. He thinks Jetstar was *double dipping*.

*How did Mr Sabapathy's initialling of the NZ start-up letter affect his IEA?*

[31] Mr Maze submits that the proposed enhanced pilot bonus was an offer capable of acceptance, and that by initialling and returning the NZ start-up letter along with the letter of offer and the IEA Mr Sabapathy accepted Jetstar's offer to vary clause 20 of his IEA. He says that the only conditions that needed to be fulfilled to make this proposal a variation of the IEA were Mr Sabapathy's acceptance of the offer of employment and him commencing in his role as First Officer by no later than 15 June 2009, which he did.

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<sup>2</sup> I accept Mr Sabapathy's evidence of this. I note I have not heard any evidence from Ms Golias. She no longer works for Jetstar and was apparently unable to be contacted.

[32] Mr Maze submits that because those conditions were met Jetstar was bound by 15 June 2009 to offer the enhanced bonus scheme to Mr Sabapathy in his first three years of employment.

[33] I find that Mr Sabapathy's initialling of the NZ start-up letter did not amount to an acceptance by him of either the proposed pilot enhanced bonus proposal or the opportunity for company funded endorsement proposal.

[34] I agree with Mr Maze's submission that the company funded endorsement proposal was not a contractual offer but at most an invitation to treat. It lacks sufficient detail to be a contractual offer that could lead by acceptance to a contractually binding TBA. The proposal clearly anticipates that Mr Sabapathy will enter into *a binding training bond agreement* at some stage in the future, presumably to be contained in the *revised offer pack*.

[35] The two proposals are in the same letter and some parts of the pilot bonus scheme proposal are on the same page as the company funded endorsement proposal. But the two proposals are incompatible with each other.

[36] If Mr Sabapathy accepted the company funded endorsement he would have to forgo the proposed pilot bonus outlined the first part of the letter as well as the pilot bonus set out in clause 20.4 of the IEA he had signed and accepted, and the reimbursement allowance for relocation costs set out in the letter of offer. The NZ start-up letter was not clearly enough drafted and set out to make the acceptance of the proposal for an enhanced bonus scheme able to be clearly accepted by merely initialling the letter, accepting the offer of employment and starting work by 15 June 2009.

[37] Without more upon merely receiving the initialled NZ start-up letter along with the IEA and letter of offer Jetstar would not know which variation of the proposals Mr Sabapathy intended to take up, the enhanced bonus scheme which retained the reimbursement allowance while he paid for his own endorsement training OR the company funded endorsement which meant he would forego any pilot bonus scheme and the relocation reimbursement allowance. By initialling the NZ start-up letter Mr Sabapathy indicated his interest in both proposals but did not accept the offer of an enhanced pilot bonus scheme.

[38] After initialling the NZ start-up letter Mr Sabapathy's terms and conditions of employment remained the same they were before he initialled it. His IEA and the letter of offer he signed represented the terms and conditions of his employment as at 22 April 2009.

Up until at least 18 or 19 June 2009, when Mr Sabapathy signed the TBA, he was entitled to the pilot bonus scheme set out at clause 20.4 of his IEA only and not the enhanced pilot bonus scheme.

[39] However, if I am wrong and initialling the two pages of the NZ start-up letter and starting work led to a binding agreement on the enhanced pilot bonus scheme it remains to consider what effect Mr Sabapathy signing the TBA in June 2009 had on any entitlement to the enhanced bonus scheme.

*Did the TBA vary the terms of Mr Sabapathy's IEA?*

[40] Mr Maze submits that the TBA was not a variation to Mr Sabapathy's IEA because the offer from Jetstar gave no consideration. Alternatively, he submits that if it did give consideration it was past consideration (having already entered into a contract itself with Alteon to pay for the training and Mr Sabapathy having already gained the endorsement); which is no consideration.

[41] It is arguable that there was no fresh consideration offered to Mr Sabapathy by Jetstar. Although it is also arguable that by refraining from seeking the cost of the training from Mr Sabapathy, when he had asked Jetstar to fund it, Jetstar gave fresh consideration. However, if that is not fresh consideration but only past consideration as Mr Maze submits what is the legal position?

[42] Consideration moving from the promisee is a long-established requirement for contract formation along with offer and acceptance, certainty of terms and an intention to create legal relations. However, in recent times the law has developed to mean that a contractual variation, as opposed to a new contract, does not necessarily require fresh consideration.

