

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Phillip Scorringe (Applicant)
AND Freedom Air Limited (Respondent)
REPRESENTATIVES Stephen Langton, counsel for Applicant
Kevin Thompson, counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 25 February 2005
SUBMISSIONS RECEIVED 30 May, 11 and 28 July, 9 and 10 August 2005
DATE OF DETERMINATION 12 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Phillip Scorringe is a pilot who has obtained the qualifications necessary to fly Boeing 737 aircraft. In March 2004 he was offered an interview for a pilot position with the respondent Freedom Air Ltd, an airline operating a fleet of B737's. He accepted and in April 2004 over three days took part with several others in an intensive selection process. At the end of it he was advised by the selection panel that if he successfully completed a proficiency course required by the airline and the Civil Aviation Authority, he would be employed by Freedom as a pilot.

[2] As soon as he had received this advice, as requested by the Freedom selection panel Mr Scorringe told them the dates he preferred to commence the proficiency course, although no start date was confirmed to him at this time.

[3] However before he was able to commence it, Mr Scorringe was withdrawn from the proficiency course after his selection by Freedom was revoked by Air New Zealand Ltd, an airline which fully owns Freedom. A few days after being told by Freedom's selection panel that he could advance to take the course, management from Air NZ rang and asked him to attend further interviews. After these, on 17 May 2004, he was told by Air NZ that he would not be employed by Freedom.

[4] Mr Scorringe has challenged his rejection. He claims he is entitled to be employed by Freedom provided he can successfully complete the proficiency course that he had earlier been told he could undertake. Mr Scorringe argues that Air NZ had not legally been able to intervene at the late stage it did to prevent Freedom from employing him.

[5] Mr Scorrige asks the Authority to resolve his problem by requiring Freedom to allow him to undertake the proficiency course, and he asks that Freedom be required to commence employing him as a B737 pilot once he has passed the course.

[6] Freedom has told the Authority the airline regrets what happened to Mr Scorrige. However it maintains that Air NZ was able to decide who Freedom could employ as a pilot. Freedom contends that at the point Air NZ intervened no agreement had been made to employ Mr Scorrige and no employment relationship had been formed with him. For this reason Freedom disputes the ability of the Authority to exercise any of its powers under the Employment Relations Act 2000 to resolve the problem Mr Scorrige understandably has with his aborted selection.

Interview/selection process

[7] Mr Scorrige says that he was successful in being selected for employment by Freedom and that to mark his success certain representations or promises were made to him by Freedom managers. He contends that the promises had contractual effect and that they therefore provide a basis for the Authority to exercise jurisdiction to resolve his problem.

[8] The contentious representations or promises were made on 23 April 2004 at the end of the interview and selection process Mr Scorrige had taken part in with six other candidates for pilot positions with Freedom. Mr Scorrige and three other candidates who were told they had been successful to that point, were spoken to as a group by selection panel members. They included the airline's Flight Operations Manager/Chief Pilot, Mr Tony Millen, and its Logistics and Planning Manager, Mr Stuart Robertson.

[9] From the evidence of Mr Scorrige, Mr Millen and Mr Robertson, I find that that the success of the four candidates was affirmed with handshakes and words of congratulations, including something like "you guys are all in," which was probably said by Mr Robertson.

[10] The successful candidates had confirmed to them by Mr Millen and Mr Robertson the starting salary, allowances and other terms and conditions including rosters for flying duty. Discussion also took place about the proficiency course required to be undertaken. Mr Millen and Mr Robertson wanted to establish each candidate's preference of course date. Mr Scorrige, I find, said that he would be available on 24 May 2004 to begin the earliest course indicated.

[11] Mr Millen then outlined the content of the proficiency course and, I find from the evidence of Mr Scorrige, made it clear that while the candidates would receive expenses during the course the payment of salary would not begin until it was finished. Mr Scorrige's evidence is that he was also told his "seniority" would begin upon successful completion of the course.