[43] In the Court of Appeal case *Antons Trawling Co Ltd v Smith*<sup>3</sup> Justice Baragwanath wrote:

*The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.*

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<sup>3</sup> [2003] 2 NZLR 23 at [93]

[44] That principle enunciated in the Court of Appeal has been accepted in a number of other cases since, although cautiously. It looks at the commercial reality of the parties' situations when the variation to the existing agreement was made and asks whether the variation should take effect despite lack of fresh consideration. The reality is when the TBA was signed by Mr Sabapathy was aware that Jetstar was going to pay for the training he had already received and would ask him to be bonded and to forgo the reimbursement allowance and any pilot bonus for the first three years of employment.

[45] I consider that the TBA was a variation that Jetstar and Mr Sabapathy both agreed to and acted upon and there was no need for fresh consideration from Jetstar. However, the principle has limits and:

*...only applies where the variation is agreed to voluntarily and without illegitimate pressure: the defence of duress will negate it.<sup>4</sup>*

[46] Therefore, the answer to whether lack of fresh consideration from Jetstar renders the TBA unenforceable requires an enquiry into whether or not Mr Sabapathy entered into the TBA under duress.

*Did Mr Sabapathy sign the training bond agreement under duress rendering the agreement voidable?*

[47] Mr Maze submits that Mr Sabapathy signed the TBA under duress because he was told if he did not his employment would not be continued. He submits, therefore, the agreement is voidable at Mr Sabapathy's election.

[48] The consideration of duress and its potential remedy of being able to void contracts made under duress fall within the area of equity. Equity intervenes only when the law otherwise would not do justice to the parties in their particular circumstances.

[49] The law on economic duress was applied by the Court of Appeal in *McIntyre v Nemesis DBK Limited*<sup>5</sup> and I have found it useful to approach Mr Sabapathy's situation with reference to that case:

*Contractual duress is the imposition of improper pressure by threats to coerce a party to enter a contract. Contracts that have been procured by duress are voidable at the discretion of the coerced party. ...*

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<sup>4</sup> *Law of Contract in New Zealand*, Burrows, Finn and Todd, Fourth Edition, 4.6.2, page 139.

<sup>5</sup> [2009] NZCA 329

*First, there must be the exertion of illegitimate pressure on a victim. Secondly, the imposition of pressure must have compelled the victim to enter the contract. ...*

*We think that the duress alleged in this case is best analysed under the following headings:*

- (a) Was there a threat against, or the exertion of illegitimate pressure on, [Mr Sabapathy]?*
- (b) If so, did that threat result in [Mr Sabapathy] being coerced into entering into the variation agreement?*
- (c) If the result of that analysis is a finding that there was duress, did [Mr Sabapathy] affirm the variation agreement?*

*Was there a threat against, or the exertion of illegitimate pressure on Mr Sabapathy?*

[50] Mr Sabapathy says:

*When I read [the training bond agreement] I became very unhappy with the terms set out in it. It was very different from what I expected and what was in the “variation letter” [by which he means the NZ start-up letter]. It was also the first time I saw the supposed price of the training programme. Jetstar said they would effectively charge me a flat fee of \$40,000 for the course even though this was not the price they got. If it was less than they were charged they would receive a commission that they had not told me about before. Then I realised that I was being asked to give up more benefits than the cost of the course as well as being bonded to them for a period of time.*

*I called Ms Golias and spoke to her ... I asked her what would happen if I did not sign it and I was told that my “employment would not be continued”.*

[51] I accept Mr Sabapathy’s evidence that Ms Golias said something that led him to understand that if he did not sign the letter he could lose his job. I have had no evidence to the contrary.

[52] I also accept what Ms Golias said put pressure on Mr Sabapathy and he viewed it as a threat. In addition, Ms Golias’ requirement for a hasty signature put further pressure on Mr Sabapathy and meant that his right to get independent advice was rendered nugatory.

[53] I also need to consider whether that pressure was improper or illegitimate. It is highly unlikely that Jetstar could have legitimately terminated Mr Sabapathy’s employment if he refused to sign the TBA letter in the form they presented to him. Therefore, I conclude that the pressure was improper as it was probably a threat of unjustified dismissal.

*Did the threat result in Mr Sabapathy being coerced to enter into the TBA?*

[54] I need to be sure that the pressure put on Mr Sabapathy was sufficiently grave to make him sign the TBA when he apparently did not wish to agree to it. In order to assess that I need to examine whether the pressure exerted by Ms Golias actually coerced him into signing because he had *no practical choice but to submit*.<sup>6</sup> In other words did Mr Sabapathy have to sign the TBA rather than have his employment ended; was he actually coerced by that pressure?

[55] Mr Sabapathy did not have time to seek any independent advice between receiving the TBA and being required to sign it. That is a factor I need to consider in deciding whether he was under duress. However, even if he had time to seek advice I consider that he would not have done so. He did not seek any independent advice before signing the IEA and the letter of offer and initialling the NZ start-up letter. At the investigation meeting Mr Sabapathy told me he would not have sought any legal advice even if he had more time to consider the TBA because he could not afford it. Therefore I do not consider the fact that there was no time to get independent advice put added pressure on Mr Sabapathy to sign the TBA.

[56] New employees are often under economic pressure when entering into employment agreements, or in this case a variation of an individual employment agreement. In order to secure the job with Jetstar that Mr Sabapathy wanted he had to gain his A320 endorsement to fly in Australia and New Zealand. He could not afford to fund that himself and did not wish to take out a loan.

[57] At the investigation meeting Mr Sabapathy said he expected that Jetstar would fund his endorsement training and he did not want to do so himself. The evidence establishes that before Mr Sabapathy signed the IEA and the letter of offer and initialled the NZ start-up proposals it was agreed between him and Jetstar that he needed endorsement training and was available to go to Melbourne to do that training.<sup>7</sup> On 20 April 2009 Jetstar booked the Alteon course for his endorsement in Melbourne.<sup>8</sup> Mr Sabapathy could not remember when he was advised of the date for his training but thinks it was about two weeks after the job offer. I find that by then, after having read the proposal for company funded endorsement, he

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<sup>6</sup> Burrows, Finn and Todd, *Law of Contract in New Zealand*, Fourth Edition, 2012, 12.2.3 at page 428.

<sup>7</sup> Document RAF 2 annexed to Captain Faulkner's witness statement records that Mr Sabapathy required rating and was available to go to Melbourne immediately to undertake it and had requested CHC base.

<sup>8</sup> Ibid.

had indicated to Jetstar through Captain Allen that he wanted the company to fund his endorsement training.

[58] Mr Sabapathy gave very candid and credible evidence at the investigation meeting. I am satisfied that up until he received the TBA on 18 June 2009 he understood that Jetstar had agreed to pay for his endorsement training, that he would be bonded for a period of two to three years, that Jetstar would not pay him the relocation reimbursement allowance and that he would be required to forgo a pilot bonus in the first three years of his employment too.

[59] I find that as at 18 June 2009 Mr Sabapathy already felt it was unfair that he, and not Jetstar, would have to bear the cost of his move to Christchurch but he had accepted that was a price he had to pay if the company would fund his endorsement training. He was committed to remaining employed by Jetstar for more than three years anyway and so did not consider the bonding for up to three years to be a burden for him.

[60] Mr Sabapathy's evidence at the investigation meeting was that he intended that Jetstar should fund his endorsement training but expected any TBA to be in more favourable terms to him than the one that he was eventually presented with. However, he also said it was *worth it* to him at the time he signed the TBA.

[61] The TBA offered to Mr Sabapathy in the letter dated 16 June 2009 was different to the training bond envisaged by clause 15 of Mr Sabapathy's IEA. Clause 15 of the IEA sets out some of the terms that Jetstar would include in any training bond agreement it might require of Mr Sabapathy in the future. It envisaged a bond period of two years of employment or a pro-rated payment back to Jetstar within 12 months after his employment ending.

[62] The NZ Start-up letter proposal for company funded endorsement in which envisaged a bonded period of three years with pro-rated payment back to Jetstar if he left employment within that period and required the reimbursement allowance and the pilot bonus scheme to be foregone.

[63] The TBA was different again. It valued the endorsement training, for the first time, at NZ\$40,000 rather than what the actual cost was. Mr Sabapathy having paid for his own A320 endorsement training in the USA in 2000 was surprised that it was valued at \$40,000 as he expected it to cost less than that. Jetstar required that if the cost was less than \$40,000

Mr Sabapathy still had to be bonded in the amount of NZ \$40,000.<sup>9</sup> Mr Sabapathy began to feel that Jetstar was gaining more benefit than he was. At that stage he also felt it would be unfair that he would be bonded as well as not able to receive a pilot bonus or the reimbursement allowance.