[12] I find no evidence that on 23 April 2004 an offer of employment outright, was made to Mr Scorrige. He does not say one was, and Mr Millen and Mr Robertson both deny they made one.

Conditional promise

[13] Both Mr Millen and Mr Robertson said in evidence that Freedom had needed pilots and that on 23 April 2004 they had assessed Mr Scorrige to be suitable for that job. Air NZ subsequently took a different view of him, for reasons that remain unclear.

[14] In their evidence Mr Millen and Mr Robertson agreed with each other that the promise of a job made to Mr Scorrige had been "conditional upon passing" the proficiency course. Neither could recall saying to Mr Scorrige that there were further conditions, such as having to obtain from

Air NZ its consent before employing him.

[15] Mr Millen was quite clear about what was promised. He said in evidence that the successful candidates were told;

.....that if they obtained a Boeing 737 type rating at their own expense (\$20 to \$30,000) and passed a Freedom Air/NZ Civil Aviation Authority B737 simulator, proficiency and Instrument Rating flight test, Freedom Air would then employ them.

[Mr Scorrige had already obtained a B 737 type rating]

[16] Mr Millen put it that an offer of employment was not “generated” until the proficiency course was successfully completed. No other stipulations were added about obtaining the approval of Air NZ, I find.

[17] Mr Scorrige said that he had understood from the promise made to him on 23 April that he would become employed by Freedom as soon as he started the proficiency course, but that the continuity of his employment would remain conditional upon passing the course.

[18] I accept the evidence of Mr Millen and Mr Robertson as to what they had said about employment; that an offer by Freedom would follow the successful completion of the proficiency course. I consider it unlikely that they would have offered employment for the duration of the course, leaving continuation of employment dependant on passing the course.

[19] I accept the evidence that Mr Millen and Mr Robertson had explained to the successful candidates that they would not be paid remuneration while on the course and that their pilot “seniority” would run from when they passed the course. In the airline industry the seniority of a pilot normally coincides with his or her length of service, which runs from the date employment commences.

[20] From the evidence I find that Mr Scorrige was given by Mr Millen and Mr Robertson on 23 April 2004, a conditional promise. From this promise Mr Scorrige has inferred or constructed an offer of employment which he says he accepted by acknowledging his readiness to commence the proficiency course on the first date Freedom had available.

[21] The legal issue for the Authority to decide in this case is whether the conditional promise made by Freedom created an employment relationship? If not, the subsequent intervention of Air NZ to break that promise cannot be put right for Mr Scorrige by the Authority restoring to him what he was promised. The issue is essentially a jurisdictional one.

Jurisdiction of the Authority

[22] The Authority’s general jurisdiction, as provided by s.161 of the Act, is made dependant on the existence of an *employment relationship*. If exercised under s.162, jurisdiction is dependant on an *employment agreement* being present. To be able to resolve Mr Scorrige’s problem the Authority must first find that there was in existence either an employment relationship or an employment agreement.

[23] *Employment relationship* is defined at s.5 of the Act as meaning any of the relationships specified at s.4(2). They include the relationship between *an employer and an employee employed by the employer*. *Employee* is defined at s.6(1) as meaning a person employed *under a contract of service* and includes *a person intending to work*.

[24] The meaning of *employment agreement* given in s.5 of the Act includes *a contract of service*.

[25] *Person intending to work* is defined at s.5 as *a person who has been offered and accepted work*.

[26] The definition of *a person intending to work* has been referred to by the Employment Court in the course of deciding that the Employment Relations Act does not contemplate grievances being brought about unsuccessful job applications. In *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399 at page 406, the Court observed that the definition means that relief under the Act is only available;

.....*where a person has actually been employed on settled terms and conditions.*

[27] It follows that before the Authority can proceed in this case to resolve the problem, it must be able to find present from the circumstances either a concluded, although not necessarily a commenced, contract of service between Freedom and Mr Scorrige, or it must be able to find that he actually became employed by the airline on settled terms and conditions.