[64] Although stated in relation to unconscionable bargains rather than situations of duress the following statement of principle is of general application to equitable relief:

*[The] equitable jurisdiction is not intended to relieve parties from “hard” bargains ...*<sup>10</sup>

[65] There is no doubt that in the TBA Jetstar was seeking to strike a hard bargain with Mr Sabapathy. In funding his endorsement training it was obtaining a benefit for itself of a First Officer who was willing to move from Australia for the NZ start-up operation. On the other hand, a fresh A320 endorsement to fly in Australia and New Zealand accompanied by a job flying commercial passenger aircraft was of enormous benefit to Mr Sabapathy. That is what he had been trying to achieve for himself from at least 2006 when he went to the USA to gain his first A320 endorsement. So long as it is kept current that endorsement is of benefit to him for potentially his entire career.

[66] I am satisfied that the TBA was “worth it” to Mr Sabapathy when he entered into it although it was a hard bargain. Mr Sabapathy’s will was not so overcome by pressure from Ms Golias that he could not exercise free will or judgment. In addition, the pressure was not so grave that Mr Sabapathy had no reasonable alternative but to agree to the TBA.

[67] Mr Sabapathy was not coerced into signing the TBA due to illegitimate pressure from Ms Golias. Mr Sabapathy may have later regretted having entered into the TBA but he did not sign it under duress.

[68] However if I am incorrect and Mr Sabapathy did sign the TBA under duress I need to consider whether he has affirmed the contract.

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<sup>9</sup> As a part of my investigative function I have established the actual cost to Jetstar of the Alteon training for Mr Sabapathy was AUS\$29,651.50 ex GST, which when converted to NZ\$ at the rate applicable on 20 May 2009, was NZ\$37,657. I obtained the applicable rate from <http://www.xe.com/currencytables/?from=AUD&date=2009-05-20>.

<sup>10</sup> *Gustav and Co Ltd v Macefield Ltd* [2007] NZCA 205

*Did Mr Sabapathy affirm the TBA?*

[69] The question is whether Mr Sabapathy's lack of action within an earlier timeframe means that even if he did sign under duress he subsequently affirmed the agreement making it enforceable.

[70] Mr Sabapathy says he did not protest that the TBA was voidable until he felt he was no longer under duress or pressure from Jetstar. He says that he was only free from such pressure once he was on unpaid leave from Jetstar in New Zealand and seconded to the Australian Jetstar operation. Mr Sabapathy says he was told in his first year in New Zealand that eventually he could go back to Australia to work. Australia was his home. I take his evidence to mean that he did not want to jeopardise his chances of getting home again.

[71] Mr Sabapathy submits that once he began work on 15 June 2009 he was eligible for the relocation reimbursement of \$10,000. The TBA did not require Mr Sabapathy to do anything active apart from continuing to work for Jetstar for the three bonded years, which he did. Therefore, Mr Sabapathy also says that on 15 June 2010, 15 June 2011 and 15 June 2012 he was eligible for annual bonuses. However, he did not apply for any of the bonuses or for the reimbursement allowance in his first three years of employment because he was still under pressure from Ms Golias' statement that unless he signed the TBA he would lose his job.

[72] Mr Sabapathy says that he did question the terms of the TBA within the first three years of his employment. He says in February 2010 he asked Matthew Bell, a Jetstar executive from Australia, why he was being required to forgo the pilot bonuses when he was bonded for three years. He says that Mr Bell told him *that is how you are paying for it*. Mr Sabapathy did not take the issue any further.

[73] That was a casual conversation in a work social setting and I do not consider that it was sufficient to bring to Jetstar's notice that Mr Sabapathy considered that he had signed the TBA under duress and sought to avoid it. That conversation is not sufficient to displace any affirmation, nor does that conversation support Mr Sabapathy's evidence that he remained fearful of his employment being ended by Jetstar all the time he was working in New Zealand. He felt secure enough in his employment to question some of his terms of employment with Mr Bell face to face.

[74] Mr Sabapathy's first formal notification to Jetstar that he wished to claim the reimbursement allowance and the pilot bonuses was in August 2013 when he applied for

mediation. That was four years and two months after he signed the TBA. Mr Sabapathy said that during the time before that he had put the TBA “on the back burner”.

[75] In *Pharmacy Care Systems Ltd v The Attorney General*<sup>11</sup> the Court of Appeal decided that Pharmacy Care Systems failure to take steps over a period of three and a half years to avoid a Deed of Settlement it had entered into meant that it had affirmed the Deed through the lack of timely steps to avoid the Deed.

[76] I consider in all the circumstances that Mr Sabapathy affirmed the TBA by his lack of timely steps to avoid it. Therefore he cannot now avoid the TBA even if he entered into it under duress, which I do not accept.

*Should the spirit of the contra proferentum rule apply?*

[77] Mr Maze also submits that in line with the Authority’s equity and good conscience jurisdiction I should decide this matter in line with the spirit of the *contra proferentum* rule. He submits that since Jetstar, a multi-national corporation, drafted the TBA document and did not supply the variation offer in a timely way the Authority should not uphold Jetstar’s attempt to force the terms of the TBA *down* Mr Sabapathy’s *throat*. I do not accept that argument. The *contra proferentum* rule only applies when a contractual term is ambiguous and means the construction favouring the party that did not draft the term is to be preferred. None of the TBA terms are ambiguous.

*Is Mr Sabapathy estopped from making the claims against Jetstar?*

[78] Jetstar’s counsel submit that Mr Sabapathy is estopped from claiming the reimbursement allowance and pilot bonuses. They rely on his acquiescence during the three year bond period and say that his inaction was relied on by Jetstar as evidence of his acceptance of the TBA arrangements and that Jetstar relied on his agreement.

[79] On the other hand Mr Maze submits that Mr Sabapathy is not estopped from asserting his claims because he did not ask Jetstar to pay for the training on the TBA terms.

[80] Estoppel is an equitable remedy that aims to ensure that if one party to a contract leads the second party to rely on a promise and which it does rely on the first party cannot go back on that understanding if to do so would cause a detriment to the second party.

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<sup>11</sup> (2004) 2 NZCCLR 187

[81] Mr Sabapathy knew at the time that he entered into his IEA that he would have to pay for his own endorsement training if Jetstar did not do so. Jetstar relied on the mutual understanding that Mr Sabapathy would be bonded in consideration of it paying for endorsement training to book the training for him. Jetstar continued to act on the understanding Mr Sabapathy would enter into a TBA with it which he did. Mr Sabapathy also acted on that understanding by failing to claim any of the amounts to which he now claims to be entitled.

[82] Mr Sabapathy was aware of the benefit he would receive from gaining the endorsement and was aware that he would have to enter into a bond period of three years, forgo any pilot bonuses over that time and that he would not receive the relocation reimbursement allowance. Jetstar's TBA offer was belatedly presented to Mr Sabapathy and contained two provisions that he was not aware would be in the TBA; the training being valued at \$40,000 and the bond repayment applying even if Mr Sabapathy was made redundant or rendered unable to fly on medical grounds. However, those terms, which were new to Mr Sabapathy, have been of no practical detriment to him because he remained employed for over three years and has never been required to repay any of the cost of his training.

[83] Because Mr Sabapathy signed the TBA and did not notify Jetstar for more than three years that he did not consider himself bound by it Jetstar did not have any opportunity to explore another arrangement whereby Mr Sabapathy funded his own endorsement training and was eligible for the reimbursement allowance and the enhanced pilot bonus scheme. In any event, that was not what Mr Sabapathy intended at the time he entered into his IEA or when he entered into the TBA. He always intended Jetstar to pay for his endorsement training.

[84] It would be unconscionable and inequitable to allow Mr Sabapathy to continue to gain from the endorsement training and also to gain the benefit of the reimbursement allowance and the pilot bonuses. That is because all along Mr Sabapathy understood he would have to 'pay' for the endorsement by way of bonding, and by not receiving the reimbursement allowance or pilot bonuses. He is estopped from making the claims against Jetstar.

### **Conclusion**

[85] It follows that Mr Sabapathy's claims are dismissed.

**Costs**

[86] Costs are reserved. The parties are invited to agree on the matter. To assist them to do so I note that the Authority usually awards costs from the starting point of a notional daily rate of \$3,500. If the parties are unable to agree the party seeking costs shall have 28 days from the date of this determination in which to put in writing its reasons for claiming costs. The other party shall then have a further 14 days to file in writing its view on costs.

Christine Hickey  
Member of the Employment Relations Authority