Determination

[28] I find that the conditional promise made to Mr Scorrige by Freedom did not create an employment agreement within the meaning of the Employment Relations Act. When entry into an employment agreement is subject to a pre-condition being satisfied, there is no employment agreement until that happens.

[29] I find also that no employment relationship within the meaning of the Act was created. Although settled terms and conditions of employment were identified, until the requirement to pass the proficiency course had been met Mr Scorrige had not actually been employed, physically or contractually.

[30] *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424, a decision of the Employment Court referred to in submissions by counsel, is distinguishable at a basic level. The Court held at page 432, line 15, that there is an important difference between the formation of the employment contract itself and the formation of its terms. It held that a contract had been formed and that therefore relief was available from the Court under the Employment Contracts Act 1991, even when the terms of employment may not have been settled.

[31] I find that Mr Scorrige's case is a reversal of the situation in *Baker*; while terms of employment may have been settled by Freedom with him, the employment contract or agreement had yet to be formed. The proficiency course had to be taken first. (The *Hayden* case referred to above seems to take a different view from the *Baker* case about the need for terms and conditions of employment to be settled before an employment contract or agreement can be concluded, but that aspect of the decisions is not determinative in this case.)

[32] The evidence of Mr Millen and Mr Robertson shows that Freedom had no intention of entering into a binding legal employment relationship until the proficiency course had been successfully completed by Mr Scorrige. Therefore I conclude that the problem Mr Scorrige experienced is not one he can have resolved by the Authority ordering any remedies available under the Employment Relations Act.

[33] With regard to the rejection of Mr Scorrige by Air NZ, Mr Millen made himself clear to the Authority that he was left unhappy when what he had promised was not delivered to Mr Scorrige.

He said he was disappointed with the lack of good faith that accompanied the subsequent breach of this promise that both he and Mr Robertson had given on 23 April. Mr Scorrings should have been told by the selection panel that Air NZ had to give its approval before he could be employed by Freedom.

[34] Whether Freedom's actions involved a lack of good faith in commerce through misleading or deceptive behaviour is not an issue for the Authority to decide. In its actions Air NZ however was not simply exercising its commercial prerogatives as the owner of Freedom, as it had a valid interest in the selection of Freedom pilots because of the Group Opportunity Priority list. Once on that list as an employed Freedom pilot, Mr Scorrings's future access to Air NZ vacancies would largely be determined by his position on the list, which in turn would be determined by his seniority.

[35] I accept that the GOP list operates in a way that provides a pilot who becomes employed by Freedom with an enhanced opportunity to later become an Air NZ pilot when a vacancy arises. Therefore to retain control over the selection of its own pilots Air NZ needed to be involved in the selection of Freedom's pilots. In this case the involvement of the two airlines in that exercise was uncoordinated, and this was to the detriment of Mr Scorrings unfortunately.

[36] Had the Authority found that a breach of an employment agreement did occur or that Freedom was responsible for creating an employment relationship problem, there would still have been some important issues to be resolved in relation to the availability of remedies. The issue is in respect of the 90 day argument that was raised by Freedom in response to the grievance claims advanced by Mr Scorrings. As well there may have been an issue as to the availability of an order for specific performance requiring Freedom to place Mr Scorrings on the proficiency course and then offer him employment once he had passed.

[37] Another significant issue that would have required further investigation if remedies had needed to be considered, is whether a recent decision by Freedom to phase out its B737 fleet and replace it with Airbus 320 aircraft, would have meant that any promises of employment could no longer be performed.

[38] Given the determination of the Authority, these issues do not need to be resolved.

Costs

[39] Costs are reserved to give the parties an opportunity to resolve the question themselves. Freedom and Air NZ should give serious consideration to their conduct that lead to the need for this case to be brought in the first place. It could easily have been avoided. The Authority is likely to be sympathetic towards Mr Scorrings in relation to the question of costs, because of the regrettable way the interview and selection process was handled in relation to him.